IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:01-cv-1854-LTB-BNB

LAWRENCE GOLAN, 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, MARYBETH PETERS, in her official capacity as Register of Copyrights, Copyright Office of the United States,

Defendants.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The government continues to frame this case as if it were about whether the Berne Convention requires the restoration of copyrights in material that had passed into the public domain. It plainly does; that is not in dispute. The focus of this case is the government's decision to participate in Berne, and its chosen method of doing so. The real questions here are (1) whether the First Amendment allows the government to restore copyrights in materials that had passed into the public domain; and (2) if so, whether the government burdened more speech than it needed to in order to comply with Berne.

The government suggests Plaintiffs do not believe the first question is a real question based on the ordering of Plaintiffs' first brief. On the contrary, the first question is critical, and the answer should be plain. In enacting the URAA, Congress took speech that belonged to the public and made it off-limits. In doing so, it interfered with the "vested First Amendment rights" of Plaintiffs and the public. The government tries to avoid the First Amendment implications of privatizing public speech by suggesting that First Amendment scrutiny of this issue is foreclosed by the Tenth Circuit's previous decision in this case. But that decision instructed this Court to apply constitutional scrutiny to exactly this question. As for the answer, the government has itself provided it. Years ago, it identified a "bright line" that protects material that "has already gone into the public domain." This Court should respect the line the government itself drew and recognize the First Amendment prohibits the government from raiding the public domain. It should recognize and protect, as a First Amendment matter, the "bedrock principle" the Tenth Circuit has already recognized in this case: works in the public domain remain in the public domain.

Even if the government has the power to give away pieces of the public domain as a general matter, both sides agree its decision about *how* to do so is subject to intermediate scrutiny. In enacting the URAA, the government chose to go well beyond what was necessary to comply with the Berne Convention, and implemented a scheme of copyright restoration that is far more harmful to the speech interests of Plaintiffs and other reliance parties throughout the United States than anything Berne demanded. As a result, Section 514 cannot survive intermediate scrutiny analysis.

Faced with this disconnect between what Berne requires and what Congress chose to do, the government urges the Court toward a variety of distractions. First, the government urges the Court toward the wrong starting point for its First Amendment analysis. It notes the Berne Convention sets "no minimum level of protection" for reliance interests and goes on to suggest that the URAA should pass First Amendment scrutiny because it provided some protection where Berne supposedly required none. That is backward. The proper starting point in the intermediate scrutiny analysis is the government's interest. Here, the interest it asserts is the need to comply with Berne. If Congress could have provided stronger protection to reliance parties while still complying with Berne, then it burdened more speech than it had to in order to comply with Berne. Accordingly, the important question is not whether Berne permits the government to do what it did, but whether Berne permits the government to do *more* than it did in protecting reliance interests. Berne plainly does.

Next, the government tries to avoid the wide discretion that Berne provides by suggesting that Berne does not permit any permanent protection for reliance parties. Yet the government admits there is no basis for any such limitation in the text of the Berne Convention

since, as the government concedes, it "does not mention reliance interests" at all and "leaves up to each member nation" the best way to protect those interests. Nor is the government able to avoid the fact that other Berne signatories including the United Kingdom have provided various forms of permanent protection for nearly a century. While the government tries to suggest these permanent provisions enacted by the United Kingdom and other Berne signatories violate Berne or are simply a bad idea, it neglects to reconcile this suggestion with the fact the U.S. itself provides permanent protection for certain reliance interests.

Finally, the government suggests the Court should simply defer to its decision about what Berne demands, notwithstanding the obvious discretion the plain text of Article 18 provides, and the tradition of permanent protection established by other signatories. But the government itself demonstrated long ago that it understood permanent protection for reliance parties is well within the terms of Berne, because the Copyright Office proposed exactly that in 1988. Congress itself identified the serious First Amendment concerns that copyright restoration would create when it chose not to restore copyrights in 1988. Yet those concerns were simply ignored in 1994, when Congress passed the URAA. Far from "minding First Amendment concerns," the government simply set them aside. That should draw heightened scrutiny, not deference.

