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# Mutually Assured Protection: Dmitri Shostakovich and Russian Influence on American Copyright Law

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# MUTUALLY ASSURED PROTECTION: DMITRI SHOSTAKOVICH AND RUSSIAN INFLUENCE ON AMERICAN COPYRIGHT LAW

## INTRODUCTION

Dmitri Shostakovich, a twentieth-century Russian neo-classical music composer, serves as an unlikely guide to several ongoing copyright law concerns: distinctions between copyrights and moral rights; the effects of copyright restoration to foreign works; and twenty-first century development of American copyright law.

The framers of the Constitution recognized copyright's importance at the start of the nation and enshrined its protection in a Copyright Clause with dual foci.[1] First, copyright should provide economic motivation to produce creative works, and second, it should lead to general public enrichment through distribution of these creative works. Ultimately, it is this second, public goal that is central to any American copyright discussion, be it legislative or judicial.

The past century or so has seen major changes in at least two aspects of copyright: duration and availability. An early American copyright was difficult to obtain, with onerous publishing, registration, and notice requirements—plus, once obtained, it only lasted fourteen years. In contrast, copyright now vests as soon as a work is created and lasts for seventy years beyond the creator's life.[2]

While copyright protects authors' economic interests and financial compensation, moral rights protect authors' personal, ideological, or idiosyncratic interests in their works. Thus, moral rights may include the right to oppose modification or use of the work in a way with which the author disagrees. Though long recognized and protected in Europe, moral rights are almost nonexistent in the United States. While an author has a cognizable claim in American court if someone has used his or her work without proper attribution or licensing—as this falls within the realm of copyright protection—the same author will not have a claim if the user has met all requirements but used the work in a way the creator disliked.

America may hold strong in its refusal to recognize moral rights, but in the past few decades, it has reversed its long-held approach to copyright for foreign authors. Until 1891, foreign authors could not secure U.S. copyrights at all; from 1891 to 1989, U.S.

1. U.S. CONST. art. I, § 8, cl. 8.

2. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012). These seventy posthumous years alone equal five times the original fourteen-year term. An author who lives fifty years after creating a work would receive a one hundred and twenty year copyright—more than eight and a half times the length of a copyright under the original Act.

copyrights for foreign authors were possible but not practicable. Only after changes to American copyright statutes in 1989 and 1994 could foreign authors easily gain copyrights for new works. The same statutes also recognized American copyrights for previously-unprotected foreign works whose home copyrights had not yet expired, in what was termed a "restoration" for thousands of creative works. This restoration yielded dual effects: it preserved the works in their original manifestations, but it also severely restricted who could use them. When users who had relied on these works challenged the restoration, the Supreme Court upheld it, demonstrating a new sensitivity toward globalization and international trade not seen in earlier copyright decisions but increasingly present in recent rulings.

It is in this mix of protections, territorial disputes, and foreign affairs that Dmitri Shostakovich becomes an unlikely tour guide of sorts. Born in Saint Petersburg, Russia, in 1906—prior to the Bolshevik Revolution—Shostakovich was a musical prodigy.[3] When his mother, herself an accomplished musician, enrolled eight-year-old "Mitya" in piano lessons, "within minutes, she recognized that she was dealing with a youngster of precocious musical ability, possessing perfect pitch and a phenomenal memory."[4] This ability served him well throughout his life: Shostakovich was a prolific composer with a fifty-six-year career, writing some fifteen symphonies, six concerti, and dozens of chamber pieces, piano solos, film and ballet scores, and choral pieces.[5]

After the Bolshevik Revolution, Shostakovich's interactions with the Soviet government were unstable. In 1936, after achieving success as a composer, Shostakovich was publicly denounced in the official Communist newspaper *Pravda* through two scathing anonymous editorials entitled "Muddle Instead of Music" and "Balletic Falsity."[6] The composer then came back into the Kremlin's favor for a time and, in his biographer's words, was "elevated to the pinnacle of prestige in the world of Soviet music."[7]

However, the government again censured Shostakovich in 1948 along with a number of other Soviet composers, and the composer's tumultuous relationship with the political leadership of his country continued.[8] Eventually, in 1960, Shostakovich joined the Communist Party and was elected the first secretary of its Composers' Union.[9] When he died in 1975, any mention of his past run-ins with the Soviet leaders was conveniently absent from his obituary. Instead, eighty-five Communist Party members and statesmen hailed him as "[a] loyal son of the Communist Party, a prominent public figure and statesman, [and] artist-citizen . . . [who] devoted his entire life to the development of Soviet music . . . [and] to the struggle for peace and friendship among nations."[10]

Ideas of peace and friendship among nations notwithstanding, Dmitri Shostakovich and his compositions were pivotal in the struggle for meaningful clarification of American copyright law for more than sixty years. Beginning with litigation brought either by

3. LAUREL FAY, SHOSTAKOVICH: A LIFE 9 (2000).
4. *Id.* at 8–9.
5. *Id.* at 347–61.
6. *Id.* at 84–85.
7. *Id.* at 156.
8. FAY, *supra* note 3, at 156.
9. *Id.* at 216.
10. *Id.* at 285.

Shostakovich himself or by the Soviet government purporting to act on his behalf, and continuing through a twenty-first century Supreme Court case involving music performance and questions of constitutionally protected freedom of speech, Soviet and Russian influence appears throughout recent American copyright case law. These cases considered in context demonstrate the tension between private rights and public use, as well as the varied personalities, power struggles, and human stories at the heart of cases and controversies involving the work of human creativity.

## I. BACKGROUND

### *A. Copyright Theory, Policy, and Practice in the United States*

Article I, Section 8, clause 8 of the United States Constitution empowers Congress to protect copyright: "The Congress shall have 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 Writings and Discoveries."[11]

Copyrightable works span eight categories, from literary or dramatic pieces to architectural works and sound recordings, in tangible form, regardless of whether they are published or unpublished.[12] Regardless of what category a work occupies, the "creative spark" is fundamental for it "to be eligible for copyright protection at all."[13] Put simply, for copyright protections to apply, a work must have at least "a modicum of creativity."[14]

Copyright's requirement that a work show some modicum of creativity is inextricably linked with copyright's "idea/expression" or "fact/expression" dichotomy: while copyright protects a creative expression of facts or ideas, it does not protect the underlying facts or ideas themselves.[15] The rationale behind this distinction is simple. While an author chooses the framing, order, organization, and description of his or her subject, generally he or she does not create the facts of the subject itself.[16] Because the underlying subject or knowledge conveyed by an author's original expression is not generally created by that author, "[a] reader of an author's writing may make full use of any fact or idea she acquires from her reading."[17] In this way, the underlying knowledge and information within a creative, copyrighted work may spread freely throughout society while the creator's unique personal expression of this information continues to exist without interference as long as his or her copyright lasts.

At the same time that copyright protects individuals' expressions of facts, it also provides economic incentives for individuals to share those expressions.[18] Put in the most pragmatic terms, a copyright is a revenue source. It grants an author the exclusive right to "distribute copies . . . of the work to the public by sale or other transfer of

11. U.S. CONST. art. I, § 8, cl. 8.

12. 17 U.S.C. § 102 (2012).

13. U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS (2012) [hereinafter COPYRIGHT BASICS]; Eldred v. Ashcroft, 537 U.S. 198, 211 (2003) (quoting Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 346–47 (1991)).

