IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854

LAWRENCE GOLAN, et. al.,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFFS' RULE 56(f) MOTION

Preliminary Statement

In order to support a motion under Federal Rule of Civil Procedure 56(f), a party must establish that it lacks "facts essential" to opposing a pending motion for summary, and that additional time will cure the problem. See Fed. R. Civ. P. 56(f). The Rule 56(f) motion filed by Plaintiffs fails to meet this burden. Accordingly, this Court should deny the Rule 56(f) motion in its entirety, and adjudicate the government's pending summary judgment motion, which establishes as a matter of law the constitutionality of §514 of the Uruguay Round Agreements Act ("URAA").[1]

[1] Because only §514 of the URAA is at issue in this lawsuit, this memorandum uses the term "URAA" to refer to §514 of that act.

There are three faults in Plaintiffs' showing. First, many of the "facts" that Plaintiffs purport to need are not facts at all. Rather, they are legislative and constitutional history, or expert opinion on the meaning of an international treaty. These are questions of law. Accordingly, as with any legal advocacy, arguments that Plaintiffs tender on these topics must be made in their legal briefs. Indeed, no less than seven Supreme Court decisions from this past term alone relied on legislative or constitutional history—often in detailed discussions that extend for pages. See infra at 7–9. In none of these decisions did the Court rely on expert testimony or documentary evidence, which would have been necessary if the Court were addressing a question of fact. Where Plaintiffs seek discovery to develop "facts" on issues of law, their Rule 56(f) motion should be denied.

Second, other facts that Plaintiffs seek time to develop are not relevant to the pending summary judgment motion. Regarding the First Amendment, for example, Plaintiffs request discovery to attempt to develop facts showing that the URAA "imposes substantial burdens on speech," which is an element of the heightened scrutiny test. See Pl. 56(f) Mot. at 12. But the sole issue presented by the government's motion for summary judgment is whether heightened scrutiny applies at all. See Gov't MSJ at 34–39. Facts that might be relevant if Plaintiffs had already convinced the Court to apply heightened scrutiny are completely beside the point. Whether the URAA "imposes substantial burdens on speech" is not relevant to the question which constitutional test should be applied in reviewing the Act. Similar problems arise in Plaintiffs' argument regarding the Due Process Clause. Where Plaintiffs' Rule 56(f) motion

seeks to avoid responding to the government's motion for summary judgment in order to develop facts and expert testimony wholly irrelevant to opposing the motion for summary judgment, their Rule 56(f) motion should be denied.

Third, the vast majority of the "discovery" that Plaintiffs intend to conduct is not discovery at all. It is simply preparation—hiring and preparing experts and gathering facts from sources other than the government. Repeatedly throughout their Rule 56(f) motion, Plaintiffs indicate that they need time to "gather historical evidence and expert testimony," to "call upon historians," and to "locate evidence and a witness." Pl. 56(f) Mot. at 4, 6, 23. They also purport to "need more time to conduct an analysis" of the works whose copyright protection has been restored by the URAA. Id. at 20. This is not discovery, as defined in the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 26(a)(5) ("Parties may obtain discovery by one or more of the following methods: depositions; . . . written interrogatories; production of documents; . . . and requests for admission.") (emphasis added). The real concern underlying Plaintiffs' Rule 56(f) request seems to be that Plaintiffs simply need more time to prepare themselves—to get their own house in order. Putting aside the extent to which Plaintiffs should have prepared before even filing this suit, Plaintiffs have already had the more than two and a half years since filing suit with which to prepare, a fact that they have been none too shy about underscoring (and blaming the government for). See Scheduling Order at 6, 7, 11. Still, if all Plaintiffs wanted was an extension of time to respond to the motion for summary judgment, the government would of course as professional courtesy have acceded to any reasonable request. However, the

government should not be made to expend taxpayer money engaging in discovery so that Plaintiffs can have additional time to develop arguments wholly independent of that discovery. See Petrus v. Bowen, 833 F.2d 581, 583 (5th Cir. 1987) (courts should exercise their "broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); Alaska Cargo Transport, Inc. v. Alaska Railroad Corp., 5 F.3d 378, 383 (9th Cir. 1993) (similar); Florsheim Shoe Co. v. United States, 744 F.2d 787, 797 (Fed. Cir. 1984) (similar). Rule 56(f) motions should not be granted to excuse a movant's lack of preparation.

