

**Nos. 09-1234 & 09-1261**  
**ORAL ARGUMENT IS REQUESTED**

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**In The United States Court of Appeals  
for the Tenth Circuit**

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LAWRENCE GOLAN, ESTATE OF RICHARD KAPP, S.A. PUBLISHING CO.,  
INC., d/b/a ESS.A.Y RECORDINGS, SYMPHONY OF THE CANYONS, RON  
HALL, d/b/a FESTIVAL FILMS, and JOHN McDONOUGH, d/b/a TIMELESS  
VIDEO ALTERNATIVES INTERNATIONAL,

Plaintiffs-Appellees/Cross-Appellants,

v.

ERIC H. HOLDER, JR., Attorney General, and MARYBETH PETERS, Register  
of Copyrights,

Defendants-Appellants/Cross-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
The Honorable Lewis T. Babcock, Chief Judge

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**COMBINED REPLY AND RESPONSIVE BRIEF FOR THE  
APPELLANTS/CROSS-APPELLEES**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In our opening brief ("Govt. Br."), we demonstrated that the district court erred in holding Section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809, 4976-4981 (codified as amended at 17 U.S.C. §§ 104A, 109(a) (1994)), unconstitutional on First Amendment free speech grounds. We showed that Section 514 is narrowly tailored to achieve the government's important interest in ensuring unquestionable compliance with its international obligations, protecting the interests of U.S. copyright holders, and providing equitable treatment to foreign authors and artists. *See, e.g., Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[T]he United States has a vital national interest in complying with international law."). The district court erred in scanting these interests, and the breadth of Congress's discretion in fulfilling them, under cases such as *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*"), and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

Plaintiffs have not rebutted these points in their responsive brief ("Pl. Br."). They suggest erroneously that the United States has voluntarily and deliberately "gone beyond" the requirements of the Berne Convention ("Berne" or "the Convention"), and they seek to do an end-run around this Court's ruling in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) ("*Golan III*") -- which rested squarely upon the Supreme Court's decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003) -- by

relitigating their rejected Copyright Clause challenge in the guise of a First Amendment claim. Their arguments are belied by the historical record, the record herein, and the decisions of the Supreme Court and this Court.

Plaintiffs argue that Section 514 "goes beyond" Berne's requirements by enforcing restoration against reliance parties, and thus fails intermediate scrutiny. Plaintiffs are mistaken. If anything, Congress went beyond Berne in a direction that favors reliance interests, and thus certainly did not violate the Constitution in enacting Section 514.

In their cross-appeal, plaintiffs raise a facial constitutional challenge to the principle of restoration itself. Although plaintiffs attempt to frame this argument as a First Amendment claim, in reality it is a Copyright Clause challenge disguised in First Amendment garb. Of course, this Court has already held in this case that restoration of copyrights pursuant to Berne is permissible under the Copyright Clause. Thus, plaintiffs' challenge to the principle of restoration in and of itself, viewed either as a direct Copyright Clause challenge or as a First Amendment challenge merely "informed" by the Copyright Clause (*see* Pl. Br. 60), must fail.

Accordingly, there is no merit to plaintiffs' assertion on their cross-appeal that the district court should have held Section 514 unconstitutional on its face. Section 514 of the URAA is constitutional in all of its applications -- but even assuming

*arguendo* that it is constitutionally infirm in any respect, it can only conceivably be so with respect to reliance parties who actually made use of works in which copyright was subsequently restored pursuant to the statute, while those works were in the public domain. Plaintiffs furnish absolutely no basis for taking the extreme step of holding the statute facially unconstitutional -- a drastic result that the Supreme Court and this Court have counseled against on many occasions.

## ARGUMENT

### I. APPLICABLE REVIEW PRINCIPLES.

At the outset, we reiterate that this case involves a First Amendment challenge to a statute that is plainly content-neutral, as the district court held and plaintiffs themselves acknowledge. *See* Pl. Br. 20. Thus, there is no dispute that intermediate scrutiny, rather than strict scrutiny, applies here.<sup>1</sup> *See id.* at 22.

As we demonstrated in our opening brief (Govt. Br. 19-22), under intermediate scrutiny, a regulation of speech must be sustained if "it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner*

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<sup>1</sup> This statement assumes *arguendo* that First Amendment scrutiny of any sort is warranted here, as the Court held in *Golan III*. We repeat our respectful disagreement with that ruling (which we recognize as binding upon the panel in this proceeding), and our reservation of the right to seek further review with respect to it in any proceedings beyond the panel stage. *See* Govt. Br. 20 n.7.

*Broad. Sys., Inc. v. FCC*, 520 U.S.180, 189 (1997) ("*Turner II*"). If a regulation of speech is intended to redress an actual or anticipated harm to an important governmental interest, then the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"). "[C]ourts must accord substantial deference to Congress's predictive judgments"; the only relevant question is whether, "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."<sup>2</sup> *Turner II*, 520 U.S. at 195. Finally, the reviewing court must uphold a

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<sup>2</sup> Plaintiffs contend that the government claims entitlement to "automatic deference" or "automatic discretion" based on the foreign relations concerns embodied in Section 514. *See* Pl. Br. 39, 40. The import of these phrases is unclear, but if plaintiffs are suggesting that we are arguing that the constitutionality of the statute is not subject to meaningful judicial review, they are setting up a straw man; we make no such argument. In any event, the government's entitlement to considerable deference comes directly from *Turner II*; the fact that the statute at issue arises in the context of international relations is merely an additional factor that counsels caution in reviewing it.