14. *Feist*, 499 U.S. at 346.

15. *Id.* at 350.

16. *See id.*

17. *Eldred*, 537 U.S. at 217.

18. Mazer v. Stein, 347 U.S. 201, 219 (1954).

ownership, or by rental, lease, or lending" for the length of the copyright.[19] Additionally, if the work is fixed in a performance-based medium, only the copyright owner may perform or display the work publicly.[20] This limited monopoly allows the creator to earn money by sharing his or her creation with the general public, while the profit earned in this way serves as a further incentive for the creator to both continue sharing his or her creation and go on to create additional works.[21]

Ultimately, American public policy underlying copyright protection is enrichment of the public sphere; benefit to the creator is a secondary, utilitarian motivation.[22] As part of this promotion of progress, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[23] Since copyright only protects original expressions while leaving underlying knowledge expressed freely usable, and since the system only rewards creators monetarily when they share their creations with the public, American copyrights ultimately serve the public.[24]

Copyright in the United States has a comprehensive statutory scheme.[25] Currently, protection vests as soon as anything with the requisite "modicum of creativity" becomes tangible.[26] No registration process or other formality, such as publication with the proper © symbol, is required for a copyright to vest.[27]

America's statutory approach to copyright has been constant since the Copyright Act of 1790 was passed during the First Congress.[28] Common law copyrights have long been disfavored; in 1834, the Supreme Court wrote that generally, "[t]his right [in copyright] . . . does not exist at common law—it originated, if at all, under the acts of [C]ongress."[29] However, early versions of the Copyright Act granted statutory protection only to published works and allowed a few common-law copyright actions for unpublished works.[30] The current Copyright Act, enacted in 1976, preempts the vast majority of common-law copyrights.[31] As described by the Supreme Court roughly ten years after Congress passed the current statute, "the Act's express objective [was to] creat[e] national,

19. COPYRIGHT BASICS, *supra* note 13.

20. *Id.*

21. *Mazer*, 347 U.S. at 219 ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

22. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'").

23. *Id.* at 349–50. *See also* Eldred v. Ashcroft, 537 U.S. 198, 212 n.18 (2003) ("[Public and private] ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.").

24. *Mazer*, 347 U.S. at 219.

25. 17 U.S.C. § 101 (2012).

26. COPYRIGHT BASICS, *supra* note 13.

27. *Id.* However, copyright registration *is* a pre-requisite for bringing litigation.

28. *Eldred*, 537 U.S. at 194.

29. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 884 (9th Cir. 2005) (quoting Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 663–64 (1834)).

30. H.R. REP. No. 94-1476, at 1 (1976) ("Instead of a dual system of 'common law copyright' for unpublished works and statutory copyright for published works, which has been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation.").

31. The primary exception is for sound recordings made before 1972. 17 U.S.C. § 301(a) (2012).

uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation."[32] While a few exceptions may still be actionable under common law, copyright in America is predominantly a legislative creation.[33]

### *B. American Copyright Duration and the Public Domain*

#### 1. Overview

Since the Constitution grants exclusive rights to creators for "limited Times," any copyright eventually expires. However, this expiration date has progressively grown more distant throughout the various Copyright Acts. Early copyrights were relatively short: the first Copyright Act, passed in 1790, granted a term of fourteen years based on the date of publication, with an option to renew once for an additional fourteen years at the author's choice.[34] In contrast, the current rule provides newly created works attributable to a non-corporate author copyright for the remainder of the author's life plus an additional seventy years.[35] Copyright duration has also changed for a variety of other categories of works, including those anonymously created, produced under work-for-hire arrangements, or previously published before the current regime.[36]

When copyright protection ceases, a work becomes part of the public domain, where it is freely usable by anyone for any purpose.[37] Supporters of this transition from private to public characterize the public domain as a "storehouse of the raw materials of creative expression, freely available to all."[38] Understandably, however, many copyright holders are not enamored of the system—at least as to their own works. This is especially evident when copyrights have strong associations with brand identities or major profit sources. For instance, Disney lobbied extensively for both the Copyright Act of 1976 and the 1998 Copyright Term Extension Act, which were directly linked to the then-nearing expiration of copyrights in certain Disney cartoons starring its hallmark symbol: Mickey Mouse.[39]

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32. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989).

33. For an example of a common law copyright exception, see Capitol Records v. Naxos of Am., Inc., 830 N.E.2d 250 (N.Y. 2005) (holding that some pre-1972 sound recordings not copyrightable under the current Copyright Act qualified for common law copyright protection).

34. Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

35. 17 U.S.C. § 302 (2012).

36. Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, CORNELL COPYRIGHT INFO. CTR., http://copyright.cornell.edu/resources/publicdomain.cfm (last updated Jan. 3, 2016) (determining copyright length can be extremely difficult because of these varying categories and exceptions). Computerized systems such as the Durationator, under the direction of Tulane Law Professor Elizabeth Townsend Gard, now run complex algorithms to help these knotty calculations. *About Us*, LIMITED TIMES, http://www.limitedtimes.com/about (last visited Feb. 23, 2017).

37. Laura N. Gasaway, *A Defense of the Public Domain*, 101 LAW LIBR. J. 451, 455 (2009).

38. *Id.*

39. M. Matthew Stewart, *How Mickey Mouse Controls Modern Copyright Law*, BUS. INSIDER (Nov. 18, 2016), http://www.businessinsider.com/how-mickey-mouse-controls-modern-copyright-law-disney-2016-11. *See also* Corey Doctorow, *We'll Probably Never Free Mickey, But That's Beside the Point*, ELEC. FRONTIER FOUND. (Jan. 16, 2016), https://www.eff.org/deeplinks/2016/01/well-probably-never-free-mickey-thats-beside-point; Timothy B. Lee, *15 Years Ago, Congress Kept Mickey Mouse out of the Public Domain. Will They Do It Again?*, WASH. POST (Oct. 25, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/10/25/15-years-ago-congress-kept-mickey-mouse-out-of-the-public-domain-will-they-do-it-again.

Currently, all works published before 1923 are in the American public domain.[40] Online repositories such as Project Gutenberg, which provides digital copies of public domain books, and the International Music Score Library Project, which provides digital copies of public domain sheet music, aggregate and catalog these works for unfettered use.[41] Teachers and educators often use public domain works in their teaching, as they can freely reproduce and distribute these works to students throughout the years.[42]

2. Alternative Copyright Licensing

Creators of new works may choose to use alternative copyright licensing options to expand the reach of their creations and expedite their creations' paths to the public domain. Creative Commons, a global nonprofit organization, is the leader in this alternative license movement.[43] It provides a number of scalable alternative copyright licenses for creators to utilize, ranging from total waiver of rights to mix-and-match copyright protections at the creator's option.[44] Content licensed under Creative Commons may be distributed through any means chosen by the creator, and platforms such as Flickr, Wikimedia Commons, YouTube, Vimeo, and MIT Open Courseware are willing hosts for such alternatively-licensed material.[45] Even large organizations may use Creative Commons licenses, such as New York City's Metropolitan Museum of Art, which recently made more than 375,000 high-definition graphics of artwork in its collections publicly accessible and usable through alternative copyright licensing.[46] Many academic writers and professors choose to license their books and teaching materials under Creative Commons to increase accessibility and decrease cost for classroom use.[47]

3. Fair Use

Even if a work is not in the public domain, teachers and other users may be able to use it through a safe harbor provision of American copyright law. This avenue, termed fair use, is statutory, and allows users to employ copyrighted works for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[48] Libraries and their employees also receive unique exceptions for some reproductions.[49]

40. Hirtle, *supra* note 36.

41. PROJECT GUTENBERG, https://www.gutenberg.org (last visited Mar. 8, 2017); IMSLP/PETRUCCI MUSIC LIBRARY, http://imslp.org (last visited Mar. 8, 2017).