One final note at the outset. Significant portions of Plaintiffs' Rule 56(f) motion advance legal arguments opposing the government's motion for summary judgment. This severely undermines Plaintiffs' claim that they are unable to oppose the motion for summary judgment without factual development. More importantly, these passages are wholly irrelevant to Plaintiffs' motion under Rule 56(f), which presents the question whether factual discovery is necessary in order to respond to the motion for summary judgment, not whether the legal arguments in the motion for summary judgment are correct. Plaintiffs' legal arguments belong in their opposition to the government's motion for summary judgment, which Plaintiffs have not yet filed. Accordingly, because the legal arguments in Plaintiffs' Rule 56(f) motion are irrelevant to this Court's consideration of Plaintiffs' request, the government will not respond to them here.

Background

Contrary to the position espoused in Plaintiffs' Rule 56(f) motion, "[t]here is no requirement in Rule 56 that summary judgment not be entered until discovery is complete." Weir v. Anaconda Co., 773 F.2d 1073, 1081 (10th Cir. 1985). Rather, the explicit text of Federal Rule of Civil Procedure 56(b) allows a defendant, "at any time," to move for summary relief. See Fed. R. Civ. P. 56(b). From there, Rule 56(f) provides protection against a court issuing summary judgment too early: If a party can show that it lacks "facts essential" to opposing the motion for summary judgment, and that additional time would cure the problem, the Court may, in its discretion, grant the party additional time before responding to the summary judgment motion. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1553–54 (10th Cir. 1993).

However, courts do not automatically, or even routinely, grant Rule 56(f) motions. If the moving party seeks to develop facts that are "either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted." Id. at 1554. Accord Unova, Inc. v. Acer Inc., 363 F.3d 1278, 1284 (Fed. Cir. 2004) (affirming the denial of Rule 56(f) motion because the evidence sought would not have been admissible as to the issue presented on summary judgment); United States v. Miami University, 294 F.3d 797, 815–16 (6th Cir. 2002) (affirming the denial of Rule 56(f) motion where the summary judgment motion presented only "questions of law and additional discovery would not aid in the resolution of those questions"); Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir. 1994) (affirming denial of Rule 56(f)

motion where the evidence sought "would not have shed light on any of the issues upon which the summary judgment decision was based"). Plaintiffs have not demonstrated that the "facts" that they seek to develop are relevant to the Court's resolution of the government's motion for summary judgment.

Argument

This lawsuit challenges the constitutionality of the URAA. The government's motion for summary judgment defends the Act on four grounds: First, that the URAA is a proper exercise of Congress's power under the Copyright Clause. See Gov't MSJ at 5–31. Second, that the URAA is a proper exercise of Congress's power to implement valid treaties. See id. at 31–34. Third, that the URAA respects the freedom of speech, guaranteed by the First Amendment. See id. at 34–39. And, fourth, that the URAA does not run afoul of the Due Process Clause. See id. at 39–43. Plaintiffs move for Rule 56(f) discovery as to each of these issues.

I. The "Facts" That Plaintiffs Seek Regarding the Copyright Clause Issue Are Legislative and Constitutional History, Which Are Legal Questions That Must Be Addressed in Legal Briefs.

Plaintiffs have moved for Rule 56(f) discovery in order to procure "evidence" disputing the government's showing that the 1790 Copyright Act, and many other statutes enacted throughout this nation's history, support the URAA's constitutionality.[2] But questions of law are not a proper subject for factual development or expert testimony. See United States v. Wilson,

[2] See Gov't MSJ at 14–25. The government contends that these statutes took similar actions—restoring intellectual property protection to works in the public domain—to the URAA, thereby demonstrating the absence of any constitutional principle preventing such restoration.

