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Conductors Pose First Challenge to Copyright Law

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In what is apparently the first constitutional challenge to a 7-year-old federal copyright law, plaintiffs, including two orchestra conductors, have filed suit against the U.S. government in federal court in Denver, challenging a law that grants copyright protection to foreign works that were formerly in the public domain.

Lawrence Golan, who is also a professor of music at the University of Denver, and other plaintiffs, including the nonprofit Symphony of the Canyons, claim that the copyright law prevents them from performing works by notable foreign composers by making the royalty fees for performing the music cost-prohibitive. Furthermore, the plaintiffs argue that the law, Sec. 514 of the Uruguay Round Agreements Act (URAA), violates the limitations imposed on copyrights by the copyright clause of the U.S. Constitution, namely that copyrights be limited in duration and that they "promote the Progress of Science and useful arts." *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. filed Sept. 19, 2001).

In one instance, a plaintiff, New York conductor Richard Kapp, who runs a recording label, found that the URAA pushed the costs for sheet music for works by such composers as Stravinsky, Shostakovich and Prokofiev from less than \$100 to at least \$1,000 -- and this only to rent the music.

"After the performance, Kapp must return the copy back to the asserted restored copyright holder, thus requiring Kapp's orchestra to pay several thousand dollars more should it wish to perform the work again," the plaintiffs' complaint states.

Money may be the reason the URAA has not been challenged before. According to one of the plaintiffs' attorneys, Edward Lee of the Stanford Law School Center for Internet and Society, challenging the law has been difficult because "the people most impacted by this law, small community artistic groups and not-for-profits, can't afford to sue." Lee, Stanford professor Lawrence Lessig and Hugh Gottschalk and Carolyn Fairless of Denver's Wheeler, Trigg & Kennedy are representing the plaintiffs pro bono.

Golan, Kapp and the other plaintiffs are also challenging the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998, which expanded copyright protection by 20 years. Earlier this year, the U.S. Court of Appeals for the D.C. Circuit rejected a constitutional challenge to the act, holding that neither the First Amendment nor the copyright clause prohibits Congress from extending the term of copyrights. *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir 2001). The plaintiffs in that case are seeking review by the U.S. Supreme Court.

According to Professor Thomas Cotter of the University of Florida Levin College of Law, URAA and CTEA proponents cited several reasons for the additional copyright coverage, including the goal of harmonizing U.S. law with the laws of foreign nations, the benefit to the U.S. economy (because the U.S. is a net exporter of intellectual property, including movies, software and sound recordings) and because people are now living longer.

The Justice Department, which is defending the *Golan* case, said the case is still under review.

Edward Hammerman of Washington, D.C.'s Dickstein Shapiro Morin & Oshinsky, who is not involved in the case, said he favors the laws because in an age of "multinational media companies and instantaneous electronic transmission," the laws "expand and protect the sole and exclusive privilege of an author."