

Nos. 09-1234 & 09-1261

ORAL ARGUMENT IS REQUESTED

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

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.

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

OPENING BRIEF FOR THE APPELLANTS/CROSS-APPELLEES

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STATEMENT OF PRIOR OR RELATED APPEALS

The Court previously addressed this case in *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007). We are aware of no other related appeals.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF PRIOR OR RELATED APPEALS	
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
A. Constitutional and Statutory Background	3
B. Facts of the Case	7
1. History of the Litigation	8
2. Most Recent District Court Proceedings and Decision	11
SUMMARY OF ARGUMENT	15
STANDARD OF REVIEW	19
ARGUMENT	19
I. APPLICABLE REVIEW PRINCIPLES	19
II. SECTION 514 ADVANCES IMPORTANT GOVERNMENT INTERESTS AND DOES NOT BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO DO SO	22
A. Section 514 Discharges International Obligations under the Berne Convention and the TRIPS Agreement	23

1.	Upholding international obligations is an important government interest	23
2.	Section 514 burdens no more speech than necessary because the government's interest in ensuring indisputable compliance with Berne and TRIPS warrants limiting its accommodations for reliance parties to temporary measures	24
a.	The political branches reasonably concluded that the United States would face international repercussions if it did not unquestionably comply with TRIPS and Berne	28
b.	Section 514 avoids challenges in the WTO	32
c.	Section 514's expansive protections for reliance parties reflect a careful balance between the needs of reliance parties and the political branches' interpretation of Berne's requirements	34
d.	The accommodations for reliance parties in Germany, Hungary, the United Kingdom, Australia, and New Zealand are less generous than those in the United States	36
B.	Section 514 Promotes the Rights of U.S. Copyright Holders Abroad	40
1.	Promoting the rights of U.S. copyright holders abroad is clearly an important government interest	40
2.	Section 514 burdens no more speech than necessary to promote the rights of American copyright holders abroad	42

C.	Section 514 Supports the Government's Interest in Equitable Treatment for Foreign Authors Who Lost Protection Through No Fault of Their Own	48
III.	ANY SPEECH THAT SECTION 514 LEAVES UNPROTECTED, BEYOND THAT REQUIRED TO ADVANCE IMPORTANT GOVERNMENT INTERESTS, DOES NOT RAISE SUBSTANTIAL FIRST AMENDMENT CONCERNS	50
A.	<i>Eldred</i> Requires Giving Little Weight to Interests in Copying Another's Work	50
B.	Even on the Narrowest Reading of the Government's Interests, Section 514 Leaves Only a Small Quantity of Speech Unprotected Beyond What Is Required to Achieve Those Interests	56
	CONCLUSION	63
	STATEMENT REGARDING ORAL ARGUMENT	
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF DIGITAL SUBMISSION	
	CERTIFICATE OF SERVICE	
	ADDENDUM	

TABLE OF AUTHORITIES

Cases:	Page
<i>Board of Trustees v. Fox</i> , 492 U.S. 469 (1989)	24
<i>Blodgett v. Holden</i> , 275 U.S. 142 (1927)	20
<i>Boos v. Barry</i> , 485 U.S. 312 (1988)	23, 24
<i>Brown v. United States</i> , 12 U.S. (8 Cranch) 110 (1814)	43
<i>Burrow-Giles Lithographic Co. v. Sarony</i> , 111 U.S. 53 (1884)	54
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	51
<i>Citizens for Peace in Space v. City of Colorado Springs</i> , 477 F.3d 1212 (10th Cir. 2007)	24, 28, 46, 47, 48
<i>Eastern Airlines, Inc. v. Floyd</i> , 499 U.S. 530 (1991)	31
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const.</i> <i>Trades Council</i> , 485 U.S. 568 (1988)	61
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	passim
<i>Eldred v. Reno</i> , 239 F.3d 372 (D.C. Cir. 2001)	2, 9
<i>F. Hoffmann-La Roche Ltd. v. Empagran S.A.</i> , 542 U.S. 155 (2005)	43
<i>First Nat'l City Bank v. Banco Nacional de Cuba</i> , 406 U.S. 759 (1972)	26
<i>Foster v. Neilson</i> , 27 U.S. (2 Pet.) 253 (1829)	27
<i>Fox Film Corp. v. Doyal</i> , 286 U.S. 123, 127 (1932)	49
<i>Fujitsu Ltd. v. Federal Exp. Corp.</i> , 247 F.3d 423 (2d Cir.), <i>cert. denied</i> , 534 U.S. 891 (2001)	31

Golan v. Ashcroft, 310 F.Supp.2d 1215 (D. Colo. 2004) 2, 9

Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007) passim

Golan v. Gonzales, 2005 WL 914754 (D. Colo. Apr. 20, 2005) 3, 9

Golan v. Holder, 611 F.Supp.2d 1165 (D. Colo. 2009) passim

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 21

Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533,
(10th Cir.), *cert. denied*, 519 U.S. 928 (1996) 38

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539
(1985) 41, 51

Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002) 57

La Resolana Architects, PA v. Reno, Inc., 555 F.3d 1171
(10th Cir. 2009) 60

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 26

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 43

Regan v. Wald, 468 U.S. 222 (1984) 21

Reid v. Covert, 354 U.S. 1 (1957) 23

Ripley v. Wyoming Med. Ctr., Inc., 559 F.3d 1119 (10th Cir.),
cert. denied, 78 U.S.L.W. 3066 (Oct. 5, 2009) 19

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) 26

Schroder v. Bush, 263 F.3d 1169 (10th Cir.), *cert. denied*,
534 U.S. 1083 (2002) 26

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 22

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) 26

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 14, 21, 47, 48

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) passim

United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) 27

United States v. Conners, 606 F.2d 269 (10th Cir. 1979) 26

United States v. Dorris, 236 F.3d 582 (10th Cir. 2000),
cert. denied, 532 U.S. 986 (2001) 20

United States v. Stuart, 489 U.S. 353 (1989) 26

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,
515 U.S. 528 (1995) 23, 25, 43

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11, 39

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) 55

Constitution:

U.S. Const., art. I, § 8, cl. 1 40

U.S. Const., art. I, § 8, cl. 8 3, 49

U.S. Const. art. VI[2] 23

Statutes:

Berne Convention Implementation Act of 1988,
Pub. L. No. 100-568, § 7, 102 Stat. 2853 6, 48

Copyright Amendments Act of 1992,
Pub. L. No. 102-307, § 102(a)(2)(A)(ii), 106 Stat. 26 6, 48

Copyright Term Extension Act ("CTEA"),
Pub. L. No. 105-298, 112 Stat. 2827 2

Emergency Copyright Act of 1941, Pub. L. No. 77-258, 55 Stat. 732 55

Pub. L. No. 66-102, 41 Stat. 368 55

Uruguay Round Agreements Act ("URAA"),
Pub. L. No. 103-465, 108 Stat. 4809, 4976-4981 1

17 U.S.C. § 104A(a) 6

17 U.S.C. § 104A(a)(1)(B) 57

17 U.S.C. § 104A(d)(1)-(2) 1, 6, 38

17 U.S.C. § 104A(d)(2) 35, 57

17 U.S.C. § 104A(d)(2)(A)-(B) 7, 35, 57

17 U.S.C. § 104A(d)(2)(A)(i),(ii) 58

17 U.S.C. § 104A(d)(3) 7, 36, 59

17 U.S.C. § 104A(d)(3)(B) 60

17 U.S.C. § 104A(h)(6) 6

17 U.S.C. § 103(b) 57

17 U.S.C. § 107 56

17 U.S.C. §§ 108-122 56

17 U.S.C. § 110 59

17 U.S.C. §§ 301-04 (1998) 2

17 U.S.C. § 502(a) 38, 39

17 U.S.C. § 505 61

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Regulation:

62 Fed. Reg. 20,211, 20,220 (Apr. 25, 1997) 7

Legislative Materials:

H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988) 34

S. Rep. No. 100-352, reprinted in 1988 U.S.C.C.A.N. 3706 5

S. Rep. No. 103-412 (1994) 5, 6

Joint House and Senate Comm. Hearings on the URAA,
103d Cong. 137 (1994) 27

Results of the Uruguay Round of Trade Negotiations:
Hearings Before the Senate Comm. on Finance,
103d Cong., 2d Sess. 14 (1994) 42

Miscellaneous:

Graeme Austin, "Does the Copyright Clause Mandate Isolationism?"
26 Colum. J.L. & Arts 17 (2002) 41

Ricketson, *International Copyright and Neighboring Rights: The Berne
Convention and Beyond* (1st ed. 1986) 28

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Neighboring Rights: The Berne Convention and Beyond*,
(2d ed. 2006) 29

Webster's Third New International Dictionary (1993) 31

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104 Colum. L. Rev. 272 (2004) 54

U.S. Copyright Office, Circular 38a (revised June 2009) 3, 41

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, plaintiffs invoked the jurisdiction of the district court over this action arising under the Constitution and laws of the United States. The district court entered final judgment in favor of plaintiffs on April 7, 2009. Appendix ("App.") 746. Defendants filed a timely appeal on June 5, 2009. App. 748. Plaintiffs filed a cross appeal on June 18, 2009. App. 751. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In order to achieve U.S. international copyright objectives, 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)), restored copyright protections to certain foreign works that had fallen into the public domain for reasons other than the expiration of the statutory term. People who sold or otherwise used the work before restoration can continue to do so indefinitely until the holder gives notice, use existing copies for a year after notice, and exploit derivative works made before the URAA's enactment indefinitely, with reasonable compensation. § 104A(d)(1)-(2).

The issue presented is:

Whether Section 514, as applied to those who sold or used works while the works were not protected by copyright, is consistent with the First Amendment

because it advances important government interests and does not burden substantially more speech than necessary to do so.

STATEMENT OF THE CASE

Plaintiffs seek to use, copy, or sell works whose copyrights were restored under Section 514, in ways that normally would constitute infringement. They originally brought this action to challenge the constitutionality of both the URAA and the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 301-04 (1998)), alleging that the provisions exceeded the power of Congress under the Copyright Clause and violated the First Amendment.

Proceedings were stayed after the Supreme Court granted certiorari to review a similar challenge to the CTEA in *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001). The Court eventually rejected that challenge. *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Plaintiffs subsequently filed an amended complaint, and the district court granted in part and denied in part the government's corresponding motion to dismiss, dismissing the CTEA claim but allowing the URAA claim to proceed. *Golan v. Ashcroft*, 310 F.Supp.2d 1215 (D. Colo. 2004) ("*Golan I*"). After plaintiffs filed a second amended complaint, the government moved for summary judgment, and plaintiffs moved for partial summary judgment. The district court granted the government's motion and

denied that of plaintiffs. *Golan v. Gonzales*, 2005 WL 914754 (D. Colo. Apr. 20, 2005) ("*Golan II*").

Plaintiffs appealed, and this Court affirmed the judgment with respect to plaintiffs' Copyright Clause challenges but vacated it with respect to their First Amendment challenge to the URAA. *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) ("*Golan III*"). After further discovery following remand to the district court, both parties filed cross motions for summary judgment. The court granted plaintiffs' motion, denied the government's motion, and entered final judgment in favor of plaintiffs. *Golan v. Holder*, 611 F.Supp.2d 1165 (D. Colo. 2009) ("*Golan IV*").

STATEMENT OF FACTS

A. Constitutional and Statutory Background.

1. The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8. The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press"

2. There is no such thing as "an 'international copyright' that will automatically protect an author's writings throughout the world." U.S. Copyright Office, Circular 38a (revised June 2009). In most cases, if the United States has not established

copyright relations with a foreign country, a work first published in that country will not be entitled to copyright protection here unless its author or coauthor is a national or domiciliary of the United States or another country that has copyright relations with the United States, and the country of first publication will be under no obligation to offer copyright protection to U.S. works.

The vast majority of nations have established copyright relations through multilateral or bilateral agreements. Section 514 of the URAA implements certain provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), that incorporates by reference the substantive provisions of the Berne Convention ("Berne" or "the Convention") and, crucially for U.S. interests, makes Article 18 of Berne applicable to sound recordings.¹ The World Trade Organization ("WTO") Agreement incorporating the Convention requires that WTO members accord foreign authors copyright protections no less favorable than those they give their own nationals, and establishes a minimum level of protection that all members must provide. WTO now includes 153 members.² Berne therefore "secure[s] the

¹ See TRIPS Article 14, paragraph 6. The URAA is the U.S. legislation implementing the agreements resulting from the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade. Title V of the URAA implements TRIPS, which requires World Trade Organization members, *inter alia*, to comply with Article 18 of Berne and apply Article 18 to phonograms (sound recordings).