133 F.3d 251, 265–66 (4th Cir. 1997); Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995); Aguilar v. International Longshoremen's Union, 966 F.2d 443, 447 (9th Cir. 1992); Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992). And legislative and constitutional history are questions of law. The Tenth Circuit has made this principle explicit in its jurisprudence. See Oklahoma ex rel. Department of Human Services v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983) ("[Q]uestions of statutory construction and legislative history raised herein present legal questions."); Union Pacific Land Resources Corp. v. Moench Investment Co., 696 F.2d 88, 93 n.5 (10th Cir. 1982) ("Questions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment."). See also Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993); Wollan v. Department of the Interior, 997 F. Supp. 1397, 1403 (D. Colo. 1998).

The reason for this rule is simple: Courts are tasked with interpreting statutes and the Constitution. When they use history to illuminate those texts, history is an "interpretive aid," and therefore "is not considered reliance on evidence." Thomson Consumer Electronics, Inc. v. Innovatron, S.A., 3 F. Supp. 2d 49, 52 (D.D.C. 1998) (internal quotation marks omitted). Accordingly, when history is used to better understand legislation or the Constitution—whether it is history of a statute, history of the founding of the Republic, or history of the common law—it is a question of law.

Even a cursory glance at the Supreme Court's jurisprudence makes this principle clear. Not less than seven times in the past Supreme Court term alone did the Court rely on history as

an aid to interpreting the Constitution or statutory texts. See Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004); Rasul v. Bush, 124 S.Ct. 2686 (2004); Blakely v. Washington, 124 S.Ct. 2531 (2004); Schriro v. Summerlin, 124 S.Ct. 2519 (2004); Hiibel v. Sixth Judicial District Court of Nevada, 124 S.Ct. 2451 (2004); Crawford v. Washington, 124 S.Ct. 1354 (2004); Locke v. Davey, 124 S.Ct. 1307 (2004). The Court's use of history was not just the history of statutes' enactments, as Plaintiffs might suggest. See Pl. 56(f) Mot. at 7. Rather, the Court's historical analyses ranged the gamut, from extended discourse on English common law at the founding, see Crawford, 124 S.Ct. at 1359–61, to American common law through history, see Rasul, 124 S.Ct. at 2692–93; Blakely, 124 S.Ct. at 2536; Schriro, 124 S.Ct. at 2525; Hiibel, 124 S.Ct. at 2457, and from the history of colonial and state practice, see Crawford, 124 S.Ct. at 1362–63; Locke; 124 S.Ct. at 1313–14, to the beliefs of the Framers of the Constitution, see Blakely, 124 S.Ct. at 2539, 2543.

If Plaintiffs are correct that history presents a question of fact, then these seven decisions would have had to rely on an evidentiary record for their analyses, for facts can only be introduced through testimony and documentary evidence. Not once did the Supreme Court do so, however, establishing concretely that the Court does not view history, when used to interpret legislation or the Constitution, as an issue of fact.

Nowhere is this principle more apparent than in the last decision issued by the Supreme Court this term, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004), one of the two principal decisions on which Plaintiffs rely in their Rule 56(f) motion. In Sosa, the Supreme Court

conducted an extended historical analysis in aid of interpreting the Alien Tort Statute. See id. at 2754–2759. This analysis was not confined narrowly to the history of the statute's enactment, but rather broadly discussed the interaction between the Alien Tort Statute and "the ambient law of the era." Id. at 2755. Nowhere in Sosa did the Supreme Court rely on an evidentiary record in support of its historical discussion; the history was submitted in an amicus brief.[3] See id. (accepting the arguments in the amicus brief of Vikram Amar, et al., as to "the ambient law of the era" in which the Alien Tort Statute was enacted). This would have been impossible if history were a question of fact, for briefs are how legal arguments are made. Facts must be entered through testimony or documentary evidence, and must occur during the trial phase of a lawsuit, not on appeal. The Sosa decision, then, rather than supporting Plaintiffs' position, confirms what Rasul, Blakely, Schriro, Hiibel, Crawford, and Locke make plain. It also confirms the Tenth Circuit's explicit holdings in Weinberger and Union Pacific.