42. Gasaway, *supra* note 37, at 456.

43. CREATIVE COMMONS, http://www.creativecommons.org (last visited Feb. 23, 2017).

44. *What We Do*, CREATIVE COMMONS, http://www.creativecommons.org/about (last visited Feb. 8, 2017).

45. *Id.*

46. Kelly Richmond-Abdou, *You Can Now Use 375,000 Images from the Met Museum for Free*, MY MOD. MET (Feb. 8, 2017), http://mymodernmet.com/metropolitan-museum-of-art-open-access.

47. *See, e.g.*, Lawrence Lessig, CODEV2, http://codev2.cc (last visited Feb. 8, 2017); Benjamin Peters, *555 Questions to Make Digital Keywords Harder*, http://press.princeton.edu/releases/m2-10696.pdf (last visited Mar. 8, 2017).

48. 17 U.S.C. § 107 (2012).

49. 17 U.S.C. § 108 (2012) (codifying that libraries and their employees do not infringe on copyrights when they make specific numbers of copies for specific purposes, such as preservation, security, or replacement of rare books).

However, reliance on fair use has some risks. First, it requires litigation to determine with certainty its application to a specific use. For a court to enter a finding of fair use, parties must first dispute the use—and copyright holders often vigorously defend their rights.[50] As a result, what constitutes fair use is often unpredictable and dependent on the individual court.[51] This can have a chilling effect upon educators and others who would otherwise utilize fair use's safe harbor.[52]

Whether a work is fully copyrighted, alternatively licensed, in the public domain, or used under the fair use safe harbor, tensions between public and private motivations often appear. Creative works are often personal to the owner and the owner's reputation, while—as will be addressed later—use of public domain works may become just as personal.[53] In any case, untangling the various rights and interests in a copyright case requires consideration of the people and motivations behind any particular use of works.

### *C. Historical and Modern American Approaches to Copyright for Foreign Works*

U.S. copyright law facilitates a rich public sphere by providing exclusive rights to authors in exchange for sharing the work with the general public. However, until very recently, these protections and exceptions applied only to works by domestic authors. Until late in the twentieth century, American copyright protection was difficult if not impossible for a work of foreign origin. Consequently, almost two centuries before Internet users started to commit digital piracy of music and movies, America was a willing and eager home to widespread "piracy" of foreign books and creations.[54]

Congress' first copyright legislation limited copyright to works by American citizens.[55] It also expressly denied protection to foreign authors in a provision "as unequivocal as it was expansive."[56] Though international copyright agreements started to develop in the nineteenth century, the United States did not participate in them.[57] Rather, as described by one copyright scholar, "[t]he United States deliberately stayed outside international copyright to benefit from its outlaw status."[58] Since foreign copyrights were not recognized whatsoever in nineteenth-century America, "[r]eprinting foreign works was not only permitted but encouraged."[59] Reprinting British works was an especially

50. For instance, the James Joyce estate is notorious for its longtime resistance to scholarly use of Joyce materials. *See* Shloss v. Sweeney, 515 F. Supp. 2d 1068 (N.D. Cal. 2007); *Shloss v. Estate of Joyce*, STAN. CTR. INTERNET & SOC'Y, http://cyberlaw.stanford.edu/our-work/cases/shloss-v-estate-joyce (last visited Nov. 23, 2017).

51. Gasaway, *supra* note 37, at 467.

52. *Id.*

53. *See infra* Part IV.

54. PETER BALDWIN, THE COPYRIGHT WARS 114 (2014).

55. ROBERT SPOO, WITHOUT COPYRIGHTS 21 (2013).

56. *Id.* Specifically, the Act stated that:

> [N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United states, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

*Id.* (internal citations omitted).

57. BALDWIN, *supra* note 54, at 112.

58. *Id.* at 113.

59. *Id.*

widespread practice.[60]

The economic ramifications of America's refusal to recognize foreign copyrights were significant. American publishers paid no royalties and reaped the full profit of any international book they published.[61] Both laissez-faire Americans and copyright-deprived Brits fiercely argued their sides: "the anti-piracy camp view[ed] reprinters . . . as 'gentlemen of the road,' lining their pockets at the expense of helpless European authors" while "[t]he pro-reprinting contingent disagreed, hailing [reprinters] as a 'kind of "literary Johnny Appleseed," disseminating to a mass audience the seeds of literary appreciation and cultural revival.'"[62] Ultimately, reprinting enriched the public sphere since the system increased the amount of literature and knowledge available to the general public,[63] but it had serious problems because it economically challenged both American and British authors. American authors found it difficult to attract an audience in a marketplace flooded with cheap foreign works, while British authors received plenty of attention from American audiences but no monetary reward to compensate them for their time and effort.[64]

Owners of foreign copyrights were understandably displeased with America's freewheeling use of their creations. Thomas Hood, a nineteenth century British humorist, described American publishers as "Bookaneers" when he called for longer British copyrights in an essay entitled, *Copyright and Copywrong*.[65] The struggle between America and Britain lasted throughout the nineteenth century, and "Congress was petitioned over a hundred times (from both sides) in the years up to 1875."[66]

In the latter part of the nineteenth century, other countries coordinated to form the Berne Convention as a way to manage international rights related to publication.[67] First established in 1886, Berne functioned without the United States for its first one hundred years.[68] Despite the petitions from American and British authors and the movement toward international copyright agreements by other countries through the Berne Convention, America was steadfast in its protections—or lack thereof.

While America was stubbornly *not* a part of Berne for many years, Congress first extended copyright protection to foreign authors in 1891, a short five years after the copyright convention's formation.[69] However, though protection for foreign authors' works was then possible, it was rarely practicable: the foreign author's country had to have reciprocity with the United States, and more importantly, the work in question had to be first or simultaneously manufactured in America to earn any protection.[70] This American

60. SPOO, *supra* note 55, at 24.

61. BALDWIN, *supra* note 54, at 113.

62. SPOO, *supra* note 55, at 16 (internal citations omitted).

63. BALDWIN, *supra* note 54, at 114.

64. Thomas Bender & David Samplinger, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT'L L. & POL. 255, 262 (1996).

65. Thomas Hood, *Copyright and Copywrong*, *in* 6 THE WORKS OF THOMAS HOOD: COMIC AND SERIOUS, IN PROSE AND VERSE 91 (New York, Wiley & Putnam 1862).

66. BALDWIN, *supra* note 54, at 117.

67. *Id.* at 11.

68. *Id.*

69. *Id.* at 122.