² See <http://www.wto.org>.

highest available level of multilateral copyright protection for U.S. artists, authors, and other creators." S. Rep. No. 100-352, at 2, reprinted in 1988 U.S.C.C.A.N. 3706, 3707 ("Berne Report").³

Berne Article 18 requires as a general matter that member nations restore copyright protections to certain unprotected foreign works whose copyright terms have not yet expired in the country of origin.⁴ Such works may have lacked protection in the United States due to a lack of national eligibility, the absence of subject-matter protection, or a failure to abide by certain required formalities, such as affixing a copyright notice or filing a timely renewal application. S. Rep. No. 103-412, at 225-

³ The United States joined the Convention in 1989, but did not pass legislation implementing Article 18 until 1994. *See* S. Rep. No. 103-412, at 225 (1994).

⁴ Article 18 provides:

- (1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expir[ation] of the term of protection.
- (2) If, however, through the expir[ation] of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.
- (3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.
- (4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

26 (1994) ("URAA Report"). The United States has for the most part abolished such formalities as a condition for copyright protection. *See, e.g.*, Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 102(a)(2)(A)(ii), 106 Stat. 264 (providing for automatic renewal of copyright term); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853 (eliminating requirement that copyright notice be affixed to work).

Under Section 514 of the URAA, copyright may be restored in works that: (1) remain protected under the law of the country where the work was originally published or created; (2) were denied copyright protection in the United States due to a lack of national eligibility, failure to comply with statutory formalities, or (in the case of certain sound recordings) lack of prior subject-matter protection; and (3) are still within the copyright term they would ordinarily have enjoyed if created or published in the United States. *See* 17 U.S.C. § 104A(a), (h)(6). Restoration does not extend the term; the copyrights expire on the same day as if the work had been protected since its creation. *Id.* § 104A(a).

In enacting the URAA, Congress protected parties who used the foreign works prior to copyright restoration. These "reliance parties" receive immunity for any act before the restoration that would otherwise have constituted infringement. 17 U.S.C. § 104A(d)(1)-(2). Although restoration is automatic, copyright holders can enforce

a restored copyright only after notifying reliance parties of their intent to do so, either directly or through the Copyright Office. *Id.* § 104A(d)(2)(A)-(B). After the notice, reliance parties have a year to use or sell existing copies. *Id.* If, before the URAA, reliance parties created "derivative works" based on the restored copyrights, they can continue to exploit these works indefinitely, by paying reasonable compensation. *Id.* § 104A(d)(2)(B), (d)(3).

B. Facts of the Case.

Plaintiffs seek to use others' copyrighted works. Some plaintiffs operate non-profit enterprises; others' businesses are for-profit. Plaintiff John McDonough, for example, operates a business in which he duplicates and sells copies of various films. Second Amended Compl. 25-26, App. 52-53. Under the URAA, he can no longer continue exploitation of such works as *Night Train to Munich* unless he obtains permission from the copyright owner. The film's copyright was restored in 1997;⁵ thus, because the one-year grace period has expired, McDonough must now seek a license from the copyright owner, like all who wish to duplicate and resell for their own benefit others' copyrighted works. *See* Second Amended Compl. 26, App. 53. Much the same is true of plaintiff Ronald Hall, whose reliance interest is largely

⁵ *See* Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act, 62 Fed. Reg. 20,211, 20,220 (Apr. 25, 1997).

limited to eight 16mm negatives of films, which he purchased years before Section 514 and now uses to make copies for sale through his website; he has long since recouped his initial investment. Deposition of Ronald Hall, 35:1-8, 70:1-22, 111:14-25 to 122:1-21, App. 630, 631, 634-37. Plaintiff Lawrence Golan, who directs several orchestras, most of which, if not all, are educational or charitable, is unaware of how many copies of restored works are in his libraries. *See* Decl. of Lawrence Golan, ¶¶ 3-5, 22, App. 671, 678. Kortney Stirland, director of the Symphony of the Canyons, a non-profit symphony composed of volunteer musicians, is aware of only one such copy in its library. Deposition of Kortney Stirland, 67:17-25, 68:1-25, 69:1, App. 693-94. Only the late plaintiff Richard Kapp appears to have created a derivative work: a recording of fifteen compositions by Russian composer Dmitri Shostakovich published through Kapp's own record label in 1991.⁶ *See* Deposition of Richard Kapp, 86:10-25 to 103:1-21, App. 696-700. It is unclear how many copies, if any, remained in the label's inventory when it received notice.

1. History of the Litigation.

1. Plaintiffs originally brought this action alleging that the URAA and the CTEA violated the Copyright Clause and the First Amendment. Proceedings were stayed after the Supreme Court granted certiorari to review a similar challenge to the

⁶ Plaintiff Kapp's estate has replaced him as a plaintiff.

CTEA in *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001). The Court eventually rejected the challenge in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Plaintiffs subsequently filed an amended complaint; the district court granted the government's corresponding motion to dismiss with respect to plaintiffs' CTEA challenges, holding that *Eldred* established the CTEA's constitutionality, but it denied the motion with respect to the URAA challenges. *Golan I*, 310 F.Supp.2d at 1215.

Plaintiffs filed a second amended complaint, and the government thereafter moved for summary judgment on the URAA challenges, while plaintiffs moved for partial summary judgment. The district court granted the government's motion, denied that of plaintiffs, and entered final judgment for the government. *Golan II*, 2005 WL 914754. The court rejected plaintiffs' Copyright Clause challenge and held that the URAA is consistent with the First Amendment, seeing "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." *Id.* at *17 (citing, *inter alia*, *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001), *aff'd on other grounds sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003)).

Plaintiffs appealed, and this Court upheld the district court's ruling that the CTEA and the URAA do not violate the Copyright Clause; however, it vacated the district court's First Amendment ruling concerning the URAA and remanded for

further proceedings. The Court saw *Eldred* as saying that Congress's exercise of Copyright Clause power is subject to First Amendment review "if it 'altered the traditional contours of copyright protection.'" *Golan III*, 501 F.3d at 1187 (quoting *Eldred*, 537 U.S. at 221). One such contour, the Court held, is "the bedrock principle of copyright law that works in the public domain remain there." *Id.* at 1187-88. Section 514, it found, "alters the traditional contours of copyright by deviating from this principle." *Id.* It determined that "copyright's two built-in free speech safeguards – the idea/expression dichotomy and the fair use defense – do not adequately protect the First Amendment interests," and that "unlike the CTEA, the URAA does not adopt supplemental free speech safeguards." *Id.* at 1188.

The Court next concluded that "once the works at issue became free for anyone to copy, plaintiffs in this case had vested First Amendment interests in the expressions, and § 514's interference with plaintiffs' rights is subject to First Amendment scrutiny." *Id.* at 1194. Although *Eldred* had held that "[t]he First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches," 537 U.S. at 221, the Court distinguished *Eldred* on the ground that the interests of plaintiffs here "are greater than the interests of the *Eldred* plaintiffs." *Golan III*, 501 F.3d at 1193.

2. Most Recent District Court Proceedings and Decision.

After further discovery in the district court, both parties filed cross motions for summary judgment. Without even hearing oral argument, the court granted plaintiffs' motion and denied the government's motion, holding that Section 514 violates plaintiffs' First Amendment rights. *Golan IV*, 611 F.Supp.2d at 1167.

As a threshold matter, the district court agreed with the parties that Section 514 is content neutral because "the speech restricted is a general category of speech—namely, speech created by foreign authors." *Id.* at 1170. It noted that "[w]hile a content-neutral restriction must be 'narrowly tailored to serve a significant government interest' unrelated to the suppression of free speech, it 'need not be the least restrictive or least intrusive means of doing so.'" *Id.* at 1170-71 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Rather, content-neutral restrictions pass First Amendment muster if they do not "burden substantially more speech than necessary to further those interests." *Id.* at 1170 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").). The court recognized that in assessing the narrow tailoring of a restriction, "[r]eview of Congress's judgment is deferential; the only relevant question is whether, in formulating its judgment, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 1171 (citing *Turner II*, 520 U.S. at 195). After reciting the settled standard governing

summary judgment motions, *id.* at 1171-72, the court noted that "[a]s long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment even if the evidence could reasonably lead to an inconsistent conclusion." *Id.* at 1172.

The government articulated three substantial interests that Section 514 advances: complying with the Berne Convention, protecting the interests of American authors abroad, and correcting historical inequities facing foreign authors who lost copyrights through no fault of their own. The court agreed with the government that "the Berne Convention requires the restoration of copyrights to foreign authors," and that complying with treaty obligations is an important government interest. *Id.* at 1172. However, the court concluded that Section 514 is substantially broader than necessary to achieve this interest. *Id.* at 1175. Relying heavily on this Court's *Golan III* opinion, the court held that plaintiffs had "vested" interests in the foreign works that were "near the core of the First Amendment." *Id.* at 1173 (quoting *Golan III*, 501 F.3d at 1193). As a result, the court determined plaintiffs' interests to be "deserving of full First Amendment protection." *Id.* Taking into account Section 514's protection for reliance interests, the court identified the protected speech burdened by Section 514 as "any speech that involves copying more than one year after notice has been filed, and any derivative works made after notice is filed and without payment of a

royalty." This, it concluded, "is clearly 'a substantial amount.'" *Id.*

In assessing whether this unprotected speech is tied to the government's interest in complying with Berne, the court stressed that Article 18 is silent on accommodations for reliance parties, and concluded that the Convention is "a grant of discretion to member nations" to address reliance interests. *Id.* at 1174. In the process, the court dismissed the contrary interpretation of the government's expert, Dr. Mihaly Ficsor, the former Assistant Director of the World Intellectual Property Organization ("WIPO"), that such accommodations could only be temporary. *See* Report of Dr. Mihaly Ficsor ("Ficsor Report"), Feb. 15, 2005, ¶ 61, App. 141-42. The Court asserted that Germany, Hungary, the United Kingdom, Australia, and New Zealand had implemented accommodations that were permanent under certain conditions. 611 F.Supp.2d at 1174. Thus, the court concluded that "Congress could have complied with the Berne Convention without interfering with a substantial amount of protected speech," by permanently excepting reliance parties. *Id.*

The court also dismissed the government's evidence that Section 514 protects American copyright holders abroad. *Id.* at 1175-76. The court rejected the government's concerns about possible reprisal if the United States left foreign copyrights substantially unprotected by providing greater accommodation for reliance interests, holding that the relevant Berne article "provides no basis for sanctions to be

levied against United States authors." *Id.* at 1175. The court also dismissed the government's view that Section 514 protects American authors whose works had entered the public domain of other countries, and it found the government's evidence on the economic impact of foreign piracy unpersuasive. *Id.* It concluded that the government "proffers no evidence showing how suppression of reliance parties' First Amendment rights will lead to suppression of reliance parties' rights in foreign nations, or how such suppression will provide a 'direct and material' benefit to United States authors." *Id.* at 1175-76 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*"). Meanwhile, the court found that plaintiffs met their burden "by their proffer of testimony before Congress . . . that stated suppression of reliance parties' First Amendment rights in the United States was unlikely to lead to suppression of foreign reliance parties' rights as they concern United States works in foreign nations." *Id.* at 1176 (citation omitted).

Finally, the court rejected the government's equitable interest in protecting foreign authors who lost their copyrights through no fault of their own. The court found that by "extend[ing] protections to foreign authors that are not afforded United States authors, even in their own country," Section 514 "appears to create an inequity where one formerly did not exist." *Id.* at 1177. The court thus entered summary judgment for plaintiffs and against the government on all three of the government's

asserted interests, and concluded that Section 514 fails First Amendment scrutiny. *Id.*

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment for plaintiffs and against the government. It identified the right legal standard: the court must uphold Section 514 against First Amendment challenge if the statute furthers an important government interest and does not burden substantially more speech than necessary to do so. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). In applying that standard, however, the court failed to follow controlling legal principles. Its assessment of the government's interests shows no trace of the deference that courts owe to the political branches regarding foreign affairs and international treaties. And its assessment of plaintiffs' First Amendment rights contradicts the Supreme Court's directive in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), that "[t]he First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches." *Id.* at 221.

I.A. Section 514 advances three important government interests. First, it ensures unquestionable compliance with the United States's obligations under both the TRIPS Agreement and the Berne Convention. It restores copyrights to eligible foreign works, in accordance with TRIPS and Berne, and provides broad protections for reliance parties. These protections, though among the world's most generous, are

temporary. This temporal limitation reflects the dominant reading of the treaty's text and accords with its negotiation history and the views of leading experts on international copyright law.

As we demonstrate *infra*, Congress was warned in 1994 that the U.S. might wind up as a defendant before an international tribunal if it did not limit the rights of reliance parties. Congress was also informed of the widespread view that such a complaint might prevail. Moreover, the new TRIPS provisions made the consequences of an adverse international ruling more severe. Thus, Congress reasonably decided to err on the side of caution in order to ensure indisputable compliance with the treaty and minimize the likelihood of disruptive trade disputes and an adverse WTO ruling. The district court should have respected Congress's judgment.

Under *Turner II*, and given judicial deference to the political branches regarding foreign affairs and international agreements, the sole question is whether Congress could have concluded, through "reasonable inferences based on substantial evidence," 520 U.S. at 195, that Section 514 was needed to ensure undeniable compliance with TRIPS and Berne. The answer to that question is plainly "yes." The question is not how the court would interpret these agreements if asked to give them domestic legal effect; rather, the focus must be on the reasonableness of the judgment made by the

political branches.