By the same token, plaintiffs mistakenly assert (Pl. Br. 23-26) that the government's citation to the Supreme Court's recognition in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), that although "[t]he First Amendment securely protects the freedom to make . . . one's own speech[,] it bears less heavily when speakers assert the right to make other people's speeches," *id.* at 221, runs afoul of this Court's prior ruling in the instant case. We have acknowledged that this Court has already held that plaintiffs' speech is entitled to First Amendment protection, and that this holding is binding for present purposes. *See* Govt. Br. 20 n.7. But the fact remains that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches," *Eldred*, 537 U.S. at 221, as plaintiffs do here.

challenged regulation if the important governmental interest in question "would be achieved less effectively absent the regulation" and the regulation does not "burden substantially more speech than is necessary to further that interest." *Id.* at 213-14.

Despite conceding that intermediate scrutiny applies, plaintiffs make two efforts to obfuscate this straightforward inquiry, neither of which has merit. Plaintiffs first suggest that Section 514 burdens "more speech than necessary," and thus fails intermediate scrutiny. *See* Pl. Br. 29. Section 514 in fact burdens no more speech than is necessary to satisfy the important government interests it serves. *See* Govt. Br. 22-49, and *infra*. Just as importantly, however, the standard is not as demanding as plaintiffs suggest -- a statute can burden more speech than necessary and still withstand intermediate scrutiny, as long as it does not burden *substantially* more speech than necessary. *Turner II*, 520 U.S. at 213-14.

The distinction is important because, when evaluating a content-neutral regulation, courts are not required to "sift[] through all the available or imagined alternative means of regulating [the subject] in order to determine whether the [regulatory] solution was 'the least intrusive means' of achieving the desired end." *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *see also Turner II*, 520 U.S. at 217. Indeed, this is a crucial difference between intermediate scrutiny and strict scrutiny. "So long as

the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."<sup>3</sup> *Ward*, 491 U.S. at 800; *see also, e.g., Turner II*, 520 U.S. at 218; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (overnight camping ban upheld even though "there [were] less speech-restrictive alternatives" of satisfying interest in preserving park lands).

Second, plaintiffs argue in the alternative that Section 514 is "substantially overbroad" in its application, and thus must be declared unconstitutional even if it otherwise would satisfy intermediate scrutiny. *See* Pl. Br. 22, 28-29. This assertion is equally misguided.

As a practical matter, any consideration of "substantial overbreadth" would essentially duplicate the second element of the intermediate scrutiny test -- whether the challenged provision burdens "substantially more speech than necessary" to further the interests it serves. *See Turner II*, 520 U.S. at 189. In discussing substantial overbreadth, however, plaintiffs misstate the standard applicable to the doctrine, quoting a footnote from a 1984 Supreme Court decision to imply that a

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<sup>3</sup> Thus, plaintiffs are mistaken when they assert that "the question is whether stronger and permanent protection for reliance parties is permissible." Pl. Br. 34.

statute is substantially overbroad if, *inter alia*, it "does not employ means narrowly tailored to serve a compelling government interest." *See* Pl. Br. 28 (quoting *Secretary of State v. Munson*, 467 U.S. 947, 965 n.13 (1984)). They thus elide a pivotal distinction between "intermediate scrutiny" and "strict scrutiny," and conflate the two standards.<sup>4</sup>

As more recent Supreme Court authority on the substantial overbreadth doctrine has made clear, however, the standard is not comparable to strict scrutiny, nor is it as rigorous as plaintiffs would have it. *See, e.g., United States v. Williams*, 128 S. Ct. 1830, 1838 (2008); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Instead, the standard for determining substantial overbreadth requires a "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks*, 539 U.S. at 118-19 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). This inquiry is not plainly different from the standard applicable to an intermediate scrutiny challenge such as this one. But to the

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<sup>4</sup> For the same reasons, plaintiffs' reliance upon the various cases cited at page 38 of their brief is misplaced, because all of those decisions involved "restrictions reviewed under strict scrutiny" -- as plaintiffs admit. Pl. Br. 39.

extent that plaintiffs argue for an independent "substantial overbreadth" review in the instant case, their analysis is off the mark.<sup>5</sup>

**II. SECTION 514 ADVANCES IMPORTANT GOVERNMENT INTERESTS AND DOES NOT BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO DO SO.**

Section 514 of the URAA satisfies intermediate scrutiny under the First Amendment, by fulfilling the government's important interests in ensuring unquestionable compliance with Article 18 of the Berne Convention, protecting American authors and artists, and doing justice to previously-unprotected foreign creators, while at the same time respecting the First Amendment interests of "reliance parties" such as plaintiffs in this action, who lawfully took advantage of the heretofore unprotected status of foreign works whose copyrights have now been restored. *See* Govt. Br. 22-49. Plaintiffs' arguments to the contrary are without merit.