70. David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for*

manufacturing clause was demanding. "[U]nder its terms, a 'book, photograph, chromo, or lithograph' was eligible for U.S. copyright protection only if 'printed from type set within the limits of the United States,' or 'from negatives or drawings on stone made within the limits of the United States.'"[71] Roughly two decades later, in 1909, America reinforced its manufacturing requirement for English-language works: "books now had to be typeset, printed, *and* bound in the US" to receive any copyright protection.[72] With these requirements, "[m]any foreign authors simply could not comply with [the clause's] strict requirements" and their works remained unprotected in the United States.[73]

The manufacturing requirement almost disappeared in the 1930s, in an attempt to bring the United States into a place where it could successfully join the Berne Convention.[74] However, this attempt ultimately failed, as "the Depression was an inauspicious moment to threaten the jobs created by the manufacturing requirement."[75] Ultimately, America's manufacturing clause stayed in place for almost a hundred years, until it was first weakened when America joined the United Copyright Convention in 1955 in a step toward greater harmony with other countries in copyright matters.[76] Continuing this more cooperative and internationally-minded course, Congress repealed the manufacturing clause in 1986.[77] America joined the Berne Convention just three years later in 1989.[78]

## II. MORAL RIGHTS AND FALSE IMPUTATIONS

In the wake of World War II and during the early stages of the Cold War, Hollywood produced a number of films intended to reinforce its support of democracy and stir the American spirit of patriotism. One of these films, Twentieth Century-Fox's *The Iron Curtain*, provided the battleground for America's first copyright law decision regarding—and ultimately rejecting—the idea of moral rights.

### *A. Moral Rights and the Tension Between Creators and Society*

Moral rights, at their simplest, are an author's rights to have an ongoing voice in the destiny of his or her creations. Unlike copyright, which addresses economic concerns such as proper compensation, moral rights address the more personal side of art. Fundamentally, "moral rights are based on the idea that an author is personally invested in his or her work."[79] "Attribution," for instance, is the author's right to receive credit by name for a creation, while "integrity" is often defined as the author's right to "protect the work from

*the United States*, 55 L. & CONT. PROBS. 211, 213 (1992).

71. *Id.*

72. BALDWIN, *supra* note 54, at 161.

73. SPOO, *supra* note 55, at 63.

74. BALDWIN, *supra* note 54, at 214.

75. *Id.*

76. 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B][2] (2015) ("The Universal Copyright Convention was created . . . to provide an alternative multilateral convention to Berne . . . . The United States was among the initial dozen states to ratify the U.C.C. in 1955.").

77. BALDWIN, *supra* note 54, at 219.

78. *Id.* at 235; SPOO, *supra* note 55, at 63.

79. MIRA T. SUNDARA RAGAN, MORAL RIGHTS: PRINCIPLES, PRACTICE, AND NEW TECHNOLOGY 4 (2011).

harm."[80] In countries that recognize moral rights, these protections may last the same duration as copyrights (such as in Germany), or may extend without limit (such as in France).[81]

France is the archetypal example of a moral rights country, as it has some of the broadest moral rights protections.[82] Its expansive approach is largely due to the way its jurisprudence understands creative works as expressions of their authors' personalities.[83] These expressions must "be preserved untouched."[84] Because of this anthropomorphic view of art, French copyright legislation broadly protects perpetual *and* inalienable moral rights including attribution, protection from all modification and disclosure, and ability to stop distribution.[85]

By placing the author at the center of the discussion, French law benefits authors but sets society and culture on unsteady footing, eternally susceptible to the desires of authors. France recognizes both "an objective right to integrity, which is the right of the author to refuse and to oppose any modification" and a "subjective right of integrity, which is the right to oppose the use of the work in a manner which does not conform to its spirit as defined by the author."[86] Both these rights make the author the final arbiter of whether another's use of the work is appropriate.

The American copyright system stands in clear contrast to France and its approach to moral rights. In the United States, only creators of some narrowly-defined and specific visual arts receive any sort of moral rights in their works, while creators of any other copyrighted work do not.[87] Thus, in America, a copyright litigation decision rests not in an inquiry regarding the author's personal feelings regarding the use, but in a court's objective analysis of the rights of the public as well as those of the author—keeping pragmatic and economic, rather than ideological, considerations at the forefront.[88]

### *B. Early Moral Rights in American Court*

Intended to "depict[] the Communist menace to American life and liberty," the 1948 Twentieth Century-Fox movie *The Iron Curtain* included music from Shostakovich and numerous other Soviet composers in its score.[89] Producers specifically selected these pieces because each composer had come into conflict with the Kremlin for work that "was not seen as supporting the Soviet state."[90] Further, each of these works was in the U.S.

80. *Id.* at 5.

81. *Id.* at 15.

82. *Id.* at 236.

83. Andre Bertrand, *Shostakovich and John Huston: The French Supreme Court on Copyright, Contracts and Moral Rights*, *in* LANDMARK INTELLECTUAL PROPERTY CASES AND THEIR LEGACY 1, 1 (Christopher Heath & Anselm Kamperman Sanders eds., 2011).

84. *Id.*

85. *Id.* at 1–2.

86. *Id.* at 5.

87. 17 U.S.C. § 106A (2012).

88. Fogarty v. Fantasy, Inc., 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.").

89. Frank Miller, *Review:* The Iron Curtain *(1948)*, TCM FILM ARTICLES, http://www.tcm.com/tcmdb/title/79403/The-Iron-Curtain/articles.html.

90. *Id.*

public domain because America recognized no copyright protections for Soviet works or those of several other foreign countries.[91]

As part of *The Iron Curtain*'s credits, Fox included the statement: "Music—From The Selected Works of the Soviet Composers—Dmitry [sic] Shostakovich, Serge Prokofieff [sic], Aram Kachaturian [sic], Nicholai [sic] Miashovsky—Conducted by Alfred Newman."[92] In sum, the Soviet music used in the film filled forty-five minutes of the eighty-seven-minute-long movie.[93] Shortly after *The Iron Curtain* debuted in 1948, Shostakovich and his fellow composers were nominally the plaintiffs in *Shostakovich v. Twentieth Century-Fox Film Corporation,* an action brought in New York state court to prevent the use of their names and of their compositions in American propaganda.[94]

While Shostakovich's name appears in the style of the case, little information about his personal role in the litigation is available. Further, given that 1948 was the year that the Soviet state censured this group of composers, some scholars opine that it was the Soviet government itself that filed suit, acting "on behalf of" Shostakovich and his fellow composers in an attempt to suppress the American film.[95] Soviet law included strong protection for moral rights at the time, and an action to get America to recognize them may have been an attempt to insinuate Soviet law into American jurisprudence.[96]

Though the plaintiffs—whoever they truly were—conceded that the music was "in the public domain and enjoy[ed] no copyright protection whatever," they alleged libel, civil rights violations, deliberate infliction of injury, and violation of moral rights as composers.[97] Allegedly, the use of Soviet music in an American propaganda film indicated the composers' "'approval,' 'endorsement,' and 'participation' therein thereby casting upon them 'the false imputation of being disloyal to their country.'"[98]

The Soviets were unsuccessful in their American suit. Addressing the libel and civil rights claims first, the New York trial court wrote that any alleged implication of approval did not exist because the work used was in the public domain.[99] The court then turned to address "deliberate infliction of injury" and invasion of moral rights together. Without completely closing off the possibility of moral rights in general—writing instead that "[c]onceivably . . . the court could in a proper case, prevent the use of a composition or work[] in the public domain"—the court held that "there [arose] a conflict between the moral right and the well-established rights of others to use [public domain] works" and denied the composers' motion for injunction.[100] Under the theory that the Soviet government itself was behind the suit, it is not difficult to imagine that the "well-established rights of others" included insulating American judicial resources from being

91. SUNDARA RAGAN, *supra* note 79, at 143.

92. Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 576 (Sup. Ct. 1948).