Ultimately, the distinction that matters for intermediate scrutiny is simple. The government may have had good reasons to participate in Berne, and it had to meet specific minimum requirements that Berne imposed in order to do so. But the government went way beyond that here. It imposed restrictions on reliance parties that Berne did not require, and it did

so without any evidence that its decision to sacrifice the speech rights of its citizens by going beyond Berne would accomplish anything at all.

Section 514 represents an unprecedented and unconstitutional raid on the public domain, which burdens substantially more speech than it needs to in order to comply with the Berne Convention. It should be overturned.

II. ARGUMENT

A. The First Amendment Prohibits Congress From Restoring Copyrights

The URAA transfers a liberty interest from the American public to foreign copyright owners. That liberty interest was the freedom to copy, share, and build upon certain works that were unquestionably in the public domain. The government tries to diminish the importance of this interest by suggesting it is nothing more than a supposed right to make "other people's speeches." Government's Opposition to Plaintiffs' Motion for Summary Judgment and Reply in Support of Defendants' Motion for Summary Judgment ("Gov't Reply") at 10 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). But the Tenth Circuit has already dismissed that suggestion. *See Golan v. Gonzales*, 501 F.3d 1179, 1193 (10th Cir. 2007). As it explained, the "speeches" in question here did not belong to other people; they had passed into the public domain so they "belonged to the Plaintiffs" and the rest of the public. *See id*. Everyone had liberty to "make" these "speeches" just as everyone today has the liberty to "make" the "speeches" of Abraham Lincoln or William Shakespeare. *See id.* at 1192 ("works in the public domain belong to the public"). What the government now purports to do is to remove that freedom to "make" these public domain "speeches," and vest that liberty privately in (typically) the estates of the people who originally made these speeches.

The government tries to attack the specific speech interest of the individual Plaintiffs here, suggesting they are "modest" or "negligible." Gov't Reply at 12-14. But the Tenth Circuit has rejected that suggestion, too. It held the speech interests at stake here fall "near the core of the First Amendment" because the URAA hampers Plaintiffs' free expression rights. *Golan*, 501 F.3d at 1193.[1]

The crucial distinction between regulating material that remains under copyright protection and giving away the public domain should not be lost on the government. This was precisely the distinction highlighted by the government when it persuaded the Supreme Court that recognizing a power in Congress to extend *subsisting* copyrights did not mean recognizing a right to remove works from the public domain. *See Golan*, 501 F.3d at 1193 n. 4 (citing Transcript of Oral Argument at 44, *Eldred v. Ashcroft, 573 U.S. 186 (2003)*). As the Tenth Circuit observed in this case, it was the government that advanced this distinction and suggested it presents a "bright line" that the government cannot cross. When asked whether Congress had the power to restore protection to a work whose "copyright . . . expired yesterday" then-Solicitor General Theodore Olsen suggested the public domain presented a "bright line" because once

[1] The government also tries to diminish the importance of the interest at stake by pointing out this argument came last in Plaintiffs' first brief. As a matter of "logic," the government asserts, "any argument challenging the method of enforcing restored copyright as to reliance interests should come after the argument, if any, challenging restoration of copyright in the first instance. . . . Presumably, a plaintiff with relative confidence in its position . . . would follow that logical order." Gov't Reply at 25. Plaintiffs certainly do not mean to confuse the government's "logic" here. Plaintiffs' first brief responded to the government's first brief, so Plaintiffs thought it most helpful to structure the reply in response to the government's assertions. But so as not to further confuse the matter with "presum[ptions]" about "relative confidence," Plaintiffs will order their reply to the government's final brief according to the "logic" of the government's own reasoning. Either way, the conclusion is the same: the URAA exceeds Congress's power under the First Amendment.