Under the controlling case law regarding intermediate scrutiny (*see* Section I, *supra*), when it enacted Section 514 Congress was not required to determine the precise parameters for restoration of protection of works, and this Court is not required to do so in passing upon the constitutionality of the statute. The government need only establish "that the recited harms are real, not merely conjectural, and that

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<sup>5</sup> We address plaintiffs' misguided "substantial overbreadth" argument further in our discussion of their facial challenge, *infra*.

the regulation will in fact alleviate those harms in a direct and material way." *Turner I*, 512 U.S. at 664. And the Court "must accord substantial deference to Congress's predictive judgments" regarding Berne, provided only that "in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195.

1. Plaintiffs delve into various areas of the legislative background that preceded the enactment of Section 514 in an effort to suggest that its reliance party provisions fail to withstand intermediate scrutiny. Relying on certain statements made prior to the enactment of the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 ("BCIA"), and on a partial quotation of an isolated remark of uncertain meaning made by an American negotiator at an international conference in 1989, plaintiffs argue that the reliance party provisions of Section 514 -- enacted several years later, in 1994 -- voluntarily and deliberately "go beyond" what Berne requires, and by extension are unconstitutional. *See* Pl. Br. 40-44. This argument is incorrect.

Moreover, plaintiffs' contention that there was "broad agreement" prior to enactment of the BCIA that Berne "did not require restoration against reliance interests," *see id.* at 40, is unsupported by any authoritative statements from the pre-BCIA era. If anything, the historical record from both the pre- and post-BCIA era

shows only that there has always been considerable debate regarding the restoration requirements of Berne Article 18.

Plaintiffs refer to a handful of persons or entities that made various statements during the pre-BCIA period, but cite no definitive statement from any source regarding the meaning of Article 18. Indeed, plaintiffs fail to identify any authority from the pre-BCIA period contending that Berne itself "does not require restoration against reliance interests" -- and no less a source than plaintiffs' amicus states that "imposing conditions [pursuant to Article 18(3)] may not include a complete absence of application of the principle of limited restoration, because then the principle is not applied at all." *See* Brief of Amicus Curiae Professor Daniel J. Gervais in Support of Affirmance ("Gervais Br.") 16. Without even one such authoritative contemporaneous statement, there certainly could have been no "broad agreement" on that point, as plaintiffs assert.<sup>6</sup>

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<sup>6</sup> While plaintiffs cite the remarks of Representative Kastenmeier (*see* Pl. Br. 7, quoting 7 William F. Patry, *Patry on Copyright* § 24:21 (2008)), it is noteworthy that the Patry treatise goes on to state that "[a]t a November 26, 1987, roundtable in Geneva, Switzerland, European experts unanimously disagreed with the position taken by Representative Kastenmeier," instead taking the position that "Article 18 requires exactly what it says it does: retroactive protection except where the work is in the public domain in the United States or in its country of origin because its term of protection has expired." *Id.* (footnotes omitted); *see also* H.R. Rep. No. 100-609, Appendix 3, 100th Cong., 2d Sess. 1136, 1198-1212 (1988) ("BCIA Report") (remarks of Messrs. Rumphorst, Tarnofsky, Dittrich and Boytha, and Ms. Del Corral). And with respect to the statement in the BCIA report that "there is considerable debate over whether any recognition of the 'principle' of

On the other hand, Professor Sam Ricketson, one of the world's leading authorities on international copyright law -- then and now -- wrote in 1986 that not only does Berne require restoration of eligible copyrights as a general matter, it also requires that such restoration must ultimately be enforced against even reliance parties:

[Reliance interest] provisions should also be of limited duration: although the word is not used, they are transitional in nature, and their essential purpose should be to ensure that third parties who have previously acted in the absence of legal restraint should not be penalized once these restraints have come into operation. On the other hand, this does not authorize their usage indefinitely: a situation must eventually be reached when the work is protected in relation to *all* persons.

Sam Ricketson, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* (1st ed. 1986) 675 (emphasis added); *see also* Govt. Br. 28-30.

The history of Berne's implementation in this country does not support plaintiffs' argument. When Congress enacted the BCIA in 1988, six years before the enactment of the URAA, it did not immediately adopt a provision addressing

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Article 18(1) of the Convention is absolutely required in light of the sweeping discretion afforded [countries] by Article 18(3)," BCIA Report at 51, the Patry treatise itself states that "[t]his position is incorrect." 7 *Patry on Copyright* § 24.21, n.19.

retroactive protection of works. Instead, it determined simply that the decision could wait, stating that "[t]he question of whether and, if so, how Congress might provide retroactive protections to works now in our public domain raises difficult questions, possibly with constitutional dimensions. These questions do not have to be addressed now and can be raised if and when presented in the context of specific facts." H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 51 (1988) ("BCIA Report"). The report further observed that "we remain persuaded that any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial and consumer considerations is possible." *Id.* at 52. Even if it could be said that Congress, when it enacted the BCIA, took the view that Article 18(1) did not require *any* copyright restoration (*see* BCIA, §§ 2(3) & 12), that view is repudiated by plaintiffs, their amicus, and the authorities upon which they rely. *See* Pl. Br. 31 ("There is no dispute the Berne Convention requires the restoration of copyrights."); Gervais Br. 16 ("imposing conditions [pursuant to Article 18(3)] may not include a complete absence of application of the principle of limited restoration, because then the principle is not applied at all,"); *id.* ("Hence, when the United States adopted a minimalist approach upon joining the Convention by failing to provide any retroactive protection, H.R. Rep. No. 100-609, at 52 (1988), it pushed the boundaries of Article 18(3) too far."); n.6, *supra*.