Furthermore, the district court relied erroneously on the United Kingdom's example to suggest that the United States should have permanently protected reliance parties in implementing Berne. If implemented in the United States, the U.K. system – allowing restored copyright holders to "buy out" reliance parties, but otherwise permitting reliance parties to continue using the works – could allow injunctive relief against reliance parties, and therefore could be considered even more restrictive of speech.

B. Second, Section 514 helps the government protect American copyright holders abroad. It preserves the United States' position as a leading advocate for a stronger international intellectual property regime. Before enacting Section 514, Congress heard testimony that other countries believed that U.S. laws did not satisfy Berne's restoration requirements under Article 18, and that these sentiments hindered American negotiators. Congress could reasonably have inferred that failure to ensure unquestionable compliance with Berne Article 18 would harm future diplomacy and copyright relations with other countries. After passing Section 514, the United States achieved important success for U.S. creators, with other WTO members and countries such as Russia. These choices, enmeshed in judgments about international diplomacy, again implicate courts' deference to the political branches.

C. Third, the government has an equitable interest in protecting the rights of foreign authors who suffered disproportionately from the formalities previously required under U.S. copyright law. Furthermore, many foreign authors lost copyrights because the United States did not have copyright relations with their nations at the time they created their works. Section 514 redresses those inequities.

II. Even if the United States could advance these interests while allowing permanent accommodations for reliance parties, Section 514 would not affect substantially more speech than necessary. By any measure, the quantity of affected speech is very small. Plaintiffs' asserted First Amendment interests ultimately boil down to what remains after excluding the work's ideas, the wide protections of fair use, indefinite exploitation before notice is given, the year-long grace period, and the indefinite exploitation of derivative works with reasonable compensation. And under *Eldred's* controlling rule that "[t]he First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches," 537 U.S. at 221, this speech carries little First Amendment weight. The district court's historically novel holding that plaintiffs' speech merits "full First Amendment protection," *Golan v. Holder*, 611 F.Supp.2d 1165, 1173 (D. Colo. 2009), transforms this Court's limited finding that plaintiffs have non-zero First Amendment interests into a flat repudiation of *Eldred's* controlling principles. Finally, to the extent that this remainder still raises First

Amendment concerns under *Eldred*, Section 514 allows courts to protect these interests through its built-in remedial scheme, rather than by striking down the statute as applied to reliance parties generally.

The district court's decision contradicts well-established principles of deference and the Supreme Court's recent guidance and thus should be reversed.

STANDARD OF REVIEW

An order granting summary judgment is reviewable *de novo*. *Ripley v. Wyoming Med. Ctr., Inc.*, 559 F.3d 1119, 1121 (10th Cir.), *cert. denied*, 78 U.S.L.W. 3066 (Oct. 5, 2009).

ARGUMENT

I. APPLICABLE REVIEW PRINCIPLES.

Under *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"), "a content-neutral regulation will be sustained under the First Amendment if it advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Id.* at 189. The district court correctly began with the undisputed proposition that Section 514 of the URAA is, at most, a content-neutral regulation. *See Golan v. Holder*, 611 F. Supp. 2d 1165, 1170 (D. Colo. 2009) ("*Golan IV*"). But in applying *Turner II*'s standard to the government's interests and plaintiffs' speech, the court failed to follow

controlling principles. These principles require judgment for the government.⁷

Congress determined that Section 514 was a necessary and appropriate way to ensure unquestionable compliance with this country's international obligations, promote the rights of American authors and sound recording producers and performers abroad, and treat foreign authors fairly – all important interests. This judgment is correct on the merits and implicates courts' deference to the political branches. As a general matter, courts start from the premise that "[s]tatutes are presumed constitutional," *United States v. Dorris*, 236 F.3d 582, 584 (10th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001), because declaring an act of Congress unconstitutional "is the gravest and most delicate duty that [courts are] called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Judicial deference is particularly pronounced in certain areas. Where Congress has weighed future harms and benefits, "courts must accord substantial deference to [its] predictive

⁷ The government continues to disagree respectfully with this Court's decision in *Golan v. Gonzales*, 501 F.3d 1179, 1183-84 (10th Cir. 2007) ("*Golan III*"), which held that Section 514 requires First Amendment analysis because it departs from the "traditional contours of copyright protection" as identified in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The government believes that the best reading of *Eldred* is that these "traditional contours" are fair use and the idea/expression dichotomy, nothing more, and that Section 514 requires no further First Amendment analysis because it preserves those safeguards. However, the government recognizes that, to the extent that it constitutes binding precedent, *Golan III* represents the law of this Circuit. This appeal thus argues that the district court erred on *Golan III*'s own terms. The government reserves the right to challenge *Golan III*'s rationale on further review beyond the panel stage.

judgments," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*"), because Congress "'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions." *Turner II*, 520 U.S. at 195 (quoting *Turner I*, 512 U.S. at 665-66) (internal quotations omitted). On issues related to foreign affairs, too, "[m]atters . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). The government's interests here require predictive judgments about foreign affairs.

Even assuming *arguendo* that Section 514 burdens more speech than necessary to advance these interests, it does not burden *substantially* more. Any affected speech is small in quantity and, under the Supreme Court's recent decision in *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003), raises few First Amendment concerns. In *Eldred*, the Court explained that, "[t]he First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches." *Id.* The district court failed to apply this guidance, reaching precisely the opposite conclusion that "[p]laintiffs' interests in copying the works at issue is deserving of full First Amendment protection." *Golan IV*, 611 F. Supp. 2d at 1173. This holding transforms this Court's limited statement that plaintiffs' First Amendment interests "are greater than the interests of the *Eldred*

plaintiffs," *Golan III*, 501 F.3d at 1193, into an insupportable deviation from *Eldred*. Moreover, the interplay between plaintiffs' speech interests and copyright law again brings judicial deference into play, given the Court's admonition that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *see also Eldred*, 537 U.S. at 204.

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

Section 514 – and in particular, its generous but temporary accommodations for reliance parties – enables the United States to fulfill its international obligations, to advance the rights of American authors and sound recording producers and performers abroad, and to provide redress for the inequitable treatment of foreign authors who lost their copyrights through no fault of their own. It thus survives First Amendment scrutiny. *See Turner II*, 520 U.S. at 213-14.

- A. Section 514 Discharges International Obligations under the Berne Convention and the TRIPS Agreement.
1. Upholding international obligations is an important government interest.

"[T]he United States has a vital national interest in complying with international law." *Boos v. Barry*, 485 U.S. 312, 323 (1988). The Constitution itself reflects this principle. The Supremacy Clause stipulates that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI[2]. A treaty such as the Berne Convention, which is not self-executing, requires implementing legislation like the Berne Convention Implementation Act and the URAA.

The government's interest in complying with its international undertakings is broader than any particular treaty or international agreement. Compliance secures the United States' "role as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995). As a result, "courts should be most cautious before interpreting . . . domestic legislation in such manner as to violate international agreements." *Id.* This principle does not derogate from the maxim that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion); *see Boos*, 485

U.S. at 323 (approving this proposition). But the importance of complying with international law does shape the rest of the First Amendment analysis. As this Court has recognized, "the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis." *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007) (citing *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

2. Section 514 burdens no more speech than necessary because the government's interest in ensuring indisputable compliance with Berne and TRIPS warrants limiting its accommodations for reliance parties to temporary measures.

The district court held that Berne Article 18 requires restoring copyrights to qualifying foreign works. *Golan IV*, 611 F.Supp.2d at 1172. After considering the matter at length, Congress and the executive branch ultimately concluded that in implementing Article 18 and TRIPS, the United States should limit accommodations for reliance parties to temporary measures, as Section 514 does. This case's procedural posture and separation-of-powers principles mandate deference to this reasoned and sound judgment.

This case is not about how courts would interpret the Berne Convention and TRIPS in the first instance. Under *Turner II*, summary judgment for the government is required "[a]s long as there is no material dispute that there is substantial evidence

from which Congress could have drawn a reasonable inference, . . . even if the evidence could reasonably lead to an inconsistent conclusion." *Golan IV*, 611 F. Supp. 2d at 1172 (citing *Turner II*, 520 U.S. at 196). The case instead is about whether Congress could reasonably determine that Section 514 is required to advance U.S. interests in implementing Berne and TRIPS.

Implementation of Berne and TRIPS through Section 514 advances government interests in two concrete ways, each depending on how international partners *view* the United States' actions, rather than the agreements' abstract meaning. Section 514 effectively ensures that other countries will not bring actions under the WTO dispute settlement mechanism challenging the United States' implementation of Berne Article 18. *See* Report of Dr. Mihaly Ficsor ("Ficsor Report"), Feb. 15, 2005, ¶¶ 27-28, App. 126-27. If the WTO found the United States in breach, the United States may be asked to change its laws or face trade sanctions. *Id.* Moreover, implementation of international agreements such as Berne and TRIPS in a manner that other nations acknowledge to be sufficient maintains the United States' international credibility. *See Vimar*, 515 U.S. at 539.

The key question in assessing the government's interest, then, is whether Congress reasonably concluded that Section 514 is necessary to satisfy international partners regarding U.S. compliance with Berne and TRIPS. This question does not

implicate a court's duty "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), invoked where "treaties are to be given effect as federal law," *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 334 (2006), rather than enforced through legislation. Rather, the inquiry is predictive and implicates a court's obligation to defer to the legislative judgment as long as Congress has drawn reasonable inferences from substantial evidence. *See Turner II*, 520 U.S. at 195.

Separation-of-powers concerns also compel deference to the political branches in matters touching foreign affairs and to the executive branch with respect to treaty interpretation. In particular, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); *see also United States v. Conners*, 606 F.2d 269, 272 (10th Cir. 1979). This principle reflects "judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972). This deference applies with special force in the realm of international trade. *See Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001) ("The Constitution confers a vast amount of power upon the political branches of the federal government

in the area of foreign policy – particularly foreign commerce.") (citation and internal quotation marks omitted), *cert. denied*, 534 U.S. 1083 (2002).

Section 514 is exactly the sort of provision that triggers this deference. In accordance with the Supreme Court's statement that non-self-executing treaties address themselves "to the political, not the judicial department; and [that] the legislature must execute the contract," *see Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), Congress assists in implementing treaties such as Berne by enacting legislation. Before passage of the URAA, Congress received and considered the executive branch's view that "it is likely that other WTO members would challenge the current U.S. implementation of Berne Article 18." *Joint House and Senate Comm. Hearings on the URAA*, 103d Cong., 2d Sess. 137 (1994) ("Joint Hearings") (testimony of Ira Shapiro, General Counsel of the Office of the U.S. Trade Representative); *see also id.* at 147, 157 n.12 (testimony of Christopher Schroeder, Counsel to the Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice) (stating that "the draft version of section 104A is intended to fill a gap in our protection of foreign works, and permits the United States to implement Article 18 of the Berne Convention more fully"; and that "[n]othing short of protecting copyrights in foreign works against all other parties can afford such holders the

protection required under the Berne Convention"). In light of that advice, Congress enacted Section 514. *See* URAA Report 225.

Because this deference implicates the separation of powers, moreover, plaintiffs' invocation of the First Amendment does not overcome it. In the context of another First Amendment challenge, this Court recognized that "[c]ourts have historically given special deference to other branches in matters relating to foreign affairs, international relations, and national security; *even when constitutional rights are invoked by a plaintiff.*" *Citizens for Peace*, 477 F.3d at 1221 (rejecting First Amendment claims of protesters who sought access to the secured area of a NATO conference) (emphasis added).

- a. The political branches reasonably concluded that the United States would face international repercussions if it did not unquestionably comply with TRIPS and Berne.

Congress's view of how to implement Berne – that accommodations for reliance parties must be temporary – accords with the dominant interpretation among prominent authorities on international copyright law, stretching from the 1980s to today. In 1986, Professor Sam Ricketson, one of the world's foremost authorities (then and now), wrote that "although the word is not used, [reliance interest provisions] are transitional in nature, and . . . [Berne] does not authorize their usage indefinitely." Ricketson, *International Copyright and Neighboring Rights: The Berne*

Convention and Beyond, 675 (1st ed. 1986). Professor Ricketson recently reaffirmed this view, emphasizing that transitional protections for reliance parties do not authorize these parties "to continue their use indefinitely; a situation must eventually be reached when the work is protected in relation to all persons." Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, 343 (2d ed. 2006).