93. *Id.*

94. *Id.*

95. SUNDARA RAGAN, *supra* note 79, at 142–43.

96. *See id.* at 143 ("The moral right of integrity enjoyed strong protection in sections 19 and 11 of the Soviet legislation of 1928.").

97. *Shostakovich*, 80 N.Y.S.2d at 577.

98. *Id.* at 578.

99. *Id.*

100. *Id.* at 578–79.

commandeered by the Soviets.

By contrast, the Soviet litigants had very different luck bringing their copyright suit over the same film in moral rights-friendly France. Rejecting the American approach, where moral rights were troublesome to apply and public interest became the deciding factor in favor of denying an injunction, the French court liberally extended moral rights to the foreigners and allowed the plaintiffs to pursue their claim.[101]

The 1948 litigation over Shostakovich's compositions was an unsuccessful attempt to broaden America's authorial rights protection beyond the pragmatic economic protections of copyright to the more personal world of moral rights. While the plaintiffs accused the defendant filmmakers of falsely imputing disloyalty to composers including Shostakovich, ultimately the New York state court prevented the plaintiffs' false imputation of moral rights into American copyright jurisprudence. Yet similar tensions between, on one hand, an author's personal rights and interests in the integrity of his or her creative work, and, on the other hand, an author's economic control over the way his or her work is used by the general public, would reappear roughly sixty years later, when Shostakovich and his compositions again occupied the center of a controversy regarding public and private interests in copyright law.[102] This time, however, the suit moved beyond the trial level—all the way to the United States Supreme Court.

## III. RELIANCE, RESTORATION, AND RECIPROCITY

The Berne Convention began to establish ground rules for cross-border copyright in 1886, but the United States only joined in 1989—more than a hundred years later.[103] To meet the requirements for participating in Berne, America had to do something it had been notoriously loath to do: extend "the same full term of copyright protection available to U.S. works" to foreign works from other Berne countries as long as the works were still under copyright protection at home.[104] Congress implemented this new protection, commonly termed a "restoration," through Section 514 of the Uruguay Round Agreement Act ("URAA"), passed in 1994.[105]

One practical effect of Berne and the URAA was the sudden copyright protection of many Shostakovich compositions, which had not enjoyed American copyright protection before but which were still protected in their native post-Soviet Russia.[106] As a result of copyright restoration, "all works published in Russia and other countries of the former Soviet Union before May 1973" received copyright protection and were consequently removed from the American public domain.[107] This included more than 150 of

101. Bertrand, *supra* note 83, at 4.

102. *See infra* Part IV.

103. Golan v. Holder, 565 U.S 302, 306 (2012).

104. *Id.* at 306–07.

105. *Id.* at 306.

106. *Works Restored to Copyright Protection*, AM. SOC. OF COMPOSERS, AUTHORS, & PUBLISHERS, https://www.ascap.com/restored_works (last visited Nov. 23, 2017).

107. *Golan*, 565 U.S. at 353 (Breyer, J., dissenting). Additionally, "films by Alfred Hitchcock, books by C. S. Lewis and Virginia Woolf, symphonies by Prokofiev and Stravinsky and paintings by Picasso" all received restored copyrights. Adam Liptak, *Public Domain Works Can Be Copyrighted Anew, Supreme Court Rules*, N.Y. TIMES (Jan. 18, 2012), http://www.nytimes.com/2012/01/19/business/public-domain-works-can-be-copyrighted-anew-justices-rule.html.

Shostakovich's compositions.[108]

Restoration had several positive effects, such as preserving Shostakovich's compositions in their original form for posterity and maintaining the integrity of what Shostakovich wrote. However, it also caused the cost of access for Shostakovich compositions to skyrocket—the price for musical scores increased as much as sevenfold for some of his works.[109] For musicians, arrangers, and performers who had made free use of Shostakovich's works while they were in the public domain, copyright restoration caused the potential for copyright infringement liability where none had previously existed.[110] Since copyright infringement can be both civilly and criminally actionable depending on the degree of reprehensibility, this change had significant impact on those who had used the previously public domain materials.[111]

It was in reaction to this sudden change that a number of "orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works § 514 removed from the public domain" challenged copyright restoration in a post-Cold War Supreme Court case styled *Golan v. Holder*.[112]

The *Golan* plaintiffs were a subset of a group known as "reliance parties": "those who had, before the URAA's enactment, used or acquired a foreign work then in the public domain."[113] Of the numerous *Golan* plaintiffs, at least three were directly and substantially affected by restoration of Shostakovich's copyrights. Plaintiff Richard Kapp had produced recordings of several Shostakovich works,[114] while plaintiff Lawrence Golan had performed and taught numerous Shostakovich works through his profession as a music professor at the University of Denver.[115] Further, "[Section 514 made] it infeasible for [plaintiff] S.A. Publishing to distribute its recording of Shostakovich's *String Quartets*, which was recorded at substantial expense and named by *Time Magazine* in 1991 as one of the best recordings in classical music."[116]

In *Golan*, the plaintiffs alleged that copyright restoration violated the constitutional requirement of limited-duration copyrights, arguing that works in the public domain may not be removed from the public domain.[117] However, the petitioners did not succeed: the Supreme Court, in a six-to-two decision with one abstention, affirmed the Tenth Circuit's decision that Section 514 was constitutional.[118]

Regarding constitutional limitations on copyright duration, the arguments made by

108. *Works Restored to Copyright Protection*, AM. SOC. OF COMPOSERS, AUTHORS, & PUBLISHERS, https://www.ascap.com/restored_works (last visited Nov. 23, 2017) (select "Shostakovich, Dmitry [sic]" under the "Choose a Composer" query; then select "All Years" under the "Choose a Year" query and click "Find Restored Work").

109. *Golan*, 565 U.S. at 353 (Breyer, J., dissenting).

110. *Id.* at 307.

111. 17 U.S.C. § 501 (2012) (civil infringement); 17 U.S.C. § 506 (2012) (criminal infringement).

112. *Golan*, 565 U.S. at 307.

113. *Id.* at 316.

114. Golan v. Holder, 609 F.3d 1076, 1082 (10th Cir. 2010).

115. Brief for Petitioners at 10–11, Golan v. Holder, 565 U.S. 302 (2012) (No. 10-545), 2011 WL 2423674.

116. *Id.* at 11.

117. *Golan*, 565 U.S. at 307. Additionally, petitioners alleged that Section 514 violated First Amendment protections by restricting freedom of expression through its restored protection of the now-copyrighted works, an argument that was also ultimately unsuccessful. *Id.*

118. *Id.* at 307–08.

the *Golan* petitioners were much the same as those brought by ultimately-unsuccessful petitioners in *Eldred v. Ashcroft* ten years earlier in opposition to the Copyright Term Extension Act ("CTEA").[119] In both *Eldred* and *Golan*, the challenging parties asserted that modifying copyright terms—to add an additional twenty years' protection to existing copyrights in *Eldred* or to restore protection to previously-public domain works in *Golan*—violated the "limited Times" provision of constitutional copyright protection.[120] In both cases, the Court rejected the "command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'"[121] Rather, because copyrights under both the CTEA and Section 514 still had a fixed end date—regardless of how distant that fixed end date might be—they stayed within the constitutional limits.[122]

In *Eldred*, the Court cited to congressional reports that increased "human longevity" and "rapid growth in communications media" rendered the older, shorter system of copyright terms inadequate motivation for creators.[123] Congress' sensitivity toward longer lifespans reflected the so-called rule of the three generations: a longstanding copyright justification that "one's children—and perhaps their children—might also benefit from one's posthumous popularity."[124] This sort of legacy is evident in Shostakovich's family, which currently extends at least to the third generation. The composer's son, Maxim, is an orchestra conductor; Maxim's son Dmitri is a pianist; and the two of them have been known to perform and record the elder Dmitri's compositions.[125] As creators and their family members live longer, the Court in *Eldred* seemed to say, it was constitutionally permissible that copyrights also live longer to provide the same effective amount of protection as before.