Furthermore, when Congress enacted the BCIA in 1988, other Berne parties had not expressed the clear view that they disagreed with the U.S. approach. This state of affairs changed when the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") entered into effect. As we explained in our opening brief, during the legislative debate over entry into force of the TRIPS Agreement, which gave rise to the URAA, Congress learned that our trading partners might not fully implement TRIPS; that our implementation to date of Article 18 of the Berne Convention was being contested by our trading partners and thus could lead to the initiation of WTO dispute settlement against the United States; and that this in turn could undermine U.S. efforts to seek comprehensive implementation of TRIPS by others. *See* Govt. Br. 32-35; *see also* Report of Dr. Mihaly Ficsor ("Ficsor Report"), Feb. 15, 2005, ¶¶ 20-23, Appendix ("App.") 122-23.

Given that background, Congress's decision in 1988 to defer addressing the question of restoration, and then in 1994 to revisit that question in light of the entry into force of TRIPS, should be regarded as constituent parts of a dynamic, evolving process. Plaintiffs' suggestion that there was "broad agreement" preceding enactment of the BCIA that Berne did not require complete protection of reliance parties' interests from copyright restoration is thus hyperbolic, to say the least, in addition to

being at odds with statements made by plaintiffs, their own amicus, and the very authorities plaintiffs invoke. *See* p. 12, *supra*.

After the enactment of the BCIA and during its consideration of the URAA, Congress heard testimony that many U.S. trading partners believed strongly that Article 18 of Berne required restoration of copyrights, and that the United States was not fulfilling its obligations under Berne. *See* Govt. Br. 27-28, 33-34 (citing testimony of Messrs. Shapiro, Schroeder, and Smith). The actual requirements of Berne Article 18 remained a point of contention, as a number of government officials emphasized that the BCIA reflected a legislative determination that Article 18 does not require restoration of copyrights. *See Joint House and Senate Comm. Hearings on the URAA*, 103d Cong., 2d Sess. 2, 81, 120 (1994) ("Joint Hearings") (remarks of Rep. William J. Hughes, Sen. Dennis DeConcini, and Assistant Commerce Secretary Bruce A. Lehman).

It is true that a representative of the United States at an international conference in 1989 (some five years before Section 514 was enacted) is recorded as stating that "the intention of the United States in this respect was to go beyond Article 18 of the Berne Convention and to require countries that had previously afforded no effective copyright protection to foreign works, to provide retroactive application of the obligations under a TRIPS agreement to pre-existing works." *See* Pl. Br. 43-44,

citing App. 364, World Trade Organization, *Meeting of Negotiating Group of 12-14 July, 1989*, MTN.GNG/NG11/14, at para. 25 (1989). Plaintiffs erroneously attach great importance to their partial quotation of this isolated remark of uncertain meaning, which can hardly be characterized either as a definitive official statement as to the requirements of Berne Article 18, or as applying to the United States.

The historical record thus establishes beyond peradventure that Section 514 was born of a congressional desire to ensure unquestionable compliance with Article 18 of Berne in the face of this uncertainty. Contrary to plaintiffs' assertion (*see* Pl. Br. 45 n.5), the government does not argue that Section 514 "goes beyond" Berne -- merely that it indisputably satisfies Berne, and thus "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. Making sure that the United States is undeniably in compliance with a treaty is not "going beyond" the treaty.

2. Plaintiffs' next, closely related argument is that the reliance party provisions of Section 514 cannot withstand First Amendment scrutiny because the national interests they serve are too speculative. *See* Pl. Br. 44-48. For purposes of this argument, plaintiffs do contest not the permissibility of restoration itself; they concede that Congress was "justified in believing that unless it enacted legislation to

comply with Article 18 [of Berne], other nations would not adequately protect American copyrighted works." *Id.* at 45. Plaintiffs suggest, however, that such concrete justification does not extend to the enforcement of restored copyrights as to reliance parties.

In plaintiffs' words, "[t]he question is . . . whether it was necessary to restore copyrights without adequate protection for reliance interests in order to induce other nations to enact or maintain protection for U.S. copyrights." *Id.* Plaintiffs ask the wrong question (and a loaded one at that) and offer the wrong answer.

Once again, plaintiffs' argument is premised entirely on the mistaken notion that Congress willfully went "beyond" Berne's requirements, and did so in a direction that penalizes rather than benefits reliance parties. This suggestion ignores the significant, carefully calibrated protections afforded reliance parties under Section 514.<sup>7</sup> *See* Govt. Br. 34-36, 60-61.