The same interpretation prevailed in 1995, less than a year after the URAA's passage. Asked for WIPO's "informal views" on the interpretation of Article 18, Arpad Bogsch, WIPO's Director General, wrote that "such provisions and measures should not be applied, in any case, for a period longer than two years from the entry into force of the Convention."⁸ Letter from Arpad Bogsch to Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, ¶ 28 (Oct. 10, 1995) (attached to Ficsor Report, Annex B), App. 185-86. More important, the letter makes clear that this view was not novel or controversial, but rather reflected "a quite general agreement." *Id.*

The expert report of Dr. Mihaly Ficsor, former Assistant Director General of WIPO, further explains this interpretation. The fundamental rules of treaty

⁸ Although the letter went out under Mr. Bogsch's signature, Dr. Ficsor was responsible for drafting the opinion, and Mr. Bogsch signed it without substantive modification. Ficsor Report ¶ 10, App. 117.

interpretation provide that international tribunals are to "interpret in good faith the provisions [of an agreement] in accordance with the ordinary meaning . . . in their context and in the light of its object and purpose." Ficsor Report ¶ 30, App. 128. Applying those principles, Dr. Ficsor found that Article 18(3), which provides that the "respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle," does not grant blanket discretion to countries to permanently exempt reliance parties from the restoration provisions. *Compare Golan IV*, 611 F.Supp.2d at 1174. Rather, Dr. Ficsor stated, Article 18(3) requires "that the conditions should serve the *application* of the 'principle'" – that is, the principle of restoration – and "they may not be imposed on the 'principle' itself." Ficsor Report ¶ 55, App. 139. In Dr. Ficsor's view, accommodations for reliance parties "may only consist of some *transitional* provisions." *Id.* ¶ 56, App. 140. Based on the convention's negotiating history, Dr. Ficsor concluded that these provisions are limited to two years. *Id.* ¶ 61, App. 141-42.

In limiting Section 514's protections to temporary measures, Congress thus acted in accordance with the prevailing international view of Berne. Consistent with these authoritative international views, established principles of treaty interpretation in U.S. courts also support the congressional judgment that limitations on the prerogatives of reliance parties were necessary to ensure indisputable compliance with

this country's international obligations.

The task of interpreting a treaty "begins with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (citation and internal quotation marks omitted); *accord*, Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1), 1155 U.N.T.S. 331, 340 (cited in Ficsor Report ¶ 30, App. 128).⁹ Article 18(1) declares that restoration "shall apply to all works" whose term has not expired in the country of origin. *See supra* n.4. Accommodations for reliance parties can be justified, if at all, only under Article 18(3).

In context, Article 18(3)'s reference to "conditions of application" (*see supra* n.4) means "attendant circumstances," *Webster's Third New International Dictionary* 473 (1993), implying peripheral matters subordinate to the overall goal of restoring copyright protection. Any accommodations for reliance parties therefore must ultimately serve, or at least not undermine, this broader goal. As explained above, leading authorities have concluded that permanent exceptions for reliance parties are not authorized by Article 18(3) because they too greatly limit the protections that a

⁹ Although the United States has not ratified this Convention, the government generally recognizes it as an authoritative guide to treaty interpretation. *See, e.g., Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 534 U.S. 891 (2001).

copyright confers. To ensure indisputable compliance with this country's international obligations, Congress reasonably legislated in accordance with that understanding of the relationship between Articles 18(1) and 18(3).

Moreover, Congress's approach in the URAA accords with Berne's drafting history and later revisions. The 1884 report of the first Berne Conference referred to proposed provisions similar to those of today's Article 18 as "*transitional provisions*." Ficsor Report ¶ 57, App. 140. The 1896 Paris Conference, which revised the Convention, clarified that these "*temporary provisions* shall apply in case of new accessions to the Union," referring to the need for countries joining the convention to take "*transitional measures*." *Id.* ¶ 59, App. 141.

b. Section 514 avoids challenges in the WTO.

When the United States first became a party to the Berne Convention in 1988, *see* 134 C.R. 32018 (Oct. 20, 1988), Berne provided for the possibility of dispute resolution before the International Court of Justice in the Hague, but no nation had ever brought a claim. Ficsor Report ¶ 20-22, App. 122-23. The "liberal and easy-going atmosphere" surrounding implementation, *id.* ¶ 23, App. 123, however, changed with the conclusion of the Uruguay Round in December 1993 and the adoption of the TRIPS Agreement. TRIPS Article 9.1 mandates that all WTO members "shall comply with Article 1 through 21 of the Berne Convention (1971) and the Appendix

thereto' (with the exception of Article 6bis on moral rights and certain rights derived therefrom)." Ficsor Report ¶ 24, App. 124.

The WTO provides a formal, binding means of settling disputes among its members. If a member is found to be acting inconsistently with its obligations under a WTO agreement, it is given a period of time to bring the challenged measures into compliance. *See* Ficsor Report ¶ 27, App. 126-27. If it fails to do so, the complaining member may seek authorization from WTO members to impose trade sanctions. *See* Results of the Uruguay Round of Trade Negotiations: Hearings Before the Senate Comm. on Finance, 103d Cong., 2d Sess. 14 (1994) (Statement of U.S. Trade Representative Mickey Kantor).

The specter of a trading partner raising questions about U.S. implementation of TRIPS and Berne was before Congress when it considered the provisions of Section 514. In addition to the testimony of government witnesses Shapiro and Schroeder (*see supra* 27), Congress heard testimony from Eric Smith, executive director and general counsel of the International Intellectual Property Alliance, that "we believe the risk is great that, if the U.S. does not take legislative action implementing recapture under TRIPS (and Berne), it may be the first country to appear before such a panel as a defendant." Joint Hearings 248. Smith further noted that "[m]any of our trading partners, particularly in Europe, have made it clear to this country that they consider

us in violation of our obligations under Article 18."¹⁰ *Id.* Congress could reasonably have inferred that U.S. trading partners would react similarly to an implementation of Berne Article 18 that granted a permanent license to all reliance parties.

- c. Section 514's expansive protections for reliance parties reflect a careful balance between the needs of reliance parties and the political branches' interpretation of Berne's requirements.

When the United States first joined Berne in 1988, it declined to restore copyrights to works in the public domain at the time, because "[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." H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 51 (1988). The same report further stated, however, 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.

In 1994, after TRIPS was concluded and concerns arose over how other members would implement the Agreement (*see* Joint Hearings 136-37 (Shapiro testimony), 147 & 157 n.12 (Schroeder testimony), 247-48 (Smith testimony)),

¹⁰ Similarly, Smith testified to his "fear we would be found in violation unless a bill is passed," and stated that "recapture is necessary for the U.S. to comply with its TRIPS obligations." *Id.*

Congress decided to take action. At that time, specific constitutional concerns became apparent: testimony before Congress warned that restoring copyrights against reliance parties might require compensation under the Takings Clause. *See* Joint Hearings 231-32 (statement of Irwin Karp); *id.* at 176-86 (testimony of Eugene Volokh).

To address such concerns, Congress created protections for reliance parties that are among the world's most generous. First, the URAA absolutely shields from liability any use of the work before its copyright was restored. 17 U.S.C. §104A(d)(2). Second, the owner cannot enforce the restored copyright against reliance parties at all until it files a notice with the Copyright Office or serves a party directly. 17 U.S.C. §104A(d)(2)(A), (B). Third, even after notice, the party may use existing copies freely for a year. *Id.* Fourth, authors who have created new works (called "derivative works") based on works that have been restored to copyright protection "may continue to exploit that work for the duration of the restored copyright," even after the year-long period, provided that the derivative author pays reasonable compensation to the owner. *Id.*

The accommodations for authors of derivative works are particularly significant. When an earlier version of Section 514 contained no such protection, congressional testimony identified that absence as especially likely to create problems under the Takings Clause. *See* Joint Hearings at 176-86 (testimony of Eugene

Volokh) (discussing H. 4896 and S. 2368). The final version of the bill added this protection. §104A(d)(3); *see* URAA Report at 225. In addressing that concern, but not acting on another suggestion (from Irwin Karp) to adopt permanent protections much like those the district court preferred here, *see* Joint Hearings at 231-32, Congress balanced the interests of reliance parties against its view of Berne's requirements. Even if courts disagree with the particulars of that choice, the political branches' judgments about treaty obligations merit deference. *See supra*, Part II.B.2.a.

- d. The accommodations for reliance parties in Germany, Hungary, the United Kingdom, Australia, and New Zealand are less generous than those in the United States.

Put together, these protections are "at least, as generous norms for reliance parties as – and in certain aspects, even more generous than – the corresponding provisions of the majority of the member countries of the European Union." Ficsor Report ¶ 100, App. 166. In particular, the United States is unique among the countries covered in the Ficsor Report in allowing reliance parties unrestricted access to works with restored copyrights indefinitely, until the owner gives notice. *See id.* ¶ 70, App. 147-48 (describing French law); ¶ 72, App. 149-51 (German law); ¶ 74, App. 152-53 (Hungarian law); ¶ 81, App. 156 (Italian law); ¶ 85, App. 158-59 (United Kingdom law). Indeed, this provision drew objections from critics like Karp. Joint Hearings 232. Even so, Congress included it, showing its concern for reliance parties and the delicate balance it struck in Section 514. The one-year grace period also protects

reliance parties more thoroughly than laws in many other countries. *See, e.g.*, Ficsor Report ¶ 72, App. 151 (noting the absence of a grace period before compensation is required in Germany).

The district court erred in concluding that other nations' laws show that Section 514 goes beyond Berne's requirements. *See Golan IV*, 611 F.Supp.2d at 1174 ("Germany, Hungary, the United Kingdom, Australia, and New Zealand . . . provide accommodations that are temporally permanent so long as certain conditions are met."). First, the court misinterpreted the accommodations in Germany and Hungary. German law indeed allows "acts of exploitation" begun before restoration to continue to their originally intended conclusion. Ficsor Report ¶ 72, App. 149-51. But the law requires reasonable compensation for any act of exploitation begun after the law's entry into force; it contains no grace period. *Id.* Hungarian law by and large follows the same general approach. *See id.* ¶ 74, App. 152-53. Accordingly, German and Hungarian laws plainly would be less protective of reliance parties than U.S. law, which provides a one-year grace period that begins with notice from the copyright holder rather than the law's entry into force. *See* § 104A(d)(1)-(2).

Second, the district court incorrectly concluded that the laws of the United Kingdom, Australia, and New Zealand protect reliance interests better than does Section 514. The opposite is true. To be sure, reliance parties in the United Kingdom

may continue using restored copyrights until the owner "buys out" the reliance party,¹¹ but the owner of the restored copyright can immediately exercise its buy-out right. Ficsor Report ¶ 101, App. 166-67. If the parties cannot agree, the next step is binding arbitration. *See id.* ¶ 84 (quoting Article 7(2) of the Copyright (Application to Other Countries) Order 1999), App. 158. At the least, this would impose potentially large costs on the reliance party.

Further, the U.K. system, if transmuted into U.S. law, could trigger other concerns, as it might burden expressive interests appreciably more than Section 514. Under such a system, the restored copyright holder could pay compensation and then be entitled immediately to seek an injunction. *See* 17 U.S.C. § 502(a) (authorizing a court to issue a permanent injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."); *see also Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1555 (10th Cir.), *cert. denied*, 519 U.S. 928 (1996) ("A copyright holder that establishes past infringement and a substantial likelihood of infringement in the future is normally entitled to a permanent injunction against the infringer pursuant to § 502(a)."). Even if reliance parties might sometimes get more *money* under the U.K. system, this system plainly burdens *expressive*

¹¹ Australia and New Zealand follow the same approach. Ficsor Report ¶ 84, App. 158.

interests more heavily than the U.S. system, which allows authors of derivative works to exploit the originals indefinitely, with reasonable compensation.

Moreover, even assuming *arguendo* that the U.K. system protects reliance parties better than does Section 514, that is not enough to invalidate a content-neutral regulation, which "need not be the least restrictive or least intrusive means" of achieving the government's interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). It simply is not the court's task to decide what the "best" or most speech-protective implementation of Berne would be – just as it is not the court's role to pick and choose among various nations' disparate and not readily comparable approaches under Berne Article 18 to protecting reliance parties, or to force the United States to raise questions about other countries' compliance with Article 18 in order to defend the government's own actions.

In sum, the U.S. model is more protective of expressive interests than those of other WTO members, and post-hoc comparisons cannot substitute for Congress's careful balancing during consideration of Section 514. Given the significant trade consequences of non-compliance under the TRIPS regime and the United States' broader interest in ensuring indisputable compliance with its international law obligations, it was inappropriate for the district court to substitute its own judgment regarding Berne for that of the political branches.

B. Section 514 Promotes the Rights of U.S. Copyright Holders Abroad.

Section 514 benefits U.S. copyright holders in two ways. First, it obviated the possibility of a dispute at the WTO that could have harmed their interests abroad. Second, Section 514 maintains the credibility of the United States in encouraging other nations to implement greater safeguards for restored U.S. copyrights, and more generally preserves the United States' position as a leading advocate for a stronger international intellectual property regime. These interests, inextricably enmeshed in judgments about international diplomacy and commerce, again implicate judicial deference in foreign affairs.

1. Promoting the rights of U.S copyright holders abroad is clearly an important government interest.

The Copyright Clause empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 1. However, there is no such thing as "an 'international copyright' that will automatically protect an author's writings throughout the world." U.S. Copyright Office, Circular 38a (revised June 2009). If the United States does not have copyright relations with a foreign country, U.S. works can be copied and distributed in that country without infringing a copyright. The TRIPS Agreement was an important step in establishing strong protections for U.S. works (and in particular for subject matter

such as sound recordings and computer software that some countries did not consider to be works of authorship, *see* Joint Hearings 263-64 (Statement of Jason S. Berman, Chairman and Chief Executive Officer, Recording Industry Association of America)).