"[s]omething . . . has already gone into the public domain [] other individuals or companies or entities may then have acquired an interest in, or rights to be involved in disseminating [the work.]." *Golan*, 501 F.3d at 1193 n. 4 (citing Transcript of Oral Argument at 44, *Eldred v. Ashcroft, 573 U.S. 186 (2003)*).

The line the government drew in *Eldred* is significant both for the purposes of the Progress Clause and for purposes of the First Amendment. That argument is based upon a method of reasoning as central as any to constitutional law — and one most prominently demonstrated by the Supreme Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954). In *Bolling*, the Supreme Court acknowledged the Equal Protection Clause of the Fourteenth Amendment did not apply to the federal government. Nonetheless, *Bolling* held the equal protection principles articulated by the Court in *Brown v. Board of Education of Topeka, Shawnee County et al.*, 347 U.S. 483 (1954) constrained the federal government under the Due Process Clause. *See Bolling*, 346 U.S. at 498-500.

Whatever else Due Process meant, the Court held, it could not mean that the federal government could act in ways that violated Equal Protection.

The government responds to Plaintiffs' argument by suggesting the Plaintiffs are somehow cheating — "ineffectively disguis[ing]" a "Copyright Clause challenge . . . under the First Amendment." Gov't Reply at 25. But Plaintiffs are no more "disguising" an argument than the Supreme Court was in *Bolling* (a case neither mentioned nor discussed by the government) when it held that even though the Equal Protection Clause did not apply to the federal government, its norms would constrain the federal government under the Due Process Clause.

That is precisely the argument Plaintiffs advance here. Whether or not Plaintiffs could challenge the removal of works from the public domain under the Copyright Clause directly,[2] the norm articulated by the Copyright Clause, and recognized by the Court in *Eldred*, demonstrate there must be a "bright line" drawn around the public domain – a line which protects Plaintiffs' "vested speech interests" and which the government cannot cross. *Golan*, 501 F.3d at 1194. That norm should inform this Court's analysis under the First Amendment. In order to respect the Framers' choice that the bargain of a monopoly on speech would include the payment to the public of a public domain, this Court should hold that Congress has no power to restore a copyright to a work in the public domain.

This is a crucial line for the Constitution to draw. If the only constraint on the government is "intermediate scrutiny," then the government would be free to auction off copyright in the works of Leonardo da Vinci, Michelangelo, Shakespeare – or even the Framers themselves – for a variety of reasons, perhaps as one way to pay off the national debt. There would be nothing to assure that the liberty to "make" public domain "speeches" would be protected under this scheme, because any number of "important governmental interests" would suffice to allow the government to privatize this otherwise public resource. *See* Pl. MSJ at 31.

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[2] This Court might well wonder why it would make sense that the First Amendment should account for and protect the public domain and not the Progress Clause directly. The reason, Plaintiffs suggest, is that the speech interests raised by the two monopolies secured in the Progress Clause are radically different. If Congress restores a patent, that doesn't necessarily affect any speech interests at all. But if it restores a copyright, it necessarily removes a liberty to speak that the public once enjoyed. Speech liberties are more protected in our Constitution than the liberty to practice an invention, and the First Amendment is the primary vehicle for protecting them.

The government dismisses this very real concern as if it were nothing but a "parade of horribles." Gov't Reply at 27. Though it expressly contends that reducing the national debt would qualify as an "important government interest" under intermediate scrutiny, the government contends selling off the public domain could not withstand constitutional scrutiny because there are "numerous means" of raising revenue other than looting the public domain:

> Under their hypothetical, the government presumably possesses numerous means of raising the money necessary to reduce the national debt, from the obvious (instituting or raising taxes, selling surplus government vehicles) to the esoteric, some of which would probably fare better under intermediate scrutiny than others might. Here, by contrast, there is only one way to meet the important government interest at stake – compliance with Berne – and that is through the restoration of copyright required by Berne Article 18.

Gov't Reply at 28.