At a basic level, the premise of plaintiffs' argument -- that enforcement of restored copyrights as to reliance interests "goes beyond" Berne in a way that harms

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<sup>7</sup> In this regard, the assertion of plaintiffs' amicus that Congress failed to accommodate "vested interests" by allowing reliance parties to recoup their initial capital outlay is equally flawed. *See* Gervais Br. 14-15 (citing William Briggs, *The Law Of International Copyright*, 266-69 (1906) (reprinted 1986)). Plaintiffs' amicus fails to grasp that in Section 514 Congress addressed the "quasi-property" interest of reliance parties by, *inter alia*, immunizing them for past use and delaying copyright restoration with respect to such parties, thereby allowing them to recoup their initial capital outlay. *See* 17 U.S.C. § 104A(d)(1)-(3).

those interests -- is incorrect. Plaintiffs themselves state that "[t]here is no dispute the Berne Convention requires the restoration of copyrights." Pl. Br. 31. But Congress reasonably concluded that, for purposes of achieving its goal of ensuring unassailable compliance with Berne, any "restoration" that allowed reliance parties to continue exploiting otherwise restored works unchecked, on a permanent basis, would be a very dubious restoration indeed. *See, e.g.,* Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, 343 (2d ed. 2006) ("[A] situation must eventually be reached when the work is protected in relation to all persons.").<sup>8</sup> Yet that is precisely what plaintiffs insist upon.

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<sup>8</sup> Although plaintiffs attack the Ficsor Report at some length (*see* Pl. Br. 33-36), Dr. Ficsor's view that under Berne Article 18 reliance party protections must be transitional is consistent with the views of copyright experts such as Professors Ricketson and Ginsburg, *supra*, with the testimony of Messrs. Shapiro, Schroeder and Smith at the Joint Hearings, *supra*, and with the observations of their own amicus. *See* Gervais Br. 13, 16. And the fact that Dr. Ficsor authored the letter signed by his superior, Mr. Bogsch, the Director General of the World Intellectual Property Organization, in no way undermines the authority of either that letter or Dr. Ficsor. Nor does Dr. Ficsor focus on the wrong treaty provisions, as plaintiffs would have it.

In addition, contrary to the intimation of plaintiffs' amicus, the government does not argue for a hard-and-fast "two-year limit on the protection o[f] reliance parties," or a "binding rule" to this effect. *See id.* at 18. Dr. Ficsor's opinion on this point (*see* Govt. Br. 29-30), however, certainly establishes that such a period is a reasonable and proper exercise of discretion under Article 18(3). And it is immaterial that a specific deadline was imposed under Berne Article 13(2) and rejected with respect to Article 18 (*see* Gervais Br. 17-18 & n.11), as those facts have no bearing on the validity of Congress's judgment in Section 514.

On the other hand, Berne itself never even mentions reliance parties, much less mandates a minimum level of protection for them. A nation acceding to Berne thus could enact provisions more or less protective of reliance interests than those enacted by a different nation, but measured against the baseline of what Berne itself requires, any degree of protection at all is invariably more protective than what is required. Accordingly, if Congress went "beyond" Berne in Section 514, it did so in a direction that *favors* reliance parties by providing them protections not required by Berne.

In light of the conflicting interpretations of the requirements of Article 18 -- both when Congress enacted the BCIA in 1988 and when it enacted Section 514 in 1994 -- Congress was entitled to proceed cautiously in derogating from Article 18's principle of copyright restoration in order to address the interests of reliance parties. Precisely because of the variety of points of view surrounding Article 18 and what it permitted with respect to reliance parties, it was appropriate for Congress to take such an approach in order to ensure that the United States would not be found in violation of its Berne obligations.

Although plaintiffs assert that Berne does not require any restoration of rights in restored works against reliance parties such as themselves, as a fallback position they have at least implicitly invoked the United Kingdom model for enforcing restored copyrights as to reliance interests as a preferable means of protecting such

interests. *See* Pl. Br. 33-34. The United Kingdom model and the various other models invoked by the district court and plaintiffs, however, do not bestow absolute protection upon reliance parties, and are not necessarily any more protective of reliance interests than is Section 514. *See* Govt. Br. 38-39. This kind of apples versus oranges comparison does not advance plaintiffs' cause.

Moreover, even if Congress went "beyond" Berne in a way that disadvantages reliance parties relative to what Berne requires, plaintiffs do not explain why the approaches taken by the United Kingdom and other nations did not also go "beyond" Berne in a similar fashion. In this regard, it is telling that none of the alternative models provides for the kind of permanent, unrestricted protection for reliance parties that plaintiffs demand -- a fact that should come as no surprise, given that the discretion regarding implementation conferred by Article 18(3) obviously was not intended to completely swallow up the substantive restoration obligation imposed by Article 18(1).<sup>9</sup> Indeed, even plaintiffs' amicus acknowledges as much. *See* Gervais

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<sup>9</sup> Plaintiffs' amicus mischaracterizes the government's position as arguing "that Article 18(3) should be interpreted narrowly, and that Berne Convention members should strive to limit the protection of reliance parties as much as possible because Article 18 establishes a baseline principle that existing works should be protected at the time of entry." Gervais Br. 6. In reality, the government maintains only that Article 18(3), with its reference to "conditions of application," must be informed by, and read in harmony with, Article 18(1), which establishes the general principle of restoration for all works whose copyright has not yet expired in the country of origin. *See* Govt. Br. 30-32. Furthermore, the reliance of plaintiffs' amicus (*see* Gervais Br. 6-8) upon Article 18(2) is wholly misplaced, as that