As goods and ideas move ever more easily across borders, fulfilling the Constitution's mandate requires the government to act internationally, in cooperation with partners. The need is especially great given the huge losses to American creators from absent or ineffective copyright protections abroad, which in the sound recording, motion picture, and computer programming industries already stood at \$2.1 billion a year in 1994. *See* Joint Hearings 247 (testimony of Eric Smith).

In the era of globalization, therefore, absent international action copyright cannot effectively be "the engine of free expression" that supplies "the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *see also* Graeme Austin, "Does the Copyright Clause Mandate Isolationism?" 26 Colum. J.L. & Arts 17, 59 (2002) (cautioning against "an isolationist reading of the Copyright Clause that is in tension with . . . America's international copyright relations over the last hundred or so years") (cited in *Eldred*, 537 U.S. at 207 n.13). In keeping with those principles, this Court has viewed the Berne Convention as serving Copyright Clause interests. *See Golan III*, 501 F.3d at 1187. Indeed, plaintiffs have acknowledged that "the norms of the

Copyright Clause should inform the scope of legitimate government interests under the First Amendment." Pls.' Mem. 33, App. 233.

2. Section 514 burdens no more speech than necessary to promote the rights of American copyright holders abroad.

Had the United States been found to have acted inconsistently with its Article 18 obligations, WTO-authorized retaliatory sanctions could have targeted America's intellectual property exports. *See* Results of the Uruguay Round of Trade Negotiations: Hearings Before the Senate Comm. on Finance, 103d Cong., 2d Sess. 14 (1994) (Statement of U.S. Trade Representative Mickey Kantor). Section 514 directly benefits U.S copyright holders by obviating this risk.

But even assuming *arguendo* that the United States could have permanently excepted reliance parties from Section 514 without provoking a WTO dispute settlement action, Congress had substantial evidence to infer that full and *indisputable* compliance would serve its broader interest in protecting American copyrights abroad. Violating or appearing to violate international law, even where it does not trigger concrete sanctions, hurts the nation's credibility. *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) ("The rule . . . is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.") (Marshall, C.J.). That undermines the United States' status as a "trusted partner in multilateral endeavors." *Vimar*, 515 U.S. at 539. Indeed, just as

courts err on the side of compliance with international law by applying the presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, (1804); *see, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2005) (applying the *Charming Betsy* presumption), so Congress can legislate in the same spirit.

Specifically, Congress heard evidence that the United States' ability to push for a stronger international intellectual property regime historically depended on its own diligence in protecting foreign intellectual property rights at home. Ira Shapiro, then-General Counsel for the Office of the U.S. Trade Representative, explained that the outcome of the URAA vote would "affect whether U.S. works that are now in the public domain in other countries, including the major markets of Russia and Eastern Europe, will be protected." Joint Hearings 136-37. Shapiro identified Russia and Thailand as countries that "have refused to protect U.S. works in the public domain in their territory[,] citing the U.S. interpretation of Berne Article 18 as their justification." *Id.* at 137. Eric Smith offered similar analysis: "if [the United States] takes the position that we have no, or only limited, obligations, [we] will have little credibility in convincing . . . the new nations with whom we are just starting copyright relations to give us the expansive protection that we need." *Id.* at 247.

Congress's choice of irrefutable compliance with Article 18 proved prescient, as an episode involving the United States and Japan shortly after the United States enacted the URAA illustrates. In 1971, Japan recognized copyright protection for sound recordings, but never extended that protection to sound recordings produced prior to that time. Ficsor Report ¶ 32, App. 129-30. This was contrary to the terms of TRIPS Article 14.6, mandating that the provisions of Berne Article 18 (including restoration of copyright) must be extended to the performers and producers of sound recordings. *Id.* Recognizing this fact, the United States began preparing to initiate a dispute settlement procedure with Japan, an effort that the nations of the European Community later joined. *Id.* As it prepared to begin the arbitration, the United States asked WIPO for its "informal views" as to the correct interpretation of Article 18. *Id.* ¶ 33, App. 130-31. WIPO's opinion letter became the basis for the resolution of the dispute without WTO intervention. *Id.* ¶ 34, App. 131. Pursuant to the settlement (and consistent with WIPO's opinion), Japan amended its law to provide copyright protection to performers and producers of sound recordings created between 1945 and 1971. *Id.* ¶ 35, App. 131. This outcome would have been inconceivable under the pre-TRIPS Berne Convention. *Id.* ¶ 36, App. 132.

Similarly, Russia acceded to Berne in 1995, but did not at that time restore works in the public domain. In 2004, however, Russia amended its law to include

restoration, thanks in part to lobbying from the United States. *See* Law of the Russian Federation No. 5351-1 of July 9, 1993, on Copyright and Neighbouring Rights (with the Additions and Amendments of July 19, 1995, July 20, 2004), art. 5 (GARANT 10001423). The strength of U.S. advocacy would have been significantly weakened had the United States' implementation of Article 18 been less effective.¹² These successes constitute a "direct and material benefit," *Turner I*, 512 U.S. at 664, to U.S. copyright holders.

As the district court recognized, "[a]s long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment even if the evidence could reasonably lead to an inconsistent conclusion." *Golan IV*, 611 F.Supp.2d at 1172 (citing *Turner II*, 520 U.S. at 196). Without explanation, however, the court concluded that "[t]he Government's evidence is inadequate to meet th[e] initial threshold inquiry" of demonstrating the absence of a genuine issue of material fact on whether Section 514 promotes this interest. *Id.* at 1176. This conclusion erred in

¹² The United States also worked with other trading partners to provide Berne and TRIPS level protection to U.S. works, including sound recordings. *See, e.g.*, Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations (December 10, 2001), Chapter II, arts. 4.8 and 16; Memorandum of Understanding Between the Government of the United States of America and the Government of the Republic of Croatia Concerning the Protection of Intellectual Property Rights (May 26, 1998), arts. 3.9 and 15.

three ways.

First, this Court has recognized that "an overly strict" definition of the government interest is "tantamount to an attempt to impose de facto strict scrutiny." *Citizens for Peace*, 477 F.3d at 1220. The district court's description of the government's interest – as "an assumption that Section 514 will encourage other countries to limit the rights of reliance parties," *Golan IV*, 611 F. Supp. 2d at 1175 – does just that. To be sure, indisputable implementation of Berne Article 18 through Section 514 has helped the United States persuade other countries to adopt similar approaches to Article 18. In addition, however, Section 514 also supports the United States' efforts to create a stronger international intellectual property regime generally. Nor is this interest based on an "assumption," but rather on historical evidence concerning diplomacy and international commerce, *see supra* at 44, and the modest inference that this historical pattern will continue in international relations.

Second, the district court overstepped the boundaries of its inquiry under *Turner I* and substituted its own judgment for that of the political branches. The Supreme Court has established that Congress's predictive judgments are entitled to substantial deference, and courts' sole role is to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 665-66. Although anticipated harms must be "not merely

conjectural," *id.* at 664, the government can satisfy its burden through "either empirical support or at least sound reasoning on behalf of its measures." *Id.* at 666.

The United States met this light burden by producing evidence, in the form of expert opinions, from which Congress could have concluded that permanently excepting reliance parties from Section 514 could lead to WTO disputes and undermine the United States' efforts to protect American creators. It also showed that, after the United States opted for unequivocal implementation of Article 18, it achieved notable success in promoting U.S. intellectual property rights abroad. *See supra*, at 45-46. No more is required, and this evidence fits comfortably within this Circuit's requirements for finding a "direct and material benefit." In *Citizens for Peace*, for example, the Court found that the exclusion of protesters from a security zone provided a "direct and material" benefit in part by avoiding the possibility that "a host of other groups would seek similar treatment," despite acknowledging that this concern was purely "hypothetical." 477 F.3d at 1223.

Third, the court's decision to grant summary judgment to plaintiffs is simply untenable in light of the government's contrary evidence. The court held that plaintiffs met their burden "by their proffer of testimony before Congress . . . that stated suppression of reliance parties' First Amendment interests was unlikely to lead to suppression of foreign reliance parties' reliance rights as they concern United States

works in foreign nations." *Golan IV*, 611 F.Supp.2d at 1176. Again, this account of the government's interest is unduly narrow. And the government proffered ample testimony before Congress, as well as other evidence, that shows exactly the opposite. Shapiro's and Smith's testimony on the likely benefits of strong action, *see supra* at 43-44, are just two examples. Indeed, given the standard under *Turner I*, this evidence requires summary judgment for the government.

C. Section 514 Supports the Government's Interest in Equitable Treatment for Foreign Authors Who Lost Protection Through No Fault of Their Own. Congress, in repealing the United States' longstanding copyright formality requirements, recognized their inequity. The Copyright Amendments Act of 1992 made copyright renewals automatic. Pub. L. No. 102-307, § 102(a)(2)(A)(ii), 106 Stat. 264. The Berne Convention Implementation Act of 1988 jettisoned the requirement of affixing a copyright notice to a work. Pub. L. No. 100-568, § 7, 102 Stat. 2853. Although formalities affected all authors, Congress enacted Section 514 with the understanding that foreign authors suffered more acutely, and thus had a greater claim for relief. Testifying before Congress, Professor Shira Perlmutter noted that "[a]s 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." Joint Hearings 191. These authors, Perlmutter noted, often "lost their U.S. copyrights to the public domain

without having sought to exploit their works here, or without being aware of the requirements." *Id.* Given that the United States had since dropped these formalities, it was appropriate to redress their inequitable effects. Other authors were even more innocent, losing their rights because the United States did not have copyright relations with their nations at the time they created their works (URAA Report 225) – a point wholly overlooked by the district court.

This equitable interest also requires limiting Section 514's accommodations for reliance parties to temporary measures. Copyright's core grant, as noted, is "the right to exclude others" from a covered work. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Permanent accommodations for reliance parties are inconsistent with this grant, and with the Copyright Clause's "exclusive Right." U.S. Const., art. I, § 8, cl. 8.

III. ANY SPEECH THAT SECTION 514 LEAVES UNPROTECTED, BEYOND THAT REQUIRED TO ADVANCE IMPORTANT GOVERNMENT INTERESTS, DOES NOT RAISE SUBSTANTIAL FIRST AMENDMENT CONCERNS.

Because the government's important interests require that accommodations for reliance parties be limited to protections substantially similar to those of Section 514, Section 514 affects no more speech than necessary and easily passes muster under intermediate scrutiny. *See Turner II*, 520 U.S. at 189. Even were this not true, however – even if the district court had been right that the United States could

advance these interests while allowing permanent accommodations for reliance parties – Section 514 would still not affect *substantially* more speech than necessary. *See id.* Any affected speech is small in quantity and, under *Eldred's* controlling rule that these interests carry less weight, 537 U.S. at 221, raises few First Amendment concerns.

A. *Eldred* Requires Giving Little Weight to Interests in Copying Another's Work.

In upholding the constitutionality of the CTEA against a First Amendment challenge in *Eldred*, the Supreme Court established two principles that control this case. First, restrictions on using specific forms of expression are less worrisome than restrictions on communicating facts or ideas, whether the expression is original or copied from another. Copyright protection, the Court held, "does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221. The Court's explanation that copyright's "built-in free speech safeguards are generally adequate" to address First Amendment concerns, *Eldred*, 537 U.S. at 221, reaffirms that facts and ideas – not specific expressions – carry the greatest First Amendment weight. The first safeguard, the idea/expression dichotomy, "permit[s] free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556. To the extent that communicating facts and ideas requires specific expressions, the second safeguard, fair use, "affords considerable 'latitude for scholarship and comment.'" *Eldred*, 537

U.S. at 220 (quoting *Harper & Row*, 471 U.S. at 560).

Second, the Court emphasized that "[t]he First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches." *Id.* at 221. So to the extent that restrictions on specific expression do raise First Amendment concerns, these concerns are less for copied expression than for the original.

These principles are consistent with the Supreme Court's treatment of fair use. Whether a new work that uses a copyrighted work qualifies as fair use often turns on whether the new work is "transformative," *i.e.* serves a new purpose. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("Although . . . transformative use is not absolutely necessary for a finding of fair use, . . . [s]uch works . . . lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright[.]"). Fair use, *Eldred* establishes, protects First Amendment values. 537 U.S. at 219-20. Given that, it would be inconceivable for a work's status as copied or original not to carry great weight in the First Amendment inquiry.

Contradicting these principles, the district court concluded that "[p]laintiffs' interests in copying the works at issue is deserving of full First Amendment protection." *Golan IV*, 611 F.Supp.2d at 1173. That conclusion also goes far beyond this Court's holding in *Golan III* that the First Amendment interests of plaintiffs here "are greater than the interests of the *Eldred* plaintiffs." *Golan III*, 501 F.3d at 1193.