The existence of "numerous" other "means" of achieving Congress's goal is precisely the problem here. It is simply false to suggest that Congress had but one choice in the matter of restoring copyrights consistent with Berne. The choice to enact the URAA was the last step in a series of decisions that Congress made, all perhaps insufficiently protective of First Amendment interests. At any step along that path, Congress could have taken steps that would have assured that the United States was not being obligated to something that was inconsistent with the Constitution. As it has done elsewhere, the government could well have negotiated an exemption from liability for any act or omission deemed required by the Constitution — a sensible exemption for any government committed, as ours is, to respecting the Constitution. *See, e.g.,* Curtis Bradley and Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*,

149 U. Pa. L. Rev. 399, 417 (2000) (noting that "First Amendment concerns led the United States to decline to agree to restrictions on hate speech in the Race Convention 'to the extent that [such speech is] protected by the Constitution and laws of the United States,'" that the U.S. attached a reservation to its ratification of the International Covenant on Civil and Political Rights to address concerns regarding Constitutional rights of free speech and free association, and that the U.S. attached a broad reservation to the Genocide Convention stating that nothing in that treaty requires or authorizes action by the U.S. prohibited by the Constitution). The government worried expressly about the First Amendment problems that restoration poses in 1988, but then chose to leave those concerns unaddressed when it enacted the URAA in 1994. The government cannot now complain that it did not take steps to protect itself from the constitutional liability it anticipated as a way to render its acts constitutional.

The demands of Berne or any other treaty do not give the government a First Amendment pass. If the Europeans modified their copyright law to deny copyright to hate speech, it is plain the United States could not do the same under the First Amendment. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 ("[t]he government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed."). It is also plain the United States could not evade that First Amendment restriction by simply signing a treaty with Europe that made it financially liable for continuing to respect copyrights in hate speech. *See Reid v. Covert*, 354 U.S. 1, 16 (". . . 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.") An argument that the government had a "compelling state interest" in enacting such a law *because of the treaty* would fail. The obvious response there, and here, is

that the government's mistake was to obligate itself in ways that are inconsistent with our Constitution.

The bottom line is clear and unavoidable here: If the government is right, then there is no constitutional protection for the public domain. The "limited times" restriction of the Progress Clause will have "no limit," as members of the Court worried, and General Olson suggested it would, either directly under the Progress Clause, or indirectly under the Free Speech Clause. That conclusion betrays the Framers' purpose in placing constitutional limits on Congress's power to regulate speech, and threatens the "bedrock principle of copyright law" that says "works in the public domain remain there." *Golan*, 501 F.3d at 1187. It is reason enough for this Court to invalidate the URAA.

B. The URAA Cannot Withstand First Amendment Scrutiny If It Burdens More Speech Than Necessary

While the parties disagree about much, the government's focus on the question of whether there were "numerous" other "means" available to achieve its stated objective of complying with Berne (*e.g.*, Gov't Reply at 3, 28) is undoubtedly correct.

Insofar as the First Amendment permits privatizing the public domain, the parties agree that intermediate scrutiny applies here. *See* Gov't Reply at 5. Under intermediate scrutiny, the URAA can only be sustained if it "furthers an important or substantial governmental interest" unrelated to the suppression of free expression and "if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1996); *see also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) (intermediate scrutiny prohibits government from imposing "greater restriction on First Amendment freedom than is essential to furtherance of the

government's purpose"). Accordingly, the URAA can only be sustained if the government succeeds in showing that the restrictions the URAA imposes on speech were essential to complying with the Berne Convention. *See id; Porter v. Bowen*, 496 F.3d 1009, 1023 (9th Cir. 2007) (intermediate scrutiny requires government restriction on speech to be "be no greater than is necessary" to further important government interest); *Conchatta v. Miller*, 458 F.3d 258, 268 (3rd Cir. 2006) (regulation fails intermediate scrutiny where it "could have been drafted more narrowly" and therefore restricts more speech than is "than is essential to the furtherance of the government interest"). If it could have complied with Berne through "numerous" other "means" while burdening substantially less speech, then the URAA flunks intermediate scrutiny. *See Turner*, 512 U.S. at 662.