The *Golan* Court moved beyond *Eldred*'s familial timelines and instead addressed modern globalization concerns and multinational interactions when it ruled that copyright restoration was constitutional. Though the Court conceded that Congress could theoretically extend copyright terms in installments with the result of perpetual copyrights, it held that this concern did not apply to restoration. Instead, it looked to the past, rather than the future, and focused on evening out previous inequities: "In aligning the United States with other nations bound by the Berne Convention, and thereby according equitable treatment to once disfavored foreign authors, Congress can hardly be charged with a design to move stealthily toward a regime of perpetual copyrights."[126] In other words, the *Golan* Court viewed Congress' copyright restoration as less of a bid for extra time and more of a reparation for America's prickly treatment of foreign authors during the nineteenth and most of the twentieth century.

The *Golan* Court did not believe restoration would create a new copyright free-for-all. Instead, the URAA limited copyright restoration to three categories: works from

119. *Id.* at 317–18.

120. Eldred v. Ashcroft, 537 U.S. 186, 193 (2003); *Golan*, 565 U.S. at 317.

121. *Golan*, 565 U.S. at 317 (quoting *Eldred*, 537 U.S. at 199).

122. *Id.* at 319–20.

123. *Eldred*, 537 U.S. at 207 n.14.

124. *Id.*

125. I MUSICI DE MONTREAL, SHOSTAKOVICH: CONCERTO NO. 1, OP. 35/CHAMBER SYMPHONY OP. 110A (Chandos Records 1992) (Maxim Shostakovich, conductor; Dmitri Shostakovich, Jr., pianist).

126. *Golan*, 565 U.S. at 319–20.

countries without copyright recognition from the United States at the time of publication; sound recordings made before 1972; and works whose copyrights were lost due to failure to comply with formalities and technicalities.[127] If the work had already entered the public domain in its home country, Section 514 provided no new American copyright protection.[128] Nor did Section 514 give retroactive copyright protection for the years before its enactment.[129] Because of this, the Court concluded that restored works "enjoy fewer total years of exclusivity than do their U.S. counterparts."[130]

While copyright restoration limited the *Golan* plaintiffs' previously-unrestricted use of restored works, it did not completely foreclose use. Restoration both prevented retroactive allegations of infringement and provided a one-year safe harbor from the time of Section 514's passage for free use of any restored works.[131] Further, if a restored copyright's owner intended to enforce the copyright, Section 514 required the owner to notify any reliance parties of its intent.[132] Reliance parties then had an additional twelve-month grace period "to sell off previously manufactured stock, perform or display the relevant work publicly, or authorize others to conduct these activities."[133] Once the grace period ended, a reliance party would then either pay "reasonable compensation" to the copyright owner or cease using the restored work.[134]

While the stated legislative intent behind copyright restoration was to place foreign works in the position they would have enjoyed had America recognized their copyrights in the first place,[135] international issues were also influential—including a post-Cold War Russian element. However, the Supreme Court made only passing reference to these international concerns in its decision, writing that "The Register of Copyrights . . . reported 'questions' from Turkey, Egypt, and Austria[, while] Thailand and Russia balked at protecting U.S. works, copyrighted here but in those countries' public domains, until the United States reciprocated with respect to their authors' works."[136]

The circuit decision below in *Golan* included greater detail regarding international concerns when Congress enacted copyright restoration. Specifically, the Tenth Circuit noted the Executive Director and General Counsel of the International Intellectual Property Alliance testified at joint hearings prior to the passage of Section 514 and asserted that "the Russian government . . . made clear that it [would] provide retroactive protection for 'works' only if the U.S. reciprocate[d] with retroactive protection for Russian works."[137] The circuit court decision also included detail regarding the Chairman and

127. *Id.* at 307.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Golan*, 565 U.S. at 316.
132. U.S. COPYRIGHT OFFICE, CIRCULAR 38B: COPYRIGHT RESTORATION UNDER THE URAA, http://www.copyright.gov/circs/circ38b.pdf.
133. *Id.*
134. *Id.*
135. *Golan*, 565 U.S. at 316.
136. *Id.* at 311 (internal citation omitted).
137. General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary,

CEO of the Recording Industry Association of America's testimony during Congressional joint hearings that "the Russians simply said to the United States negotiators . . . that they will interpret their obligations on retroactivity in exactly the same manner that the United States interprets its obligations."[138] In these industry experts' estimation, then, it seemed that mutually assured protection was the only way for America and Russia to make progress in the copyright arena.[139]

Justice Breyer, joined by Justice Alito, dissented from the *Golan* majority and would have found copyright restoration unconstitutional based on the utilitarian underpinnings of American copyright protection.[140] Central to their discussion was Thomas Jefferson's and James Madison's "great uncertainty as to whether the Constitution should authorize the grant of copyrights and patents at all, [as] 'the benefit even of limited monopolies is too doubtful' to warrant anything other than their 'suppression.'"[141] Justice Breyer also placed great weight on the conclusion that "text, history, and precedent demonstrate that the Copyright Clause places great value on the power of copyright to elicit *new* production."[142] Since Section 514 rewarded creators whose creations were already shared with the public, rather than encouraging new art, Breyer concluded, the legislation at issue did not further the aims of copyright law.[143]

The two dissenting justices also expressed great concern about removing works from the public domain, largely because such removal "reverse[d] the payment expectations of those who used, or intended to use, works that they thought belonged to them."[144] Also, in the dissenting justices' opinions, Section 514 ran afoul of the First Amendment because, "[b]y removing material from the public domain, the statute, in literal terms, 'abridges' a preexisting freedom to speak."[145]

Justice Breyer's dissent briefly discussed Berne and the URAA, but only to the extent of calling the legislation in question "a dilemma of the Government's own making" because Congress failed to reserve public domain works from inclusion during URAA negotiations.[146] However, the dissent did not address the reciprocity consideration the

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103d Cong., 2d Sess., 249 n.2 (1994) (quoted in *Golan v. Holder*, 609 F.3d 1076, 1087 (10th Cir. 2010)).

138. *Id.* at 291 (quoted in *Golan*, 609 F.3d at 1088).