Br. 16 ("Hence, when the United States adopted a minimalist approach upon joining the Convention by failing to provide any retroactive protection, H.R. Rep. No. 100-609, at 52 (1988), it pushed the boundaries of Article 18(3) too far."). Article 18(3) provides "significant leeway" (Gervais Br. 8), but it is not unlimited, and it is not the role of a court to second-guess the judgment of Congress in this matter, or to pick and choose among the disparate legislative enactments of other Berne parties.<sup>10</sup>

The same faulty logic infects the remainder of plaintiffs' argument. According to plaintiffs, Berne does not require any restoration of rights against reliance parties like themselves. *See* Pl. Br. 31, 36. But as we have shown, in enacting Section 514 Congress concluded that a restoration of copyright that was wholly ineffective as to reliance parties would be widely regarded in the international sphere as an empty gesture -- one that would not satisfy other Berne parties, and that could well generate

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provision by its own terms establishes only that restoration does not apply to works that have fallen into the public domain through the expiration of a previously-granted copyright term in the country where copyright protection is claimed. Similarly, Berne Article 7 (*see* Gervais Br. 7 & n.4) merely provides that the country where protection is claimed need not provide longer copyright protection than the country of origin. These inapposite provisions shed no light upon the instant controversy.

<sup>10</sup> Plaintiffs' amicus acknowledges that the "conditions of application" permitted by Article 18(3) "must be *transitional*," but adds that "transitional is not synonymous with brief or short-lived." Gervais Br. 13. "Transitional," however, plainly also is not synonymous with "perpetual," and transition to the governing principle of restoration can only be sensibly understood as involving temporary accommodations that ultimately reconcile the interests of reliance parties with the principle of restoration. This is precisely the balance Congress struck in Section 514.

international trade claims against the United States. *See* Govt. Br. 24-34. Thus, a "restoration" that allowed reliance parties in the United States to continue exploiting otherwise restored works of foreign authorship, permanently and without limitation, would have done nothing to protect American works abroad. There is nothing speculative about Congress's reasoning in this regard.

Reduced to its essence, plaintiffs' argument is that the carefully crafted protections Congress provided for reliance parties in Section 514 are constitutionally inadequate, because the First Amendment gives reliance parties an untrammelled right to use, in perpetuity, copyrighted material that is restored under Berne. Plaintiffs thus do not challenge Congress's actual exercise of its judgment in Section 514, so much as its right to exercise any judgment at all in a matter that directly concerns the international relations of the United States and the interests of U.S. copyright holders. Plaintiffs' position is extreme and untenable, and the congressional judgment embodied in Section 514 easily passes First Amendment muster under *Turner I* and *Turner II*.

3. Finally, plaintiffs argue that the United States' interest in correcting historic inequities to foreign authors is not entitled to weight. *See* Pl. Br. 49-51. Plaintiffs' contention rests upon the view that American authors were just as disadvantaged by the now-abandoned formalities once peculiar to American copyright law as were

foreign authors.<sup>11</sup> But the record before Congress contradicts that notion. As explained by Shira Perlmutter, then-professor of law at Catholic University School of Law (later to become Associate Register of Copyrights for Policy and International Affairs at the United States Copyright Office):

As difficult as it has been for American authors to comply with the strict formalities that were the hallmark of United States copyright law for so many years, it has been even more difficult for foreign authors. Many lost their U.S. copyrights to the public domain without having sought to exploit their works here, or without being aware of the requirements of our law. Now that we have essentially eliminated formalities from our copyright system, it is appropriate to restore these copyrights and redress the draconian effects of our prior law.

Joint Hearings, 191 (statement of Shira Perlmutter). Although plaintiffs dismiss this statement as a "passing remark" and a "bare conclusion unsupported by explanation or evidence," Pl. Br. 50 n.7, in reality it posits a self-evidently meaningful distinction between American authors and foreign authors: the former were far more likely than

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<sup>11</sup> For example, § 304 of the Copyright Act of 1976 at one time required authors to renew their copyrights by application to the Copyright Office within one year prior to such copyrights' expiration. *See* Pub. L. No. 94-553, 90 Stat. 2573. In addition, § 401 of that same Act required that a copyright notice appear on all publicly distributed copies of a work. *Id.* Foreign authors, many of them unaware of these and other technical nuances of United States copyright law, frequently lost their copyrights for failure to adhere to such provisions. Congress has since repealed both requirements, but such legislation did not affect copyrights that had already been lost. *See* Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, § 102(a)(2)(A)(ii); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, § 7.

the latter both to be aware of the pitfalls of American copyright law, and to have ready access to legal assistance to gain protection against those pitfalls. *See also* Sam Ricketson, *U.S. Accession to the Berne Convention: An Outsider's Appreciation (Part 2)*, 8 *Intell. Prop. J.* 87, 111 (1993) ("[T]he renewal of terms under the pre-1976 U.S. Act was virtually unknown to other copyright laws and was something that many foreign authors were unaware of or about which they may not have received advice from their American representatives.").