Plaintiffs fare no better with the second Supreme Court decision that they cite in support the position that history, as it is used in this lawsuit, is a question of fact. See Hunter v. Underwood, 471 U.S. 222 (1985) (discussed by Plaintiffs at Pl. 56(f) Mot. at 6). Plaintiffs are correct that the district court in Hunter admitted factual evidence as to what occurred during the

[3] Plaintiffs concede that this is true, see Pl. 56(f) Mot. at 6, but contend that it proves that history can be relevant to legal interpretation. See id. Of course history can be relevant to legal interpretation; the government spent 11 pages in its motion for summary judgment painstakingly detailing how the history of intellectual property legislation from 1790 through World War II should inform the Court's interpretation of the Copyright Clause. See Gov't MSJ at 14–25. See also Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) ("[A] page of history is worth a volume of logic."). But Sosa also underscores a more fundamental principle: When history is used as a guide to legal interpretation, history itself is a legal issue. Sosa proves Plaintiffs wrong.

enactment of the state legislation at issue in the lawsuit. See Pl. 56(f) Mot. at 6. Plaintiffs neglect to mention, however, that in a case where a plaintiff challenges the constitutionality of a statute on the grounds that it was motivated by racial animus, as the plaintiff did in Hunter, he must prove "racially discriminatory intent or purpose" as an essential element of the cause of action. Hunter, 471 U.S. at 227. See also Harris v. City of Wichita, 1996 WL 7963, **3 (10th Cir. 1996) (unpublished) ("Discovery into motive may be permissible when the alleged constitutional violation turns on an unconstitutional motive."). Thus, what took place during the statute's enactment was the relevant fact to the Hunter decision, not to understanding or interpreting the statute, but to whether the statute was motivated by racial animus, and therefore unconstitutional.[4] This is different use of history than what Plaintiffs contemplate here.

Thus, Plaintiffs' position, that "[c]ourts have not hesitated to consider historical evidence and expert testimony where, as here, a constitutional challenge may hinge on disputed historical information related to a law," is demonstrably false. Pl. 56(f) Mot. at 6. The best (and only) support that Plaintiffs can muster for this contention is two Supreme Court decisions, one of which, Sosa, actually supports the government's position, and the other of which, Hunter, is wholly irrelevant to the issue at hand.

Plaintiffs' Rule 56(f) motion seeks discovery on two historical issues, both of which are attempts to illuminate the meaning of statutes or the Constitution, and thus fall under Sosa,

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[4] Additionally, the Court carefully noted that, in Hunter, there was no disagreement over the factual history of the statute's enactment. See Hunter, 471 U.S. at 229 ("Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.").

Rasul, Blakely, Schriro, Hiibel, Crawford, and Locke, not Hunter. Plaintiffs first seek to collect and submit information "related to the historical understanding of copyright at the time of the drafting of the Copyright Clause, both in the U.S. and England."[5] Pl. 56(f) Mot. at 4. Plaintiffs intend to use this information to contend that the government has misinterpreted the 1790 Copyright Act. See id. at 9–10. In turn, Plaintiffs intend to use the new understanding of the 1790 Act to dispute the government's use of the Act as a way of understanding the Copyright Clause.[6] This is paradigmatic use of history as an interpretive aid for understanding legislation: Plaintiffs seek to use history as an aid to interpreting the 1790 Act, which then will serve as an aid to interpreting the Copyright Clause. Indeed, Plaintiffs admit as much, when they explain that "the First Congress's understanding of the effect of the Copyright Act of 1790 may have on the public domain . . . can only be understood by examining the factual context in which the Act arose and operated in 1790." Pl. 56(f) Mot. at 8 (emphasis added and deleted). This is precisely the same purpose to which the Supreme Court used history in Sosa. See 124 S.Ct. at 2755–61 (extended discussion of the Alien Tort Statute and the "ambient law of the era" in which it was