The government bristles at this standard because it cannot meet it. First, it tries to conflate the issues by suggesting that Section 514 is immune from attack because Berne requires restoration. *See* Gov't Reply at 4, 28. That misses the point. Berne plainly does require restoration. The question is *how* that restoration is implemented, and whether Congress's implementation of Berne burdens more speech than it has to in order to comply with Berne. Even the government knows that is so; it ultimately concedes the real question here is whether its chosen "***means*** of enforcing copyright in restored works" against reliance parties "satisfies intermediate scrutiny." Gov't Reply at 5 (emphasis added).

After acknowledging the issue, the government tries to gloss the standard that applies. It reports that a statute "can burden more speech than is necessary and still withstand intermediate scrutiny, as long as it does not burden substantially more speech than is necessary." Gov't Reply at 7 (emphasis in original). But the government does not bother to explain how that

distinction (whatever it means) applies here. The government has the burden of showing it burdened no more speech than was "essential" to complying with Berne. *See Turner*, 512 U.S at 662; *see also Heideman*, 348 F.3d at 1197; *Porter*, 496 F.3d at 1021, *Conchatta*, 458 F.3d at 268. While that does not require the government to demonstrate there were *no* less restrictive alternatives, the existence of *some* less restrictive alternatives tends to show a statute imposes a speech burden that is more extensive than necessary. *See Rubins v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (striking down labeling ban because the availability of less intrusive options to advance the government's interest indicates that the law is more extensive than necessary); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 418 n.13 (1993) ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction . . . that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

The government likewise resists application of the substantial overbreadth test, suggesting it, too, allows it to burden more speech than necessary, so long as it is not "substantially more." Gov't Reply at 8 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). But *Hicks* itself explains that a law may be held overbroad when its "application to protected speech [is] substantial." *Hicks*, 539 U.S. at 119-20. It does not require the burden to be substantially more than substantial. Here, there is no doubt the URAA's burden on speech is substantial. The Tenth Circuit said as much. It held the URAA interferes with "vested First Amendment interests" in free expression. *Golan*, 501 F.3d at 1394. And that interference is not limited to the Plaintiffs in this case. It extends to anyone's right to make "unrestrained artistic use" of restored works, which sits "near the core of the First Amendment." *Id* at 1193.

In any event, "precision of regulation" is the "touchstone" in overbreadth analysis, *see NAACP v. Button*, 371 U.S. 415, 438 (1963), and the Tenth Circuit holds the same principle applies equally to intermediate scrutiny. *See, e.g.*, *American Target Advertising v. Giani*, 199 F.3d 1241, 1247 (10th Cir. 2000) ("intermediate scrutiny" requires statute to be "narrowly drawn" to serve important government interest "without unnecessarily interfering with First Amendment freedoms"). If a statute regulates protected activity – as the Tenth Circuit has held the URAA does – and can achieve its goals by means less destructive to First Amendment interests, it flunks the test. *See American Target*, 199 F.3d at 1249 (invalidating regulation imposing bonding requirement on charitable solicitations because it imposes "sizeable price tag upon the enjoyment of a guaranteed freedom" and government interest was "sufficiently served by measures less destructive of First Amendment interests").

That is precisely the problem here. Under Berne, the United States had lots of options in respect to *how* it restored copyrights, and the government could have complied with the Berne convention by imposing significantly less drastic restrictions on the speech interests of reliance parties.[3]

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[3] The government suggests that Plaintiffs' First Amendment interests are somehow diminished because they are making "other people's speeches." Govt. Reply at 10, n.4. The Tenth Circuit has specifically rejected this argument. *Golan* 501 F.3d at 1193. Indeed, *Turner* itself was about "must carry rules" – regulations requiring cable television operators to broadcast "other people's speeches." *Turner*, 512 U.S at 624. Nothing in *Turner* suggests the government's burden is lessened, or the plaintiffs' speech interests are diminished insofar as they involve "other people's speeches." *See id.* On the contrary, some of the Supreme Court's most important First Amendment cases have involved speech created by someone other than the speaker. *See e.g., Cohen v. California*, 403 U.S. 15 (1971) (holding that t-shirt opposing the Vietnam War was protected by the First Amendment); *New York Times Company v. U.S.*, 403 U.S. 713 (1971) (holding the New York Times had the right to publish Pentagon Papers created by the government). Full intermediate scrutiny applies here, and there is no basis to suggest Plaintiffs' speech interests are diminished.