"Greater" need not mean "full," and it *cannot* mean "full" after *Eldred*.

The district court relied heavily on this Court's statement that "the speech at issue here belonged to plaintiffs when it entered the public domain." *Golan IV*, 611 F. Supp. 2d at 1173 (quoting *Golan III*, 501 F.3d at 1193). This reliance is inapposite, for two reasons. First, the district court conflated two aspects of the First Amendment inquiry. This Court's entire analysis of plaintiffs' First Amendment interests came in assessing whether removing works from the public domain implicates First Amendment interests *at all*, not in determining their weight. *See Golan III*, 501 F.3d at 1192-94. Inherent in this Court's remand, 501 F.3d at 1196, was the understanding that the district court would itself weigh these interests. Instead, the court recited out-of-context language from *Golan III* in answering the very question that this Court had purposefully left open. *See Golan IV*, 611 F. Supp. 2d at 1173.

Second, the district court misunderstood *Eldred*. *Eldred's* statement on the lesser First Amendment interests in "other people's speeches," 537 U.S. at 221, did not depend on whether speech is still in copyright or is in the public domain, but rather on the fact that another person's speech is not "one's own speech." *Id.* Context renders that conclusion inescapable. In *Eldred*, it was undisputed that plaintiffs had no current rights to the copyrighted works; at issue was a challenge to a twenty-year extension of existing copyrights. *Id.* at 192. The Court thus had to look forward to the

hypothetical period in which, if not for the extension, the work would be in the public domain – that is, it addressed precisely the situation here. *Eldred's* language therefore controls.¹³ The district court's contrary determination transformed this Court's limited finding that plaintiffs had at least some First Amendment interests into a repudiation of *Eldred's* controlling principles.

The district court's view is also historically novel. Under *Eldred*, the practice of the First Congress is entitled to "almost conclusive" weight in interpreting the Copyright Clause. 537 U.S. at 213 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)). Given the intimate connection between plaintiffs' claims and Congress's copyright power, plaintiffs cannot escape this principle by raising their objection under the First Amendment.

The *Eldred* court recognized that "the First Congress clearly did confer

¹³ This Court's finding that the works "belonged" to plaintiffs when they entered the public domain does not dictate the outcome of the required assessment of the magnitude of the First Amendment interests for another reason. Generally, the right to use works in the public domain is "non-exclusive, [and] subject to constitutionally permissible legislation." *Golan III*, 501 F.3d at 1192-93. This right bears little resemblance to traditional ownership, so the finding that the public domain works "belong" to plaintiffs, in itself, says little about what interests they acquired.

Nor, contrary to the district court's assertion, did this Court specifically "consider[] Plaintiffs' interests 'near the core of the First Amendment.'" *Golan IV*, 611 F. Supp. 2d at 1173, quoting *Golan III*, 501 F.3d at 1193. Rather, the Court merely stated as a general matter that "*artistic expression* is near the core of the First Amendment." *Golan III*, 501 F.3d at 1193 (emphasis added).

copyright protection on works that had already been created." 537 U.S. at 196 n.3. Although this Court, in assessing whether removal constitutes a "traditional contour[] of copyright protection," *id.* at 221, concluded that historical evidence from the founding era was insufficient to establish "any burgeoning tradition of removing works from the public domain," *Golan III*, 501 F.3d at 1191, it did not dispute *Eldred's* historical finding or the government's evidence that not all states enacted copyright statutes under the Articles of Confederation. *Id.*; see Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 Colum. L.Rev. 272, 338 n.284 (2004) ("Of the general copyright laws passed by the States during the years of the Articles of Confederation, two of them (Maryland and Pennsylvania) never even came into effect; they included reciprocity clauses that were never fulfilled because one State, Delaware, never enacted a general copyright law"). Moreover, the Supreme Court has established that no common law post-publication copyright existed before the first Copyright Act. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834). So, some people who had unfettered use of someone else's original work before the Copyright Act lost that access. No evidence shows any protections for these reliance parties, suggesting that the First Congress – which drafted the First Amendment – viewed their First Amendment interests as marginal at best.

Later Congresses saw things the same way. Nineteenth century private bills

removed works from the public domain without protecting reliance parties, for no grander purpose than to give another individual a copyright. *See Golan III*, 501 F.3d at 1191. And the wartime acts of Dec. 18, 1919, Pub.L. No. 66-102, 41 Stat. 368, and the Emergency Copyright Act of 1941, Pub.L. No. 77-258, 55 Stat. 732, which gave authors additional time to comply with copyright formalities, also took the tardy works from the public domain – again, with no provision for parties who used the works in the interim.

Although the Court in *Golan III* found the preceding history insufficient to establish that plaintiffs here have no cognizable First Amendment interest whatever, *see* 501 F.3d at 1190-92, at a minimum the history proves that any such interest is highly attenuated. The district court overlooked this significant point in weighing plaintiffs' interest.

B. Even on the Narrowest Reading of the Government's Interests, Section 514 Leaves Only a Small Quantity of Speech Unprotected Beyond What Is Required to Achieve Those Interests.

Over whatever domain Section 514 restoration is not strictly required, the quantity of affected speech is small. First, plaintiffs retain the benefits of copyright's built-in First Amendment safeguards. Under the idea/expression dichotomy, "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation." *Eldred*, 537 U.S. at 219. So, plaintiffs retain their First Amendment

rights to exploit indefinitely anything, aside from the expression itself, in the restored works. Moreover, the fair use defense allows them to continue to use the expression itself, "including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. Even beyond these safeguards, Title 17 contains a host of other exclusions from a copyright holder's enforcement rights. *See* 17 U.S.C. §§ 108-122. For example, Section 110 precludes infringement actions for certain public musical performances whose purposes are nonprofit, educational or charitable.

Second, Section 514 itself protects a huge quantity of speech by reliance parties. *See supra* at 34-36. Because Section 514 protects authors who used the work before restoration, §104A(d)(2), there is no danger of a chilling effect from retroactive liability. Reliance parties can continue using any works subject to copyright restoration indefinitely, until the holder gives notice, and even afterward they retain unfettered use of existing copies for a year. §104A(d)(2)(A), (B). These protections are especially broad for authors of derivative works, who can exploit these works indefinitely, with payment of reasonable compensation. This right includes "at the very least . . . the right to license that work to others for display . . . and reproduction." *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 347 (S.D.N.Y. 2002). Derivative authors

can also maintain independent copyrights on whatever original expression they have added to the underlying work, 17 U.S.C. § 103(b), which they can enforce against third parties.

Third, because the restored works remain protected only until their original term ends, 17 U.S.C. § 104A(a)(1)(B), Section 514 does not affect any expression that occurred before restoration or that will occur after the term's end. Plaintiffs' asserted First Amendment interests, which the district court found sufficient to overcome the government's important interests, thus boil down to what remains after excluding the work's ideas, the wide protections of fair use, indefinite exploitation before notice is given, the year-long grace period, and the indefinite exploitation of derivative works with reasonable compensation.

These speech interests are a thin reed for courts to controvert the considered, evidence-based opinions of Congress and the executive in foreign policy matters. Just how thin is apparent from the specific interests that plaintiffs assert. The reliance interest of plaintiff Ronald Hall, who sells copyrighted and public domain films through a website, is basically limited to eight 16mm negatives of films made by other people. Having purchased the negatives years before Section 514, he has long since recouped his investment. Deposition of Ronald Hall, 35:1-8; 70:1-22; 111:14-25 to 122:1-21, App. 630, 631, 634-37. Plaintiff Lawrence Golan is unaware how many

copies of restored works are in the libraries of his orchestras, most of which, if not all, are educational or charitable. *See* Decl. of Lawrence Golan, ¶¶ 3-5, 22, App. 671, 678. Kortney Stirland, director of the Symphony of the Canyons, a non-profit symphony composed of volunteer musicians, is aware of only one such copy in its libraries. Deposition of Kortney Stirland, 67:17-25; 68:1-25; 69:1 1, App. 693-94. Regardless of the number, each could have continued full use for up to a year after receiving notice. § 104A(d)(2)(A)(i), (ii). More important, each may be able to perform these works in public as an educational or non-profit organization, even after the year ends. *See* 17 U.S.C. § 110.

Only the late plaintiff Richard Kapp appears to have created any derivative work: a recording of fifteen compositions by Shostakovich published through his own record label in 1991. *See* Deposition of Richard Kapp, 86:10-25 to 103:1-21, App. 696-700. It is unclear how many copies, if any, remained in the record label's inventory when it received notice. Had Kapp wished to continue selling copies after restoration, however, he could have done so by paying reasonable compensation to the holder of the restored copyright. *See* 17 U.S.C. § 104A(d)(3). Under the United Kingdom model – preferred by the district court – the holder could have immediately forced Kapp to cease his speech. *See* Ficsor Report ¶ 101, App. 167.

Despite Section 514's many protections for reliance parties, the district court

without citing any evidence concluded that Section 514 made it too expensive for plaintiffs to exercise their First Amendment rights. *Golan IV*, 611 F.Supp.2d at 1173. Even if this assertion found support in the record, it would say little about how much speech Section 514 burdens generally: many people will not enforce their restored copyrights, and for those restored copyrights that are enforced, many reliance parties may choose to negotiate a license agreement with the copyright owner (or, in the case of a derivative work, pay reasonable compensation) to continue their use of restored works.

More fundamentally, the district court's conclusion overlooks key aspects of Section 514's remedial scheme. In keeping with *Eldred*, Section 514 differentiates reliance parties between those who merely copy another's speech and those who contribute their own expression by creating derivative works. It then ensures protection for any distinct First Amendment interests that creators of derivative may have.

If the parties cannot agree on reasonable compensation, the restored owner must bring an action in district court, in which the owner bears the burden of proving both that it owns a copyright eligible for restoration and that the creator of the derivative work infringed that copyright. 17 U.S.C. § 104A(d)(3)(B); see *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171 (10th Cir. 2009) (describing the general

standard for infringement actions). Even if the district court concludes that the creator of the derivative work owes compensation, it can – and must – set the amount to not unduly burden speech. Moreover, Section 514 requires courts to consider "the relative contributions of expression of the author of the restored work and the reliance party to the derivative work." 17 U.S.C. § 104A(d)(3)(B). Thus, a reliance party who makes speech entitled to greater concern under *Eldred* – because it contributes something new and is not exclusively copied from another, 537 U.S. at 221 – will pay less as compensation.

Title 17 also includes safeguards against restored copyright owners who bring suits seeking *unreasonable* compensation. If a creator of a derivative work makes a reasonable settlement offer, and the owner rejects it and then fails to recover more, the creator of the derivative work may qualify for attorneys' fees as a "prevailing party" under 17 U.S.C. § 505.

Finally, if all these safeguards prove insufficient and a court determines, on particular facts, that requiring compensation will impermissibly burden a reliance party's First Amendment rights, *then* the court could set reasonable compensation at zero, applying the well-established principle of construing statutes to avoid constitutional problems. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988). Thus, the district court, rather

than allowing Section 514's remedial process to safeguard First Amendment values, short-circuited that process.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and summary judgment entered for defendants.

Respectfully submitted,¹⁴

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¹⁴ The Department of Justice gratefully acknowledges the assistance of Zach Schauf, a student at Harvard Law School, in the preparation of this brief.

STATEMENT REGARDING ORAL ARGUMENT

On remand from this Court, the district court held that Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4976-4981 (codified as amended at 17 U.S.C. §§ 104A, 109(a) (1994)), which restores certain copyrights for foreign works, is unconstitutional on First Amendment grounds. The statute in question concerns the international obligations and foreign relations of the United States, and the government has appealed from the district court's ruling. Moreover, plaintiffs have cross-appealed with respect to the scope of the district court's holding and the appropriate relief.

All of the issues that are presented on these cross-appeals are of substantial importance to the government, plaintiffs, the international community, and a multitude of interested persons and groups. In light of the significance of the case, oral argument is plainly warranted.

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect 12, the foregoing brief contains 13,993 words. The text of the brief is in proportional Times New Roman font with 14-point type, and the brief thus complies with the type-volume limitations, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)(B) and 10th Circuit Rule 32(a).

s/_____
JOHN S. KOPPEL
Attorney

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
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s/

JOHN S. KOPPEL
Attorney

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I hereby certify that on this 19th day of October, 2009, I filed and served the foregoing "OPENING 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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s/

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Attorney

ADDENDUM

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, JUDGE**

Civil Case No. 01-cv-01854-LTB

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,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States; and
MARYBETH PETERS, in her official capacity as Register of Copyrights, Copyright Office of
the United States,

Defendants.

MEMORANDUM OPINION AND ORDER

Babcock, J.