[5] Plaintiffs' argument as to the 1790 Act also includes an extended discussion of Wheaton v. Peters, 33 U.S. 591 (1834), which the government relies on in its motion for summary judgment. See Pl. 56(f) Mot. 8–9. However, the meaning of the Wheaton decision is plainly an issue of law. Plaintiffs' lengthy discussion of Wheaton, therefore, has no bearing on their Rule 56(f) motion, which should have dealt only with areas of fact for which Plaintiffs need discovery in order to oppose the pending motion for summary judgment. As a result, the government need not respond at this time.

[6] The government uses the 1790 Copyright Act as support for the proposition that the Copyright Clause does not prevent the restoration of copyright protection to works in the public domain, because the 1790 Act protected works that had previously been in the public domain. See Gov't MSJ at 15–16.

enacted). Accordingly, the history of copyright at the passage of the 1790 Copyright Act is an issue of law. Therefore, Plaintiffs have no right to present affidavits, testimony, or expert reports on this issue and cannot claim that they need discovery in order to respond to the government's motion for summary judgment.

Plaintiffs also seek to collect and submit historical information in order to dispute the clear text of the seven statutes, six presidential proclamations, and four judicial decisions that the government contends bear out an historical tradition that supports the government's interpretation of the Copyright Clause.[7] See Pl. 56(f) Mot. at 5. This too is legislative history—Plaintiffs intend to use this historical information as a tool for interpreting these statutes, proclamations, and judicial decisions.[8] Of course, Plaintiffs argue the contrary,

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[7] See Gov't MSJ at 19–25.

[8] Plaintiffs attempt to disguise the nature of their intended use of history, labeling this dispute between the parties a dispute over the "existence—or not—of such a historical tradition." Pl. 56(f) Mot. at 5. This is true, for what it is worth. The parties do disagree whether the historical tradition exists. However, that disagreement is over the meaning of the statutes, presidential proclamations, and judicial decisions cited by the government, which is what makes out the historical tradition. A disagreement over the meaning of these legal texts is not a factual disagreement. Moreover, the disagreement over the historical tradition is only relevant as an aid to interpreting the Copyright Clause. Even if legal texts were not the basis for the disagreement, then, because the dispute is only in the service of interpreting the Copyright Clause, it would present a question of law, as the Supreme Court illustrated in Sosa.

Additionally, because the government has not introduced in support of its motion for summary judgment testimony or expert witnesses to establish the historical tradition—because it is clear that the government believes that the legislation, presidential proclamations, and judicial decisions cited in its motion for summary judgment bear out this history—Plaintiffs have no need to "discover" from the government on what basis it asserts that an historical tradition exists. See Pl. 56(f) Mot. at 4–5, 7.

suggesting that "[h]ow a law operated in practice in 1790 is no less a fact than the existence of written commentary from that period." Pl. 56(f) Mot. at 5. But Plaintiffs' statement is only as accurate as its second clause, for the Supreme Court in Sosa had no problem relying on commentary from "that period" without hearing evidence or expert testimony on it. See Sosa, 124 S.Ct. at 2756 (citing Blackstone and other commentators). See also Blakely, 124 S.Ct. at 2543 (citing Blackstone without reliance on the evidentiary record); Schriro, 124 S.Ct. at 2525 (same); Hiibel, 124 S.Ct. at 2457 (citing English commentary without reliance on an evidentiary record). Plaintiffs cannot sidestep these Supreme Court decisions, nor the decisions of the Tenth Circuit in Weinberger and Union Pacific.[9] History, when used as an interpretive aid to the Constitution or to legislation—no matter how old, and no matter whether the history is of the statute's enactment or the history of the time period more broadly—is a question of law, to which no factual development is proper. Therefore, Plaintiffs' suggestion that they need discovery in order to respond to the government's motion for summary judgment as to the Copyright Clause issue should be rejected; Plaintiffs seek to develop testimony that is inadmissible before this Court.