C. The URAA Burdens More Speech Than Necessary And Thus Fails Intermediate Scrutiny And Substantial Overbreadth

The government identified two basic interests in defense of the URAA. First, it contended the URAA was necessary to comply with Berne; second, it contended the URAA corrects for "historic inequities wrought on foreign authors" who lost their copyright because they did not meet the same requirements U.S. authors had to meet. *See* Gov't Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Gov't MSJ") at 11. The first suggestion is demonstrably false. The second has been all but abandoned, since there is plainly no "inequity" in asking foreign authors to meet the same requirements imposed on U.S. authors.

1. The URAA Is Not Justified By The "Important Or Substantial" Governmental Interest In Complying With The Berne Convention

Originally, the government contended the URAA should pass intermediate scrutiny because restoration was necessary to bring the United States into compliance with Berne. *See* Gov't MSJ at 10-13. Now that Plaintiffs have pointed out that Berne provides wide discretion and permits the U.S. to provide protection for reliance interests greater than that provided in Section 514, the government has a new story. Curiously, it does not begin with the government interest that must be the starting point of intermediate scrutiny. Instead, the government contends that the URAA passes intermediate scrutiny because it provides more protection for reliance parties than the bare minimum that Berne requires. *See* Gov't Reply at 9-11.

That is not saying much. In fact, the government points out that Berne says nothing at all about protection for reliance parties, does not set a minimum at all, and instead "leaves [that issue] up to each member nation." Gov't Reply at 9. In short, the government asks for a First Amendment pass because it did something more than nothing.

The government tries to justify this curious position based on a series of similarly curious assertions. It reports that Congress was, in fact, looking out for reliance parties because it (1) immunized them for any act committed prior to restoration, and (2) required foreign copyright owners to provide notice of restored rights. *See* Gov't Reply at 10. But any act committed prior to restoration involved a public domain work that everyone was free to use in any way; there was no infringement to begin with. Due process would presumably foreclose any liability for pre-restoration "infringements" and would, for that matter, demand some notice that materials that once belonged to the public were suddenly off limits. The fact the government did something it could not avoid does not help it pass intermediate scrutiny.

The government goes on to suggest it "augmented" its protection of reliance parties by extending to them fair use rights, and other exceptions, such as the Section 110 right to perform or display works for educational, religious and charitable purposes. *See* Gov't Reply at 11. But the Tenth Circuit has already held these so-called augmentations "do not adequately protect the First Amendment interests" at stake here. *Golan* 501 F.3d at 1188. Indeed, these are restrictions that apply to all copyrights, and they applied automatically to restored copyrights. They provide no unique or specific protection for reliance parties. The fact the government

chose to leave these generally applicable portions of the Copyright Act does not help it pass intermediate scrutiny, either.[4]

The only specific protections for reliance parties included in the URAA are the provisions that allow reliance parties to dispose of existing copies of restored works within one year of notice of restoration, and permit reliance parties to continue to exploit derivative works created prior to enactment of the URAA if they pay compensation to the copyright owner. *See* Gov't Reply at 11. Yet the fact Congress chose to include these minimal protections says nothing about the question of whether it could have done more while still complying with Berne. As a result, it sheds no light on the question that matters: did the government burden more speech than it needed to in order to comply with Berne?