This case—as now presented—concerns the validity of Section 514 of the Uruguay Round Agreements Act (“URAA”), 17 U.S.C. § 104A. Section 514 restores the United States copyrights of foreign authors who lost those rights to the public domain for any reason other than the expiration of a copyright term. Plaintiffs filed this suit in September 2001, asserting claims challenging Section 514—as well as the Copyright Term Extension Act of 1998—under the Copyright Clause and the First Amendment. This Court granted summary judgment in favor of the Government or dismissal as to each of those claims. [**Docket ## 28, 109**]. On appeal, the Tenth Circuit affirmed this Court’s rulings as to Plaintiffs’ Copyright Term Extension Act claims and Plaintiffs’ Copyright Clause claims, but reversed this Court’s rulings as to Plaintiff’s First

Amendment challenge to Section 514. *See Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007). The Tenth Circuit remanded to this Court with instructions to assess whether Section 514—which the Tenth Circuit determined interfered with Plaintiffs’ “First Amendment interest in using works in the public domain”—passed First Amendment scrutiny. The parties have filed cross-motions for summary judgment on this issue [**Docket ## 147, 148**] as well as responses/replies [**Docket ## 154, 155**]. An *amicus* brief was filed in support of the Government [**Docket # 152**]. The motions are adequately briefed and oral argument would not materially assist their determination. After consideration of the motions, the papers, and the case file, and for the reasons stated below, I GRANT Plaintiffs’ motion [**Docket # 148**] and DENY the Government’s motion [**Docket # 147**].

I. BACKGROUND

Plaintiffs in this case represent a broad range of artisans and businesses that rely upon works in the public domain for their trade. As relevant to the issue presented here, these works were produced by foreign authors and, for varying reasons—including the authors’ failure to renew the copyrights with the Copyright Office, or failure to include a notice of copyright on the copyrighted works—did not enjoy copyright protection in the United States prior to the enactment of the URAA in 1994. Section 514 of the URAA ostensibly implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works—an international treaty first enacted in 1886, but not joined by the United States until 1988. Article 18 requires member nations to provide copyright protection to works by foreign authors so long as the term of copyright protection in the country of origin has not expired as to a specific work. *See Berne Convention*, Art. 18. Section 514 of the URAA—by granting copyright protection to these

foreign authors—removed from the public domain the works upon which Plaintiffs relied. As the subject works are now protected by United States copyright laws, Plaintiffs find themselves in the position of having to either pay for their previously royalty-free use, or cease using the works altogether. Plaintiffs argue their First Amendment rights were violated by Congress when these works were removed from the public domain.

On April 20, 2005, I granted summary judgment to the Government on Plaintiffs' First Amendment claims, holding: "I see no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." **[Docket # 109]**. On appeal, the Tenth Circuit reversed, holding: "since § 514 has altered the traditional contours of copyright protection in a manner that implicates plaintiffs' right to free expression, it must be subject to First Amendment review." *Golan*, 501 F.3d at 1197.

II. TENTH CIRCUIT OPINION

The Tenth Circuit began its review with an outline of basic principles of copyright law and how those principles interconnect with the First Amendment:

Under the Copyright Clause, Congress may "promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their [respective] Writings." U.S. CONST. art. I, § 8, cl. 8. . . . "[O]nce the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003). These imaginative works inspire new creations, which in turn inspire others, hopefully, *ad infinitum*. This cycle is what makes copyright "the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Congress's power to bestow copyrights is broad. *See Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.") (internal quotation marks omitted). But it is not boundless. . . . The Supreme Court has recognized that the First Amendment can limit Congress's power under the Copyright

Clause. *Id.* at 219–21 (indicating that copyright acts are not “categorically immune from challenges under the First Amendment”) (internal quotation marks omitted). The Court has emphasized, however, that “copyright’s built-in First Amendment accommodations”—the idea/expression dichotomy and the fair use defense—generally protect the public’s First Amendment interest in copyrighted works. *Id.* at 219–20.

Although these built-in free speech safeguards will ordinarily insulate legislation from First Amendment review, the *Eldred* Court indicated that such review is warranted when an act of Congress has “altered the traditional contours of copyright protection.” *Id.* at 221. The Court did not define the “traditional contours of copyright protection.” However, as we discuss in detail below, one of these traditional contours is the principle that once a work enters the public domain, no individual—not even the creator—may copyright it.

Golan, 501 F.3d at 1183–84.

In reaching its conclusion that Section 514—by removing works from the public domain—“altered the traditional contours of copyright protection,” the court first noted “the bedrock principle of copyright law that works in the public domain remain there.” *See Golan*, 501 F.3d at 1187. Indeed, the primary purpose of the Copyright Clause is to incentivize authors to produce works to benefit the public good. *See id.* at 1188. Once a work is created, a copyright attaches that allows the author to restrict the use of the work for the duration of the copyright period—at which point the work enters the public domain for the free use of anyone. *See id.* at 1189. This incentive drives “the engine of free expression” enshrined in the First Amendment. *See id.* at 1188.

Section 514 altered the traditional copyright scheme such that “the copyright sequence no longer necessarily ends with the public domain: indeed, it may begin there.” *See id.* at 1189. Such an alteration is inconsistent with the copyright scheme as designed by the Framers and as implemented by Congress in the ensuing years. *See id.* at 1190–92. Accordingly, “[Section] 514 deviates from the time-honored tradition of allowing works in the public domain to stay there.”

Id. at 1192.

Having established that Section 514 “altered the traditional contours of copyright protection”—therefore requiring First Amendment review, *see Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)—the Tenth Circuit turned to the question of how the alteration affected the First Amendment rights of Plaintiffs. The court first noted that Plaintiffs had, subject to constitutionally permissible restraints, a non-exclusive right to “unrestrained artistic use of these works” that was protected by the First Amendment. *See Golan*, 501 F.3d at 1193. Section 514 interfered with this right by making the cost of using the works prohibitive. *See id.*

Distinguishing Plaintiffs’ case from that at issue in *Eldred*, the court noted that the *Eldred* plaintiffs did not have a right to copy the works at issue. *See id.* (“As the *Eldred* Court observed, the most the *Eldred* plaintiffs could show was a weak interest in ‘making other people’s speeches.’ By contrast, the speech at issue here belonged to plaintiffs when it entered the public domain.”). The court concluded “that once the works at issue became free for anyone to copy, plaintiffs in this case had vested First Amendment interests in the expressions, and § 514’s interference with plaintiff’s rights is subject to First Amendment scrutiny.” *Id.* at 1194.

Finally, the Tenth Circuit considered whether “copyright’s built-in First Amendment accommodations”—the idea/expression dichotomy and the fair use defense—were, when combined with the additional protections explicitly included in Section 514, adequate to protect Plaintiffs’ First Amendment interests. Addressing the idea/expression dichotomy, the court found the rule to be inapplicable to Plaintiffs’ case because Plaintiffs’ interest was in the expressions themselves, not merely the underlying ideas. *See id.* at 1194. Addressing the fair use doctrine, the court found the doctrine to be an insufficient substitute for the unlimited use

allowed once a work was in the public domain. *See id.* at 1195. The court then held Section 514’s “supplemental protections”—which include a one-year safe harbor provision and a provision allowing the continued use of derivative works, if a reasonable royalty is paid—inadequate to insulate Section 514 from a First Amendment challenge. *See id.* at 1196; *see also Eldred*, 537 U.S. at 221. The court remanded with instructions to apply a First Amendment analysis.

III. STANDARD OF REVIEW

A. First Amendment Review

As mandated by the Tenth Circuit, the initial inquiry in my First Amendment analysis is “whether § 514 is content-based or content-neutral.” *See Golan*, 501 F.3d at 1196. Content-based restrictions on speech are those which “suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 657 (10th Cir. 2006) (internal citations and quotations omitted). These restrictions “are subject to the most exacting scrutiny.” *See id.* If Section 514 is a content-based restriction, I must consider whether the Government’s interest in promulgating the restriction is truly “compelling” and whether the Government might achieve the same ends through alternative means that have less of an effect on protected expression. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). By contrast, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A content-neutral restriction must be “narrowly tailored to serve a significant governmental interest.” *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288,

293 (1984)).

The parties both argue Section 514 is content-neutral. I agree. A restriction will be considered content-neutral when it can be justified without reference to the content of the speech restricted. *See Boos v. Barry*, 485 U.S. 312, 320 (1988) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Here, the speech restricted is a general category of speech—namely, speech created by foreign authors. The justification for the restriction lies in the protection of the authors’ interests in the expressions themselves, not the ideas the works encompass. Accordingly, Section 514 must be reviewed under the “content-neutral” standard. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994) (“*Turner I*”).

“A content-neutral regulation [of speech] will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (“*Turner II*”). While a content-neutral restriction must be “narrowly tailored to serve a significant government interest” unrelated to the suppression of free speech, it “need not be the least restrictive or least intrusive means of doing so.” *See Ward*, 491 U.S. at 791, 798. The requirement of narrow tailoring is satisfied so long as the restriction promotes a substantial government interest that would be achieved less effectively absent the restriction. *See id.* at 798–99.

Review of Congress’s judgment is deferential; the only relevant question is whether, in formulating its judgment, Congress has drawn reasonable inferences based on substantial evidence. *See Turner I*, 520 U.S. at 195. “So long as the means chosen are not substantially broader than necessary to achieve the government’s interest,” the restriction will not be invalid simply because “the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Ward*, 491 U.S. at 800.

When determining whether a regulation of speech is “substantially broader than necessary to achieve the government’s interest,” the Court asks whether the regulation suppresses a substantial amount of protected speech judged in relation to the Government’s legitimate interest. *See Virginia v. Hicks*, 539 U.S. 113, 118–19, 122–23 (2003). This requires a balancing of Plaintiffs’ interests with those of the Government. *See United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). The first step is to construe the challenged statute to determine the scope of the speech the statute affects. *See id.* The second step is to determine the scope of protected expressive activity necessarily suppressed by the statute’s terms. *See id.* at 1841. If the statute “leaves unprotected a substantial amount of speech not tied to the Government’s interest . . . it is overbroad and unconstitutional.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002).

B. Summary Judgment

In a motion for summary judgment, the moving party “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue

of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED. R. CIV. P. 56(c)). If this burden is met, then the non-moving party has the burden of showing there are genuine issues of material fact to be determined. *See id.* at 322. It is not enough that the evidence be merely colorable; the non-moving party must come forward with specific facts showing a genuine issue remains. *See id.*; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I shall grant summary judgment, therefore, only if the pleadings, depositions, answers to interrogatories, admissions, or affidavits—construed viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in that party’s favor—show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992); *Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 420 (10th Cir. 1990); FED. R. CIV. P. 56(c).

In a motion for summary judgment, I view the evidence “through the prism of the substantive evidentiary burden.” *Liberty Lobby, supra*, 477 U.S. at 254. The inquiry is based on “the quality and quantity of evidence required by the governing law” and “the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant.” *Id.* Where—as here—the parties file cross-motions for summary judgment, I am entitled to assume that no evidence needs to be considered other than that filed by the parties. *See Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000). Nonetheless—as cross-motions for summary judgment are to be treated separately—the denial of

one does not necessarily require the grant of the other. *See id.*

Although this case is presented in the light of summary judgment, the Court must still accord substantial deference to the predictive judgment of Congress. *See Turner I*, 512 U.S. at 666. In this context, the question is whether Congress based its decision on reasonable inferences and substantial evidence. *See id.* As long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment even if the evidence could reasonably lead to an inconsistent conclusion. *See Turner II*, 520 U.S. at 1196. If, however, Plaintiffs show the Government is unable to proffer such evidence, Plaintiffs are entitled to summary judgment. *See Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 129–30 (1989).

IV. ANALYSIS

The burden is on the Government to show it has a significant interest that is protected by limiting Plaintiffs' speech and that Section 514 does not burden substantially more speech than necessary to further the Government's interest. *See Turner I*, 512 U.S. at 664–65. The Government proffers three interests allegedly served by Section 514: (1) Section 514 brings the United States into substantial compliance with its international treaty obligations under the Berne Convention; (2) Section 514 helps protect the copyright interests of United States authors abroad; and (3) Section 514 corrects for historic inequities wrought on foreign authors who lost their United States copyrights through no fault of their own.

A. Compliance with the Berne Convention

It is not disputed that the Berne Convention requires the restoration of copyrights to

foreign authors. While compliance with international treaty obligations represents an important governmental interest, “[a]t the same time, it is well established that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.’” *Boos*, 485 U.S. at 324 (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)); see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006). Accordingly, I must ask whether Section 514 meets the requirements of the Berne Convention in a manner that is not “substantially broader than necessary to achieve the government’s interest.” See *Ward*, 491 U.S. at 800. In determining whether Section 514 is “substantially broader than necessary,” I must balance the Government’s interest against that of Plaintiffs. See *Williams*, 128 S. Ct. at 1838.