[9] Plaintiffs attempt to distinguish the binding Tenth Circuit decisions, Weinberger and Union Pacific, see supra at 7, by arguing that these decisions prohibit the use of factual development and expert testimony only "for statutory interpretation questions." Pl. 56(f) Mot. at 11 n.6. But that is precisely the use to which Plaintiffs seek to put history. As established above, Plaintiffs seek to introduce historical "evidence" as an interpretive device for the 1790 Act and the numerous other acts passed in the 19th and 20th centuries, on which the government relies. This is precisely what Weinberger and Union Pacific proscribe.

It is important to note the government does not eschew the use of history as an interpretive device. Nor does it object to the presentation of history in Plaintiffs' opposition to the government's motion for summary judgment. Rather, the government merely seeks to have this Court ensure that the conduct of this lawsuit respects the delineation between questions of fact and questions of law, as the Supreme Court and the Tenth Circuit have articulated it. Any arguments that Plaintiffs seek to make based on history can be made in their briefs. They may hire historians to assist in the preparation of those briefs, and they may cite to historical documents as support for their arguments. Plaintiffs cannot, however, treat an interpretive aid—even history—as a question of fact.

An independent reason for denying Plaintiffs' Rule 56(f) motion as to the Copyright Clause issue is that the "discovery" that Plaintiffs seek regarding this issue is not discovery at all. Rather, Plaintiffs only request additional time in order to gather evidence and hire experts. See, e.g., Pl. 56(f) Mot. at 4 (requesting time to "gather historical evidence and expert testimony"); id. at 5 (in opposition to the motion for summary judgment, Plaintiffs will use "expert testimony of a historian and historical evidence"); id. at 6 ("Plaintiffs intend to call upon historians"); id. at 7 ("Plaintiffs seek to develop . . . historical evidence and expert testimony"). This cannot support a motion under Rule 56(f), for Plaintiffs do not require discovery in order to compile this "evidence." See Fed. R. Civ. P. 26(a)(5). Nor should they need additional time, for they have had more than two and a half years since they filed this lawsuit to prepare their position in this case. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir.

1993) (where the 56(f) movant has been "dilatory," the motion should be denied); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992) (same); Patty Precision v. Brown & Sharpe Manufacturing Co., 742 F.2d 1260, 1264 (10th Cir. 1984) (same). The government should not bear the burden of Plaintiffs' lack of preparation.

II. Plaintiffs' Suggested Discovery Regarding the First Amendment Issue Is Irrelevant to the Pending Summary Judgment Motion.

The discovery that Plaintiffs seek regarding their claim that the URAA abridges the freedom of speech, in violation of the First Amendment, suffers from a simple, but fatal, flaw: The facts that Plaintiffs purport to need are completely irrelevant to the pending motion for summary judgment. As a result, the Rule 56(f) motion should be denied as to this issue, for discovery that does not bear on the motion for summary judgment provides no support for a motion under Rule 56(f). See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir. 1993) (when discovery is "either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted"); Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir. 1994) (affirming denial of Rule 56(f) motion where the evidence sought "would not have shed any light on any of the issues upon which the summary judgment decision was based").

As explained in Plaintiffs' Rule 56(f) motion, Plaintiffs seek to delay responding to the government's motion for summary judgment on the First Amendment issue in order to develop information "related to whether §514 imposes substantial burdens on speech," the analysis of which would be important if the URAA is subject to heightened First Amendment scrutiny. Pl.