139. Perhaps Congress recognized the benefit in reciprocal copyright protection between the United States and Russia in part because both countries heavily utilize the other's cultural exports. Peter Ilyich Tchaikovsky, a Russian who predated Shostakovich by roughly half a century, composed both the Christmastime favorite *The Nutcracker* and rousing *1812 Overture*, often played on the Fourth of July. *See* Sarah Begley & Julia Lull, *How* The Nutcracker *Colonized American Ballet*, TIME (Dec. 24, 2014), http://time.com/3640792/nutcracker-american-history; Everett Evans, *How Did the* 1812 Overture *Become A Fourth Tradition?*, HOUS. CHRON. (June 29, 2012), http://www.chron.com/entertainment/article/How-did-the-1812-Overture-become-a-Fourth-3674377.php (discussing the "sheer popularity" of Tchaikovsky's compositions in America). At the same time, current American music has a large presence in Russia, where Taylor Swift and Nick Jonas rank in some top 100 song charts as reported by music website Shazam. *Russia Top 100*, SHAZAM, http://www.shazam.com/charts/top-100/russia (last visited Feb. 23, 2017).

140. *Golan*, 565 U.S. at 349 (Breyer, J., dissenting).

141. *Id.* at 348 (quoting letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 PAPERS OF THOMAS JEFFERSON 440, 443 (J. Boyd ed., 1956)).

142. *Id.* at 351.

143. *Id.* at 347.

144. *Id.* at 357.

145. *Golan*, 565 U.S. at 358.

146. *Id.* at 365.

Tenth Circuit and Supreme Court majority both emphasized. Instead, Justice Breyer focused on the internal mechanisms Congress could have put into place to avoid granting restoration.[147] In short, while the dissent addressed the utilitarian and economic intent behind copyright law, it did not address the pragmatic issues of an increasingly global intellectual property market, nor did it address the foreign relations considerations linked to those issues.

In a significant swing away from America's longstanding refusal to grant foreign works protection, Congress approved America's entry into the Berne Convention just over a hundred years after the international group first coalesced. This move allowed foreign works such as those composed by Shostakovich to receive copyright protections in exchange for the goal of securing Americans' rights in other countries.[148] Approximately sixty years after the *Shostakovich* decision denied any claim asserted by the man himself, or his country acting in his name, *Golan* affirmed restrictions on use of Shostakovich's compositions and enabled his heirs to benefit from the rule of the three generations through copyright restoration.

## IV. TWENTY-FIRST CENTURY COPYRIGHT DEVELOPMENTS

The Supreme Court's 2012 *Golan* decision demonstrated an ongoing change in the way American courts approach copyright for foreign works or foreign authors. As previously discussed, until 1891, foreign works received no copyright protection whatsoever in America.[149] With the 1989 membership in the Berne Convention and 1994 passage of the URAA, the "landscape" of American copyright recognition for foreign works changed.[150] Shortly after *Golan*, in a 2013 case between a single plaintiff and an international textbook publishing conglomerate, the Supreme Court gave additional recognition to some foreign works—further broadening the scope of American international copyright protections.[151] Yet, while the Court has become increasingly friendly to longer copyrights and foreign copyright owners, it has recently reaffirmed in no uncertain terms that moral rights are *not* a facet of American copyright protection.

### *A. Morals Rights' Current Status*

While, in *Golan*, the Court took a far more expansive view of international copyright than America historically has exhibited, it still has its limits—and those limits include a firm denial of the concept of moral rights. The landmark case reaffirming the lack of moral

147. *Id.*

148. Ironically, Russia was not so cooperative when it came time to actually effect protection. When it joined Berne around the same time as America, Russia enacted a reservation that prevented restoration for foreign works in the Russian public domain. *Berne Notification No. 162: Accession by the Russian Federation*, WORLD INTELLECTUAL PROP. ORG. (Dec. 13, 1994), http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_162.html. This reservation stayed in place until January 2013. *Berne Notification No. 258: Notification by the Russian Federation of Withdrawal of Declaration Concerning Article 18 of the Paris Act*, WORLD INTELLECTUAL PROP. ORG. (Jan. 31, 2013), http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_258.html.

149. *Golan*, 565 U.S. at 309.

150. *See id.* at 312.

151. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013).

rights in American copyright law is *Dastar v. Twentieth Century-Fox Film*, a 2003 Supreme Court case that serves as a direct successor to Shostakovich's 1948 district court lawsuit. At the center of the *Dastar* dispute was a 1949 television series based on Dwight D. Eisenhower's written memoir of World War II.[152] Though copyright holders renewed the copyright on the written memoir, as was necessary at the time, copyright owners for the television series failed to re-up their protection, and the series became part of the American public domain in 1977.[153] Shortly before the fiftieth anniversary of the end of World War II, the Dastar company purchased tapes of the original television series, made minor modifications such as a new opening and narrated chapter introductions, and sold the videos as a set called "World War II Campaigns in Europe."[154] Copyright holders for the still-protected written memoir and other versions of the television series then brought suit against Dastar, alleging both copyright infringement of the original book and violations of the Lanham Act, which "prevents the unaccredited copying of a [trademarked] work."[155]

Writing for a unanimous Court, Justice Scalia rejected the copyright holders' claims regarding plagiarism or infringement. In discussing the three main types of intellectual property—copyright, trademarks, and patents—the Court wrote that the right to "copy without attribution, once a copyright has expired, like 'the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public."[156] This exchange, the Court explained, is part of the "carefully crafted bargain" that copyright protects between a creator and the public.[157] Once the copyright holder's rights expire at the end of protection, the limited monopoly that once existed disappears and "the public may use the invention or work at will and without attribution"—even to the extent of plagiarizing it.[158]

*Dastar*'s holding reached the same legal conclusion as *Shostakovich* fifty-five years earlier: when a work is in the public domain, the public has the right to make any use of it whatsoever, free from interference by the former owners.[159] However, *Dastar* also widened the reach of this doctrine. In *Shostakovich*, a trial-level New York state court denied moral rights protections for the plaintiffs but left the door open for possible moral rights protections in the future, noting that, "[c]onceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights."[160] The Supreme Court in *Dastar*, though, closed the door to any sort of moral rights in the United States when it stated the bright line rule "under which, once [a] patent or copyright monopoly has expired, the public may use the invention or work at will and without

152. Dastar Corp. v. Twentieth Century-Fox Film, 539 U.S. 23, 25–26 (2003).
153. *Id.* at 25.
154. *Id.*
155. *Id.* at 24–25.
156. *Id.* at 33 (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230 (1964)).
157. *Dastar*, 539 U.S. at 33.
158. *Id.*
159. *Id.* at 34; Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948).
160. *Shostakovich*, 80 N.Y.S.2d at 578.

attribution."[161] While in recent years Congress and the Court may have taken a far more global view of copyright protection than America historically has demonstrated, as shown by the repeal of the Copyright Act's manufacturing clause and the wide foreign and international protections granted by *Eldred* and *Golan* since 2000, the majority of American copyright protections still protect exactly that: *copy*right, not *moral* rights.[162]

*Golan*'s dissent, written by Justice Breyer and joined by Justice Alito, would later invoke *Dastar* in its reasoning.[163] Specifically, the dissenting justices used *Dastar*'s statement that, "[t]he right to copy . . . once a copyright has expired . . . passes to the public."[164] The *Golan* majority tacitly distinguished *Dastar* by underscoring that "[w]orks that have fallen into the public domain *after* the expiration of a full copyright term—either in the United States or the country of origin—receive no further protection under § 514."[165] Instead, Section 514 only removed works from the public domain that, under Berne and the URAA, should never have been there in the first place.[166]

### *B. International Copyright Sales and the First Sale Doctrine*

Roughly a decade after *Dastar*, and only a year after *Golan*, the Supreme Court demonstrated its increasingly-generous attitude toward U.S. copyright protection beyond American shores in *Kirtsaeng v. John Wiley & Sons, Incorporated*.