Ultimately, there should be no doubt about this question. The very discretion the government trumpets makes it clear that Berne left the government plenty of discretion to provide better protection for reliance parties. The plain terms of Berne leave every signatory wide discretion to "determine … the conditions" of restoration and do not demand *any* enforcement against reliance parties. Berne Convention, Art. 18(3); *cf.* Gov't Reply at 9 (acknowledging that Berne is silent in regard to restoration against reliance parties). The widely varied approaches of Berne members regarding reliance parties – as documented by the government's expert himself – leave no doubt as to the breadth of discretion Berne provides.

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[4] Leaving fair use and the related protections of Section 110 intact was hardly a "choice" at all. *Eldred* makes it clear that these protections are essential to the constitutionality of copyright regulation itself, because they protect critical free speech interests. The government can hardly suggest the URAA is constitutional on the ground that Congress chose not to dismantle other essential First Amendment protections in enacting it.

The government tries to avoid the plain terms of Berne, as well as the obvious discretion it grants, with the same pitch it made before. Once again, the government argues that Berne prohibits any permanent protection for reliance parties. *See* Gov't Reply at 25-26. But that is simply not so. Nothing in the text of Berne suggests it. And a variety of Berne members do provide various forms of permanent protection to reliance interests. *See* Pl. MSJ at 24-27. That includes the United Kingdom (which has done so for more than a century) and even the U.S. itself. *See id.* The fact is the government is asking this Court to adopt an interpretation of Berne that calls into question the law of important U.S. allies, and the U.S. itself. *See id.* The Court should reject that invitation and recognize the discretion the plain text of Berne provides, as confirmed by nearly a century of tradition.

Whatever the government wants to say now about whether Berne permits permanent protection for reliance interests, there was a time when it openly acknowledged that permanent protection for reliance interests was both permissible and necessary. When Congress first considered restoration in 1988, the Copyright Office itself proposed two alternatives. The first was no restoration at all. The second was restoration with strong – and permanent – protection for reliance parties. *See* Pl. MSJ at 19-20. Specifically, that second proposal provided permanent protection for, among other things, the "continuance of enterprises lawfully undertaken" prior to restoration. *Id.* The Copyright Office explained this permanent protection was necessary because restoration "cannot cut off existing rights in the continued utilization of works in the United States, which were lawful prior" to restoration. *Id.* The government simply ignores this. *Compare* Govt. MSJ at 11-15 *with* Pl. MSJ at 18-21.

While Congress did not implement restoration in 1988, the history of the BCIA shows that the government itself believed that strong and permanent protection for reliance interests was not only permissible, but essential. When Congress did implement restoration in 1994, it chose an approach to restoration different from the one favored in 1988. But the fact Congress chose to provide weaker protection for reliance interests in 1994 does not mean it was required to do so under Berne. On the contrary, in enacting the URAA, Congress went beyond Berne, and imposed restrictions on reliance parties that Berne simply did not mandate.

2. Any Interest In Going "Beyond Berne" Is Too Speculative To Satisfy Intermediate Scrutiny

In its first brief, the government tried to justify its decision to go beyond Berne and impose restrictions on reliance parties greater than anything Berne required by suggesting it needed to do so in order to induce other nations to restore and protect U.S. copyrights. *See* Gov't MSJ at 16-20. Plaintiffs pointed out the government conflated two distinct points in doing so. *See* Pl. MSJ at 22-24. All of the congressional testimony and other evidence on which the government relied emphasized that it was compliance with Berne that was necessary to secure protection for U.S. authors abroad. *See id.* The government now acknowledges the limits of its interest, and disavows any justification for going "beyond Berne" by insisting it did not do so. *See* Gov't Reply at 20. Accordingly, both parties agree the government had no justification for going beyond Berne, doing more than it requires, or imposing significantly greater restrictions on the speech interests of U.S. reliance parties than Berne demands.