56(f) Mot. at 12. But the government's entire argument as to the First Amendment in its summary judgment briefs is that no heightened scrutiny is necessary. See Gov't MSJ at 34–39. This requested discovery has no bearing on that issue; "whether §514 imposes substantial burdens on speech" does not affect the question whether the URAA must be subjected to heightened scrutiny. Plaintiffs do not contend otherwise.[10]

To be sure, Plaintiffs also discuss at length why they believe the government is wrong to argue that no heightened scrutiny applies. See Pl. 56(f) Mot. 14–18. This is a legal argument, however—an argument that should be in Plaintiffs' opposition to the government's motion for summary judgment, not in a Rule 56(f) motion. Because this legal discourse does not relate to the relief that Plaintiffs seek in their Rule 56(f) motion, the government will not respond to it here.[11]

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[10] Additionally, many the facts that Plaintiffs claim they intend to "discover" from the government are already publicly available. Information on Notices of Intent to Enforce—which represent two of the three categories of information on which Plaintiffs contend they need discovery, see Pl. 56(f) Mot. at 12–13—are, as mandated by the URAA, published in the Federal Register. See 17 U.S.C. §104A(e)(1)(B). What is more, Plaintiffs are aware that this information is published publicly, for their lawyers' own website, created specifically for this lawsuit, links to the Copyright Office's website, which posts all the Federal Register notices. See Plaintiffs' lawyers' website <http://notabug.com/golan>, linking to the U.S. Copyright Office's website <http://www.copyright.gov/gatt.html>. This further militates in favor of denying Plaintiffs' Rule 56(f) motion.

[11] Plaintiffs also argue that the Court has already rejected the government's argument that heightened scrutiny does not apply. See Pl 56(f) Mot. at 14. This is not true. The Court held that, at the motion to dismiss stage, Plaintiffs' First Amendment claim survived. 310 F. Supp. 2d 1215, 1220 (D. Colo. 2004). That decision does not tie the Court's hands at the summary judgment stage, especially in light of the Luck's Music Library decision, which was issued after this Court's ruling on the motion to dismiss. See Luck's Music Library, Inc. v. Ashcroft, __ F.

(continued...)

III. The Facts That Plaintiffs Seek to Marshal Regarding the Due Process Clause Are Irrelevant to the Issues Raised by the Motion for Summary Judgment.

Regarding their contention that the URAA violates the Due Process Clause, Plaintiffs request additional time to oppose the government's motion for summary judgment so that they can assemble information on "the length and effect of [the URAA's] retroactivity." Pl. 56(f) Mot. at 18 (emphasis deleted). As with their First Amendment position, however, Plaintiffs' request fails because the length and effect of the URAA's supposed retroactivity are not relevant to the government's motion for summary judgment. The government's summary judgment position as to the Due Process issue is twofold: First, that the URAA is not retroactive. See Gov't MSJ at 39–41. And, second, that, even if the URAA were retroactive, it would be evaluated under the rational basis standard, which does not allow for factual development or expert testimony.[12] See id. at 41–43. Understanding the length and effect of the URAA's supposed retroactively will in no way allow Plaintiffs to better address these two legal issues. Accordingly, because the factual development that Plaintiffs intend is irrelevant to the issues presented by the summary judgment motion, Plaintiffs' Rule 56(f) motion as to the Due Process issue should be denied. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550,

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[11](...continued)
Supp. 2d __, 2004 WL 1278070 (D.D.C. 2004). At any rate, this argument relates only to the merits of the government's summary judgment motion, not to whether the Court should delay Plaintiffs' response to that motion.

[12] Plaintiffs spend pages in their Rule 56(f) motion contending that these legal arguments are incorrect, see Pl. 56(f) Mot. at 18–23, but a Rule 56(f) motion is the wrong vehicle for such arguments. See supra at 4.

1554 (10th Cir. 1993) (when discovery is "either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted"); Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir. 1994) (affirming denial of Rule 56(f) motion where the evidence sought "would not have shed any light on any of the issues upon which the summary judgment decision was based").

Additionally, an independent reason for rejecting Plaintiffs' Rule 56(f) motion is that the "discovery" that Plaintiffs contend they need is not discovery, but rather additional time to utilize their own resources. As their memorandum notes, Plaintiffs "are in the process of collecting" the information that they seek regarding the effect of the URAA and "need more time to conduct an analysis." Pl. 56(f) Mot. at 20. They seek the leniency of the Court because, "[t]his is no easy task." Id. at 18. But Plaintiffs have had more than two and a half years since this lawsuit was filed in which to seek this information. See supra at 14–15. If Plaintiffs simply need additional time to ready their own house, the government will not object to a reasonable extension. However, the government and the public fisc should not have to bear the burden of this delay by being forced to engage in discovery in the interim.