As noted by the Tenth Circuit, Section 514 was inconsistent with the United States copyright scheme as designed by the Framers and as implemented by Congress in the ensuing years. See *Golan*, 501 F.3d at 1190–92. Moreover, Section 514 interfered with Plaintiffs’ vested First Amendment rights to unrestrained use of the restored works. See *id.* at 1193–94. The Government argues under *Eldred* that Plaintiffs have a diminished interest in the restored works because Plaintiffs were not the original authors. See *Eldred*, 537 U.S. at 221 (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”). The Tenth Circuit, however, was not persuaded by this argument and distinguished Plaintiffs’ case from that at issue in *Eldred*, holding: “plaintiffs’ First Amendment interests in public domain works are greater than the interests of the *Eldred* plaintiffs. The *Eldred* plaintiffs did not—nor had they ever—possessed unfettered access to any of the works at issue there. . . . By contrast, the speech

at issue here belonged to plaintiffs when it entered the public domain.” *See Golan*, 501 F.3d at 1193. Unlike the plaintiffs in *Eldred*, therefore, Plaintiffs here did not have an amorphous and prospective “trivial interest” in property that belonged to someone else, but instead had “vested First Amendment interests in the expressions” contained in the works themselves. *See id.* at 1188, 1194. The Tenth Circuit considered Plaintiffs’ interests “near the core of the First Amendment.” *See id.* at 1193. The impact of removing the restored works without accommodating Plaintiff’s reliance interests is substantial. *See Golan*, 501 F.3d at 1182 (noting the added expense to Plaintiffs of complying with Section 514 made the exercise of their First Amendment rights costs prohibitive). Accordingly, I do not find the Government’s argument persuasive and conclude Plaintiffs’ interests in copying the works at issue is deserving of full First Amendment protection.

Having determined the scope of the Government’s interest and Plaintiffs’ interest, I now turn to the question whether Section 514 “leaves unprotected a substantial amount of speech not tied to the Government’s interest.” *See Ashcroft*, 535 U.S. at 256. As noted by the Government, Plaintiffs’ First Amendment speech is not entirely unprotected under Section 514. Plaintiffs—in addition to the protections afforded under the “traditional contours of copyright protection”—are immunized from liability for acts of copying occurring before restoration and are entitled to continue copying so long as the original author does not file notice of intent to enforce his or her copyrights. Plaintiffs are also entitled to sell or otherwise use copies of restored works for one year, and may continue to exploit derivative works forever, so long as a reasonable royalty is paid. What speech remains unprotected under Section 514, therefore, is any speech that involves copying more than one year after notice has been filed, and any derivative works made after

notice is filed and without payment of a royalty. When compared to the limited amount of speech that remains protected under Section 514, other than speech already protected by the idea/expression dichotomy and the fair use doctrine—speech that the Government concedes cannot be limited by its interest in complying with the Berne Convention—the amount unprotected is clearly “a substantial amount.” *See Ashcroft*, 535 U.S. at 256. I therefore ask whether the unprotected speech is “not tied to the Government’s interest” in complying with the Berne Convention. *See id.*

I begin by noting that the Berne Convention does not provide any direct reference to the question at issue here: whether or how member nations should accommodate “reliance parties”—namely, those persons with a vested interest in previously public-domain works—once the affected works are removed from the public domain and placed into the domain of copyright protection. To the extent Berne addresses this issue at all, the determination is left to the member nations: “respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.” *See Berne Convention*, Art. 18(3).

I read Article 18, Section 3, as a grant of discretion to member nations to implement the Berne Convention’s directive—that the copyrights of foreign authors be restored so long as the term of copyright protection in the country of origin has not expired—in light of each member nation’s established corpus of copyright law. Such discretion is not limited by Article 18, Section 3, so long as the directive is applied within the bounds of existing law. *See Fiscor Report*, Part E [**Docket # 147-4**]. In the United States, for example, it is not disputed that the restored copyrights must still be subject to the well-established First Amendment exceptions afforded by the fair-use doctrine and the idea/expression dichotomy. *See Golan*, 501 F.3d at

1194–95.

While the Government proffers an expert opinion stating that Article 18, Section 3, requires such accommodations be temporary in nature—*see* Ficsor Report, Part E [**Docket # 147-4**]*—*nothing in the Berne Convention indicates this is necessarily the case. Several member nations—including Germany, Hungary, the United Kingdom, Australia, and New Zealand—provide accommodations that are temporally permanent so long as certain conditions are met. *See* Ficsor Report, Part F [**Docket # 147-4**]. While these member nations imposed various schemes limiting the rights of reliance parties, none of these nations restored copyrights in the subject works in a manner that was equivalent—either in force or in time—to copyrights in those works that had not fallen into the public domain. *See* Ficsor Report, Part F [**Docket # 147-4**].

Congress itself—by affording reliance parties certain protections in Section 514 that went beyond those normally required to accommodate copyright law and First Amendment concerns—implicitly recognized that Article 18, Section 3, does not require the full restoration of equivalent copyrights. *See* 17 U.S.C. § 104A(d). Some of these protections—such as allowing reliance parties to use restored works for an unlimited period of time if the author fails to file a notice of intent to enforce his copyright, and allowing reliance parties to use derivative works for so long as a reasonable royalty is paid to the original author—are temporally permanent in nature. Although, as noted by the Tenth Circuit, none of these provisions are adequate to fully protect Plaintiffs’ First Amendment interests, they provide some protection beyond that which a normal copyright would allow. *See Golan*, 501 F.3d at 1193–94. By enacting such protections, Congress demonstrated it understood the broad latitude provided

member nations to protect reliance parties—even for an unlimited amount of time.

In light of the discretion afforded it by Article 18, Section 3, Congress could have complied with the Berne Convention without interfering with a substantial amount of protected speech—for example, by permanently “excepting parties, such as plaintiffs, who have relied upon works in the public domain,” *see Golan*, 501 F.3d at 1196; *see also* Ridder Dec. Ex. A [Docket # 150-9]. Accordingly—to the extent Section 514 suppresses the right of reliance parties to use works they exploited while the works were in the public domain—Section 514 is “not tied to the Government’s interest” in complying with the Berne Convention. *See Ashcroft*, 535 U.S. at 256. Section 514 is therefore “substantially broader than necessary to achieve the government’s interest.” *See Ward*, 491 U.S. at 800. Resolution of this question of law shows summary judgment in favor of Plaintiffs and against the Government is appropriate on this issue. *See Mares*, 971 F.2d at 494; FED. R. CIV. P. 56(c).

B. Protection of United States Authors’ Copyrights Abroad

Although the Government argues Section 514 serves the additional important Government interest of protecting the copyrights of United States authors abroad, this justification is largely intertwined with its argument regarding compliance with Article 18 of the Berne Convention—a justification which has been rejected as insufficient to justify the infringement of Plaintiffs’ First Amendment rights above. It is unnecessary to readdress these concerns here.

In addition to Article 18, however, the Government also argues Section 514 is necessary to protect United States authors from reprisal under Article 6. Article 6 states:

Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter

country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

By its own terms, Article 6 allows sanctions only against a “country *outside the Union* [that] fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union.” (emphasis added). As the United States is “one of the countries of the Union,” Article 6 provides no basis for sanctions to be levied against United States authors. Accordingly, compliance with Article 6 cannot provide an important Government interest. *See Turner I*, 512 U.S. at 664 (“when the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural”).

The Government next appears to argue that Section 514—to the extent it suppresses the right of reliance parties to use works they exploited while the works were in the public domain—serves an important Government interest because it protects American authors whose works had entered the public domain of other countries from having those public domain works exploited by reliance parties in those countries. Although the precise contours are not clear, the essence of this argument appears to be an assumption that Section 514 will encourage other countries to limit the rights of reliance parties, despite—as held above—having no obligation to do so under the Berne Convention.

In support of its argument, the Government proffers evidence of the economic impact caused by foreign piracy of copyrighted United States works. The Government’s evidence, however, focuses on the prior reluctance of foreign nations to protect American works unless the

United States implemented Article 18 of the Berne Convention. The Government proffers no evidence showing how suppression of reliance parties' First Amendment rights will lead to suppression of reliance parties' rights in foreign nations, or how such suppression will provide a "direct and material" benefit to United States authors. *See Turner I*, 512 U.S. at 664.

The Supreme Court teaches that—while Congress's predictive judgments are entitled to substantial deference—a court must "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *See id.* at 665–66. When Congress "trench[es] on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures." *See id.* at 666 (quoting *Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)). This requires an analysis of evidence speaking to the precise question at issue. *See id.* at 666–67. Without the benefit of specific factual data supporting Congress's reasoning, a court "cannot determine whether the threat is real enough" to constitute an important Government interest, or whether the remedy chosen is sufficiently narrow to overcome a First Amendment challenge. *See id.* at 665–67.

In order to properly pursue a motion for summary judgment, the Government "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The Government's evidence is inadequate to meet this initial threshold inquiry. Accordingly—as the evidence presented is inadequate to support the Government's motion in the first instance—summary judgment in favor of the Government

on this issue is inappropriate. *See id.*

Denial of the Government's summary judgment motion on this issue does not necessarily require me to grant Plaintiffs' cross-motion on the same question. *See Atlantic Richfield Co.*, 226 F.3d at 1148. Plaintiffs are still required to point to evidence they believe demonstrates the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. Plaintiffs meet this threshold inquiry by their proffer of testimony before Congress speaking to the precise issue raised—testimony that stated suppression of reliance parties' First Amendment rights in the United States was unlikely to lead to suppression of foreign reliance parties' rights as they concern United States works in foreign nations. *See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, Part III.B.2 [Docket # 150]*.

Although the Government had the opportunity to present evidence that was contrary to Plaintiffs' supported position, it did not do so. I therefore assume, for purposes of Plaintiffs' motion, that no such evidence exists. *See Atlantic Richfield Co.*, 226 F.3d at 1148. As the burden remains on the Government to present specific evidence showing it has a significant interest that is protected by limiting Plaintiffs' speech and that Section 514 does not burden substantially more speech than necessary to further the Government's interest, the Government's failure to muster such evidence shows no question of material fact remains to be determined on this issue. *See Turner I*, 512 U.S. at 664–65; *Celotex*, 477 U.S. at 323; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. Summary judgment in Plaintiffs' favor on this issue is therefore appropriate.

C. Correction of Historic Inequities

The Government's third proffered justification is that Section 514 "serves an important

equitable interest—the restoration of copyright protection to authors of foreign origin who lost their United States copyrights through no fault of their own, either because they failed to comply with United States copyright formalities, or because the United States did not have copyright relations with their nations at the time they created their works.”

Although neither party argues this point in any detail, the *amicus* brief filed in support of the Government’s position [**Docket # 152**] concedes an important point raised by Plaintiffs—namely, that Section 514 extends protections to foreign authors that are not afforded United States authors, even in their own country. Rather than correct an historic inequity, Section 514 appears to create an inequity where one formerly did not exist. The Government proffers no evidence showing how granting foreign authors copyrights in the United States—yet denying similar protections to United States authors—could constitute an important Government interest. Indeed, this rationale appears inconsistent with the Government’s overarching argument that restoring copyrights to foreign authors is an important Government interest for the simple reason that it will afford United States authors more copyright protection. As Plaintiffs’ position remains unrebutted by the Government, summary judgment in Plaintiffs’ favor is also appropriate on this issue.

V. CONCLUSION

Congress has a legitimate interest in complying with the terms of the Berne Convention. The Berne Convention, however, affords each member nation discretion to restore the copyrights of foreign authors in a manner consistent with that member nation’s own body of copyright law. In the United States, that body of law includes the bedrock principle that works in the public domain remain in the public domain. Removing works from the public domain violated

Plaintiffs' vested First Amendment interests. In light of the discretion afforded it by the Berne Convention, Congress could have complied with the Convention without interfering with Plaintiffs' protected speech. Accordingly—to the extent Section 514 suppresses the right of reliance parties to use works they exploited while the works were in the public domain—Section 514 is substantially broader than necessary to achieve the Government's interest.

On the basis of the record before the Court, I conclude no evidence exists showing whether the Government's two additional justifications for implementing Section 514—Section 514 helps protect the copyright interests of United States authors abroad; and Section 514 corrects for historic inequities wrought on foreign authors who lost their United States copyrights through no fault of their own—constitute important Government interests, or whether Section 514 is narrowly tailored to meet those interests.

Accordingly, the Government's motion [**Docket # 147**] is DENIED; Plaintiffs' motion [**Docket # 148**] is GRANTED.

Dated: April 3 , 2009.

BY THE COURT:

 s/Lewis T. Babcock
Lewis T. Babcock, Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-cv-01854-LTB

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,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States;
and
MARYBETH PETERS, in her official capacity as Register of Copyrights, Copyright
Office of the United States,

Defendants.

JUDGMENT AFTER REMAND

Pursuant to and in accordance with the Memorandum Opinion and Order signed by Judge Lewis T. Babcock on April 3, 2009, incorporated herein by reference, it is

ORDERED that the Government's Motion for Summary Judgment (Docket # 147) is DENIED; Plaintiffs' Motion for Summary Judgment (Docket # 148) is GRANTED. It is

FURTHER ORDERED that judgment is entered in favor of Plaintiffs and against the Government. It is

FURTHER ORDERED that Plaintiffs shall have their costs by the filing of a Bill of Costs with the Clerk of this Court within ten days of the entry of judgment.

DATED at Denver, Colorado, this 7th day of April, 2009.

FOR THE COURT:

GREGORY C. LANGHAM, CLERK

By: s/ Edward P. Butler

Edward P. Butler
Deputy Clerk