3. The URAA Is Not Justified By The Government's Asserted Interest In Equal Treatment Of Foreign Authors

The second interest the government asserts in support of the URAA is the need to correct for "historic inequities wrought on foreign authors" who lost their copyright because they did not comply with now-discarded copyright formalities like registration and renewal. *See* Gov't MSJ at 20-21; Gov't Reply at 21-22. There is plainly no inequity here, since U.S. authors were subject to the same formalities. *See* Pl. MSJ at 24. The government tries to avoid this fact by suggesting that these formalities were burdensome and difficult to understand; as a result, many foreign authors lost copyright by failing to comply with these rules. *See* Gov't Reply at 21-22. But the fact is the same rules applied to U.S. authors and nothing suggests they were any less burdensome or confusing to them, assuming they were really all that complicated in the first place. Insofar as the government really wants to "redress the draconian effects of our prior law" (*see* Gov't Reply at 22) that interest should theoretically apply to U.S. and foreign authors alike. It does not justify the government's decision to favor foreign authors at the expense of the speech rights of U.S. reliance parties.

4. In Enacting the URAA, The Government Did Not Consider First Amendment Interests, Or Balance Them With The Other Interests It Asserts

In its first brief, the government urged this Court not to "second-guess the considered judgment of Congress and the Executive in determining how ***best*** to comply with Berne ***while minding First Amendment concerns***." Gov't MSJ at 27 (emphasis added). Plaintiffs pointed out it is clear the government was not, in fact, "minding First Amendment concerns" because the government was unable to identify a single reference to First Amendment concerns in the entire legislative history of the URAA. *See* Pl. MSJ at 26. And it still does not

do so. Instead, it now contends it was not required to "address First Amendment concerns" at all. Gov't Reply at 18. Had there been any indication that Congress considered the First Amendment interests at stake when it enacted the URAA in 1994, it might be entitled to some deference. Here, there is no such indication. On the contrary, First Amendment concerns were raised expressly and specifically in 1988, when Congress passed the Berne Convention Implementation Act but chose not to restore copyrights. Pl. MSJ at 27-29. Those concerns were simply cast aside in 1994, when Congress enacted the URAA. *See id.* Casting aside serious and specific First Amendment concerns raised just six years earlier should not earn Congress any deference. If anything, it should draw heightened scrutiny.

D. The URAA Fails Intermediate Scrutiny And Substantial Overbreadth Because It Goes Beyond Any Important And Substantial Governmental Interest

Ultimately, the plain terms of Berne and the tradition of its other signatories make it clear that the United States could have provided permanent protection to reliance parties in acceding to Berne, and that is precisely the approach to restoration that the Copyright Office proposed in 1988. When the government enacted the URAA in 1994, it chose to provide much less protection for reliance parties than it had to in order to comply with Berne, while simply ignoring the constitutional concerns that were raised just six years before. The URAA burdens important speech interests of the Plaintiffs and many others like them, and it does so unnecessarily. It cannot survive intermediate scrutiny or substantial overbreadth analysis.

III. CONCLUSION

The URAA represents an unprecedented, unconstitutional and unnecessary raid on the public domain. It should be overturned.

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Respectfully Submitted,

s/ Anthony T. Falzone

LAWRENCE LESSIG
ANTHONY T. FALZONE
JULIE A. AHRENS
CHRIS K. RIDDER
Center for Internet and Society
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone: (650) 736-9050
Facsimile: (650) 723-4426
Email: falzone@stanford.edu

HUGH Q. GOTTSCHALK
CAROLYN J. FAIRLESS
Wheeler Trigg Kennedy LLP
1801 California Street, Suite 3600
Denver, CO 80202
Telephone: (303) 244-1800
Facsimile: (303) 244-1879
Email: gottschalk@wtklaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on 3/13/09, I electronically filed the foregoing Reply in Support of Plaintiffs' Motion for Summary Judgment, with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

CHRISTOPHER R. HALL
Christopher.Hall@usdoj.gov
Trial Attorney
United States Department
Civil Division, Room 7128
20 Massachusetts Ave, NW
Washington D.C. 20530
(202) 514-4778
(202) 616-8470, facsimile

Counsel for Defendants

/s/
ANTHONY T. FALZONE