The first sale doctrine allows a copyrighted work, once lawfully sold, to be transferred in whatever way its new owner intends.[167] For instance, someone who buys a book may then loan that book to a friend, or the owner of a DVD may resell it at a garage sale. The controversy in *Kirtsaeng* involved a much broader geographical area than the boundaries of a garage sale, though, as there the Court considered whether the first sale doctrine applied to foreign-manufactured works.[168]

American textbook producers often publish English-language versions of their books in foreign countries, which are usually significantly less expensive than—but otherwise essentially equivalent to—their American-marketed counterparts.[169] These foreign copies "state that they are not to be taken (without permission) into the United States."[170] Despite this warning statement, Kirtsaeng made a fairly lucrative business of purchasing these books through his friends and family in Thailand and then reselling them in the United States at a profit.[171] Once American textbook company John Wiley & Sons became aware of Kirtsaeng's scheme, it brought a copyright infringement suit against him, alleging that "Kirtsaeng's unauthorized importation of its books and his later resale of

161. *Dastar*, 539 U.S. at 33.
162. *See id.*
163. *Golan*, 565 U.S. at 358 (Breyer, J., dissenting).
164. *Id.*
165. *Id.* at 314 (emphasis added).
166. *See id.*
167. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 524 (2013).
168. *Id.*
169. *Id.* at 525–26.
170. *Id.* at 525.
171. *Id.* at 526. One might say Kirtsaeng was a modern-day "bookaneer" in the style of Thomas Hood's copyright wrongdoers.

those books amounted to an infringement of Wiley's . . . exclusive right to distribute as well as [the] related import prohibition."[172]

Wiley pushed for a geographic reading of the first sale doctrine, arguing that it applied to sales "*where the Copyright Act is applicable.*"[173] In other words, the doctrine should only protect the resale of works originally sold within the United States. However, the six-to-three Court sided with Kirtsaeng and took a broader, non-geographical approach.[174] Comparing books with numerous other commercial products, such as cars, calculators, and computers, the Court reasoned that "[m]any of these items are made abroad with the American copyright holder's permission and then sold and imported . . . to the United States."[175] If the first sale doctrine did not apply to foreign-produced works, the Court reasoned, both domestic and foreign sellers would be subject "to the disruptive impact of the threat of infringement suits."[176]

The Court bolstered its non-geographical reading of the first sale doctrine with several other elements of current copyright jurisprudence. First, it explained that "the [Copyright] Act itself says that works '*subject to protection under this title*' include unpublished works 'without regard to the nationality or domicile of the author,' and works 'first published' in any one of the nearly 180 nations that have signed a copyright treaty with the United States."[177] In other words, the statutory plain language led to a non-geographic reading of the first sale doctrine. The Court also underscored the liberality of the current Copyright Act in comparison to earlier versions of the statute, with emphasis that the current law "phase[d] out" the manufacturing clause that previously restricted foreign publications' American protections.[178] In the majority's opinion, "[t]he phasing out of this clause sought to equalize treatment of copies manufactured in America and copies manufactured abroad" and supported a non-geographical reading.[179]

In light of an increasingly globalized society and exchange of copyrighted works across borders, the Court "doubt[ed] that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities."[180] It also cited to *Kirtsaeng amici* that reported "over $2.3 trillion worth of foreign goods were imported in 2011 [and] American retailers buy many of these goods after a first sale abroad."[181] In one example of potential economic impact, art museums would need to seek "permission from the copyright owners before they could display [a] work [first sold overseas] . . . even if the copyright owner has already sold or donated the work to a foreign museum."[182]

*Golan* and *Kirtsaeng* exemplify an increasingly globalized copyright jurisprudence

172. *Kirtsaeng*, 568 U.S. at 528.
173. *Id.* at 529.
174. *Id.*
175. *Id.* at 543.
176. *Id.*
177. *Kirtsaeng*, 568 U.S. at 532.
178. *Id.* at 536.
179. *Id.*
180. *Id.* at 530.
181. *Id.* at 543.
182. *Kirtsaeng*, 568 U.S. at 543–44.

in America. The eye toward facilitating both domestic and international trade seen in both cases is a stark contrast to the previous history of American copyright, since American copyright historically either afforded no protection or placed high demands on obtaining protection for foreign works.[183] However, *Kirtsaeng* still imposed limits, and the Court reinforced *Dastar* when it included a short reference to the lack of moral rights in the American copyright scheme in the majority opinion: "[m]useums, for example, are not in the habit of asking their foreign counterparts to check with the heirs of copyright owners before sending, *e.g.*, a Picasso on tour."[184] In conjunction, *Dastar*, *Golan*, and *Kirtsaeng* established the Court's twenty-first century approach to copyright by both affirming a central tenet of American copyright law—the lack of moral rights—while also broadening the protections and exceptions of American copyright law to best function in an increasingly globalized society.

## CONCLUSION

At first glance, Russian neo-classical composer Dmitri Shostakovich seems an unlikely player in the development of American copyright law. However, his influence and that of his mother country have had a significant impact on the way the United States provides protection for authors while incentivizing them to share their works for the ultimate benefit of the general public.

Twentieth Century-Fox's use of Shostakovich's compositions in an American propaganda movie sparked one of the first American legal decisions on the topic of moral rights. More than sixty years later, educators' and performers' use of Shostakovich's compositions in their businesses became a major issue in the Supreme Court's review of copyright restoration. In order to ensure copyright protection and recognition for new American works in Russia, the United States had to do what it was notoriously loath to do: recognize foreign copyrights, including those from Shostakovich's Russia.

Congressional motivation for this restoration appears to have come at least in part from the concern that Russia would refuse to acknowledge American copyrights if America continued in its refusal to acknowledge Russian copyrights, leading toward a type of post-Cold War mutually assured protection between the two countries in the copyright arena.

Suits involving Shostakovich first foreshadowed and later demonstrated an increasingly globalized approach to American copyright in the twenty-first century. Once Congress removed the Copyright Act's manufacturing clause, which had severely limited American copyright protections for foreign works, two Supreme Court decisions cemented a new liberality toward international copyright: 2012's *Golan*, which affirmed copyright restoration for previously unprotected foreign works such as Shostakovich's compositions, and 2013's *Kirtsaeng*, which affirmed the first sale doctrine's applicability to domestic and international trade. However, even with these wide expansions of copyright protections, America continues to restrict American copyright guarantees to purely economic, rather than moral, rights. The 1948 *Shostakovich* New York trial court

183. *Golan*, 565 U.S. at 309.
184. *Kirtsaeng*, 568 U.S. at 544.

decision, one of the first American decisions addressing the concept of moral rights, preceded the Supreme Court's clear statements in 2003's *Dastar* that moral rights are not welcome in American jurisprudence and that public domain works, once free from the limited monopoly of copyright protections, are thoroughly and freely usable.

While a Russian neo-classical composer may be an unusual case study for examining America's copyright system, Dmitri Shostakovich, his compositions, and his country all were influential in shaping various elements of American copyright law: its steadfast denial of moral rights, the evolution of its approach to foreign works' protections, and the ongoing development and ramifications of American copyright protection. Ultimately, this Russian musical prodigy and the pieces he produced throughout his fifty-six-year career serve as a valuable case study for examining the personalities, power struggles, and stories at the heart of cases and controversies involving the work product of human creativity.

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