IV. Interpreting the Berne Convention Is a Question of Law, for Which No Facts Are Admissible, and Which Cannot Support a Rule 56(f) Motion.

Finally, Plaintiffs seek a Rule 56(f) extension in order to "locate evidence and an expert witness" to assist the Court in interpreting the Berne Convention, which the government asserts is implemented by the URAA. See Pl. 56(f) Mot. at 23. In support of this request, Plaintiffs note that Federal Rule of Civil Procedure 44.1 allows for evidentiary submissions regarding "the law

of a foreign country." Fed. R. Civ. P. 44.1. Plaintiffs do not, however, explain how this rule applies here.

The Berne Convention, signed by the President and ratified by the Senate, is not the "law of a foreign country." It is a treaty, signed by the President and ratified by the Senate. The proper interpretation of a treaty is a question of law. See, e.g., Smythe v. U.S. Parole Commission, 312 F.3d 383, 385 (8th Cir. 2002) ("Questions of statutory and treaty interpretation are questions of law that we review de novo."); United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001) ("Proper interpretation of a treaty presents a question of law that this court reviews de novo."); Cortes v. American Airlines, Inc., 177 F.3d 1272, 1280 (11th Cir. 1999) ("The first issue requires us to determine whether the district court properly construed the terms of a treaty, which is a question of law that we review de novo."); Barseback Kraft, AB v. United States, 121 F.3d 1475, 1479 (Fed. Cir. 1997) ("The underlying questions of contract and treaty interpretation are both questions of law."); Yapp v. Reno, 26 F.3d 1562, 1565 (11th Cir. 1994) ("Treaty interpretation presents a question of law, subject to de novo review."); Kreimerman v. Casa Veerkamp, S.A., 22 F.3d 634, 639 (5th Cir. 1994) ("[T]he interpretation of treaty provisions is a question of law."). Accordingly, discovery on the meaning of the Berne Convention cannot be a basis for granting Plaintiffs' Rule 56(f) motion; treaty interpretation is not a question subject to factual development or expert testimony. See Unova, Inc. v. Acer Inc., 363 F.3d 1278, 1284 (Fed. Cir. 2004) (affirming the denial of Rule 56(f) motion because the evidence sought would not have been admissible as to the issue presented on summary

judgment); United States v. Miami University, 294 F.3d 797, 815–16 (6th Cir. 2002) (affirming the denial of Rule 56(f) motion where the summary judgment motion presented only "questions of law and additional discovery would not aid in the resolution of those questions").

Further, an independent reason for denying Plaintiffs' Rule 56(f) request as to international law is because their motion makes plain that they do not seek time in which to conduct discovery. Rather, they seek time to conduct their own research into this issue and hire experts, each of which could have been done in the more than two and a half years since this lawsuit was filed. See Pl. 56(f) Mot. at 23 (Plaintiffs seek to "locate evidence and an expert witness to discuss the Berne Convention and the TRIPs Agreement."). The government should not bear the burden of Plaintiffs' lack of diligence. See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir. 1993) (where the 56(f) movant has been "dilatory," the motion should be denied); Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992) (same); Patty Precision v. Brown & Sharpe Manufacturing Co., 742 F.2d 1260, 1264 (10th Cir. 1984) (same).

Conclusion

For the foregoing reasons, the Court should deny in its entirety Plaintiffs' motion for discovery pursuant to Rule 56(f).

Dated: August 2, 2004

Respectfully submitted,

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Certificate of Service

I certify that, on August 2, 2004, I caused a copy of the foregoing Opposition to Plaintiffs' Rule 56(f) Motion to be served by first-class mail, postage prepaid, upon counsel at the following address:

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