In addition, plaintiffs dismiss the other historical inequity that Section 514 helped to correct, *i.e.*, the loss of copyright protection to certain foreign authors whose own countries were not eligible for United States copyright at the time of publication. Plaintiffs concede that this problem "might justify restoration in general," but "does not necessarily justify a restoration that favors foreign authors at the expense of speech rights of U.S. reliance parties." Pl. Br. 51. This argument rests upon a *non sequitur* and therefore does not withstand scrutiny. The injury in question was unique to foreign authors, and therefore a remedy unique to them plainly is justified as well.

### **III. SECTION 514 IS CONSTITUTIONAL ON ITS FACE.**

In their cross-appeal, plaintiffs challenge the core of Section 514 -- the restoration of copyright for eligible works under Berne. *See* Pl. Br. 51-64. They

argue that the statute is unconstitutional on its face, because "[t]he First Amendment prohibits the government from removing works from the public domain." Pl. Br. 51 (capitalization omitted). This absolute argument has no legal foundation.

Both the Supreme Court and this Court have emphasized repeatedly that facial constitutional challenges are both disfavored and extremely demanding. *See, e.g., Wash. State Grange v. Wash. State Repub. Party*, 128 S. Ct. 1184, 1190, 1191 (2008) (stating that facial challenges are "disfavored" and that the plaintiff can only prevail on such a claim if it shows "that the law is unconstitutional in all of its applications" or, at a minimum, that the law has no "plainly legitimate sweep"); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1155 (10th Cir. 2007) (stressing that the plaintiff must establish that the law is unconstitutional "in every application"); *Faustin v. City of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005) ("Because facial challenges push the judiciary toward the edge of its traditional purview and expertise, courts must be vigilant in applying a most exacting analysis to such claims.") (quoting *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005)). This is a daunting task, and the plaintiff bears a "heavy burden." *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d at 1155, quoting *McConnell v. FEC*, 540 U.S. 93, 207 (2003).

Furthermore, on a closely related note, the Supreme Court and this Court have frequently reiterated that the overbreadth doctrine is "strong medicine" that the Court has employed "with hesitation, and then only as a last resort." *See, e.g., Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999) (citing cases; internal quotation marks omitted); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d at 1156. "The overbreadth claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists," and "[i]n addition to being substantial, the overbreadth must also be real." *Faustin*, 423 F.3d at 1199 (citations omitted).

Plaintiffs present no persuasive legal or equitable argument as to why non-reliance parties -- *i.e.*, people who did not make use of particular speech during the period prior to copyright restoration -- should have a First Amendment right to use speech that has been copyrighted before they use it. In such a scenario, non-reliance parties are no different from any other person who wishes to use copyrighted material. Plaintiffs' argument rests upon an abstract, absolute and rigid view of the public domain, *i.e.*, that once speech has entered the public domain, the First Amendment requires that it must always and forever remain in the public domain. There is no support for this view in the law. *See Govt. Br. 54-56.*

Indeed, what plaintiffs characterize as a facial First Amendment challenge to restoration is not in reality a First Amendment challenge at all, but rather a challenge under the Copyright Clause refashioned as a free speech claim. Intermediate scrutiny aside, they argue that "[a] proper respect for the design of the [Copyright] Clause, in light of the speech issues raised by copyrights, . . . should lead this Court to find that regardless of the importance of complying with a treaty, there are certain means that are inconsistent with the First Amendment."<sup>12</sup> Pl. Br. 60. This argument is nothing more than a Copyright Clause claim dressed in First Amendment garb.

That being the case, the argument requires little in the way of response other than citation to the law of the case. In 2007, this Court rejected plaintiffs' claim that the Copyright Clause barred the restoration of copyright implemented by Section 514 pursuant to the requirements of Berne, explaining that the power to restore works to copyright, at least on the basis of the facts of this case, is not outside of the authority granted to Congress under the Copyright Clause. *Golan III*, 501 F.3d at 1186-87. In rejecting plaintiffs' suggestion that absent a ruling in their favor, "Congress could

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<sup>12</sup> For reasons of their own, plaintiffs choose not to refer to the Copyright Clause, instead referring to something they call the "Progress Clause" (*see, e.g.*, Pl. Br. 53) -- a term apparently of their own devising that evidently encompasses all of Art. I, sec. 8, cl. 8, which includes what have customarily been known as the Copyright Clause and the Patent Clause. Instead of accepting plaintiffs' rechristening of a constitutional provision, we will refer to the Copyright Clause by its traditional name, as did the Supreme Court in *Eldred* and this Court in *Golan III*.

adopt a practice of copyrighting works as they fall into the public domain," the Court explained that "this argument is similar to one the *Eldred* plaintiffs raised, and, like the *Eldred* Court, we are mindful that a 'regime of perpetual copyrights is clearly not the situation before us.'" *Id.* at 1186. Thus, it is hardly surprising that the district court did not even mention this argument in its opinion, let alone rule in plaintiffs' favor on it, and this Court should be equally emphatic in summarily rejecting plaintiffs' Copyright Clause *qua* First Amendment argument.

Plaintiffs demur, suggesting that they are raising a First Amendment challenge animated by the "plain purpose" of the Copyright Clause. *See* Pl. Br. 56. They assert that even if the Copyright Clause "does not directly block the removal of works from the public domain . . . the First Amendment analysis must consider the legitimacy of the means chosen independently of the ends." *Id.* And they further contend that "removing works from the public domain *of copyright* (as distinct from patents) is an illegitimate means regardless of the end or the importance of the interest." *Id.* But these assertions merely prove our point that this so-called First Amendment claim is a masquerading Copyright Clause argument.

In reality, plaintiffs' position that the Copyright Clause must "inform the contours of the First Amendment or the legitimacy of the Government's means," Pl. Br. 60, amounts to an argument that they can reassert the same direct challenge

previously rejected by this Court as long as they do so indirectly. They cannot make such an end-run around *Golan III* (or around *Eldred* for that matter, in which the Supreme Court entertained and rejected Copyright Clause and First Amendment challenges, without even hinting that Copyright Clause values somehow "inform" First Amendment analysis). But even assuming *arguendo* that they could, the question becomes whether the Copyright Clause norms that plaintiffs invoke would require invalidation under the First Amendment of the URAA's copyright restoration provision.

Quite apart from the law of the case, the answer to that question is no -- there are no Copyright Clause norms that would invalidate Section 514 under the First Amendment. The same intermediate scrutiny standard we have already discussed applies in this context as well: a provision will be sustained where it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. We have already established that Section 514 satisfies the second element of that test. *See* Part II, *supra*; Govt. Br. 22-49. It also meets the first.

The crux of plaintiffs' argument is this: if Berne requires copyright restoration, compliance with Berne *ipso facto* cannot serve an important governmental interest,

because the sanctity of the public domain trumps any interest that could only be met by removing one or more works from the public domain. Not only is that a classic bootstrap argument, but that very argument has already been rejected by this Court in the instant case -- albeit under the Copyright Clause. *Golan III*, 501 F.3d at 1186-87. If removal of works from what plaintiffs view as an inviolable public domain does not by itself violate the Copyright Clause, it cannot by itself disqualify compliance with Berne from representing an important government interest under the First Amendment's intermediate scrutiny standard.

Plaintiffs attempt to escape this inevitable conclusion by conjuring up a parade of horrors in which the government "launders" unconstitutional legislation through international treaties. *See* Pl. Br. 61-64. In particular, plaintiffs suggest a series of far-fetched hypotheticals in which Congress uses the expedient of a treaty to restrict hate speech, eliminate firearms rights, or eliminate the right to trial by jury. *See id.* at 62. But plaintiffs' reasoning is flawed. Under their hypotheticals, to the extent that the government's interests are valid and important, the government presumably possesses numerous means of accomplishing its various goals, some of which would probably fare better under intermediate scrutiny than others might. Here, by contrast, there is only one way to achieve the important government interests at stake, and that

is through the limited restoration of copyright mandated by Section 514, consistent with Berne Article 18.

Curiously, plaintiffs make much of the fact that "[t]he Government does not contend it has any justification for restoring copyrights independent of these treaties, or provide any important interests unrelated to these treaties." Pl. Br. 61-62 (citation omitted). But that is simultaneously beside the point and precisely the point, because the government's "important interests []related to these treaties" (*id.*) are entirely sufficient.

It does not follow, however, that the government has "concede[d] by implication that Congress could not restore copyrights on its own, through a statute unconnected to any international treaty." Pl. Br. 62. The government certainly could conceivably restore copyrights "on its own, through a statute unconnected to any international treaty" (*id.*) under appropriate circumstances, and has in fact done so on a number of occasions. *See* Govt. Br. 54-56. Here, however, the Berne Convention furnishes a wholly adequate justification for the limited copyright restoration sanctioned by Congress in Section 514.

In short, the Court's previous ruling in this case means that plaintiffs' First Amendment challenge to the core of Section 514 of the URAA -- the principle of restoration itself -- must stand or fall on its own. And it falls.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the government's opening brief, the judgment of the district court that Section 514 of the URAA is unconstitutional as applied to reliance parties should be reversed, and the case should be remanded for entry of summary judgment in favor of the government with respect to both plaintiffs' as-applied claim and their claim that Section 514 is unconstitutional on its face.

Respectfully submitted,

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**JANUARY 2010**



## CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order filed March 18, 2009, I hereby certify that:

1. all required privacy redactions have been made and, with the exception of those redactions every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and
2. the digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

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Version: 1.71.1705.0

Last Updated: January 4, 2010

s/  
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JOHN S. KOPPEL  
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2010, I filed and served the foregoing "COMBINED REPLY AND RESPONSIVE BRIEF FOR THE APPELLANTS/CROSS-APPELLEES" by submitting a digital copy via the ECF system and causing the original and 7 hard copies to be dispatched to the Clerk of this Court by first-class mail, postage prepaid, and by effecting service via the ECF system and causing hard copies be served upon the following by first-class mail, postage prepaid:

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