

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,¹
MARYBETH PETERS, in her official capacity as Register of Copyrights, Copyright Office of
the United States,

Defendants.

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

¹ Pursuant to Fed. R. Civ. P. 25(d), Attorney General Eric H. Holder Jr. is substituted for former Attorney General Michael B. Mukasey as defendant in his official capacity.

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INTRODUCTION

In considering the enactment of what would become § 514 of the Uruguay Round Agreements Act, 17 U.S.C. § 104A, Congress knew what it was required to do under the Berne Convention for the Protection of Literary and Artistic Works: provide restoration of copyright to works of foreign authorship that met certain requirements. Section 514 completed a process that had begun in 1988, when the United States first acceded to the Berne Convention. At that time, Congress tabled the issue of whether to adopt Article 18 of the Convention, which requires in relevant part that newly acceding nations restore copyright “to all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” Berne Convention, art. 18(1). But with the 1994 entry into force of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”) – to which the United States was a signatory – a wait-and-see approach was no longer possible. The reason for that was at least two-fold: (1) TRIPs made clear that Berne signatories must adopt all of the Convention’s provisions, including Article 18; and (2) TRIPs for the first time provided an effective procedure for the resolution of trade disputes arising under Berne obligations. Further, the adoption of Article 18 and its restoration of copyright was the only manner in which the United States could protect the rights of its own authors abroad.

Obviously, restoration raised the mechanical question of how authors’ rights in newly restored works should be protected, in particular against third parties that had accrued financial or other interests in such works in reliance on their erstwhile public domain status. Berne itself does not mention reliance interests, and certainly does not require by its own terms any minimum level of protection for such interests. Ultimately, Congress adopted a panoply of reliance interest

protections that goes well beyond the non-existent requirements of Berne. These Berne-specific protections fit alongside more general protections in the Copyright Act itself, all of which apply to reliance parties.

It is these reliance interest protections, codified at 17 U.S.C. § 104A(d)(2), on which Plaintiffs now focus the majority of the arguments they raise in their opening brief on summary judgment, which ostensibly focuses on the First Amendment implications of § 514 pursuant to the terms of the Tenth Circuit's remand order. Plaintiffs make three fundamental concessions: (1) that § 514 is a content-neutral regulation, thus subject to intermediate scrutiny under the First Amendment; (2) that Berne requires restoration; and (3) that compliance with Berne represents an important government interest. In line with those concessions, they emphasize throughout the first thirty pages of their brief that the principle of restoration itself is not an issue under the First Amendment. Instead, they submit, the question is how restoration is enforced against reliance interests. In essence, Plaintiffs argue, § 514 goes beyond Berne by enforcing restoration against reliance parties at all, and thus fails intermediate scrutiny.

Plaintiffs are incorrect. If anything, Congress went beyond Berne in a direction that favors reliance interests. But there is no reasonable question that while Berne permits a degree of discretion in enforcing copyright in restored works, there is a limit: Sooner or later, copyright in restored works must be enforced as to all parties, including those with reliance interests. That conclusion, mandated by Berne, is also consistent with the First Amendment.

At the very end of their brief, Plaintiffs finally raise a challenge to the principle of restoration itself. But it is not really a challenge under the First Amendment. Rather, despite the way Plaintiffs characterize it, it is a Copyright Clause challenge through and through. Of course,

both this Court and the Tenth Circuit have held in this case that restoration of copyright pursuant to Berne is permissible under the Copyright Clause. Whether that is the law of the case or simply controlling authority, the result is the same: Plaintiffs' challenge to the principle of restoration in and of itself, viewed either as a straight-up Copyright Clause challenge or as a First Amendment challenge merely informed by Copyright Clause "norms," as Plaintiffs describe it, must fail.

ARGUMENT

I. THE PRINCIPLE OF COPYRIGHT RESTORATION PURSUANT TO BERNE IN AND OF ITSELF SATISFIES FIRST AMENDMENT SCRUTINY.

Whatever else it might have done, Plaintiffs' opening memorandum has narrowed the issues to be decided by the Court by making three fundamental concessions: (1) that § 514 is a content-neutral regulation of speech subject to intermediate scrutiny, Pls.' Mem. at 10; (2) that the Berne Convention requires restoration of copyright as to certain works formerly in the public domain, *id.* at 2; and (3) that compliance with Berne represents an important government interest, *id.* at 2, 22.² Given these three critical concessions, the basic question of whether the restoration

² Consistently through the first thirty pages of their opening memorandum, Plaintiffs emphasize that the core element of § 514 – the restoration of copyright as to certain works under Berne – is not at issue under the First Amendment; rather, the issue is whether and how restored copyrights should be enforced against reliance interests. *See, e.g.*, Pls.' Mem. at 2 ("It may be important to comply with Berne, and Berne no doubt requires restoration. But Berne does not require any restoration of rights against reliance parties like the Plaintiffs here."); 22 ("Congress was thus plainly justified in believing that unless it enacted legislation to comply with Article 18, other nations would not adequately protect American copyrighted works.").

Near the end of their memorandum, however, Plaintiffs finally turn to the principle of restoration itself that is at the heart of § 514. Rather than addressing whether the restoration of copyright itself under Berne satisfies the intermediate scrutiny standard, though, Plaintiffs argue that the Court need not even apply the intermediate scrutiny test, because insofar as compliance with Berne requires the removal of works from the public domain, it represents an illegitimate interest under a First Amendment suffused with Copyright Clause norms. *See* Pls.' Mem. at 30-34. But as we explain in Part III, *infra*, this is not a First Amendment argument at all, but rather a Copyright Clause argument in the guise of a First Amendment argument. That being the case, it

of copyright for certain works formerly in the public domain satisfies intermediate scrutiny under the First Amendment is no longer in dispute. A content-neutral regulation such as § 514 will be sustained under the First Amendment where it: “(1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests.” Turner Broadcasting Sys. v. Fed. Election Comm’n, 520 U.S. 180, 189 (1994) (“Turner II”) (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)). If compliance with Berne represents an important government interest, and such compliance in turn requires the restoration of copyright in public domain works meeting certain eligibility criteria, then that interest cannot be satisfied without the restoration of such copyrights. Consequently, there simply is no room to debate whether that interest would be achieved “less effectively” without § 514, or whether § 514 burdens “substantially more speech than is necessary to further that interest.” Id. Without restoration provided by § 514, that interest could not be met at all.

If restoration of copyright consistent with Berne satisfies First Amendment scrutiny in and of itself, such restoration must mean something in practical terms. To constitute something more than an empty gesture – which it must – the restoration of copyright for eligible works must include a means of enforcing such copyright. That right of enforcement is essentially universal as to parties who had not developed a “reliance” interest in a given work, prior to its restoration, based upon its erstwhile public domain status. See Berne Convention, art. 18(1); Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighboring Rights: The Berne Convention and Beyond (2d ed. 2006) 338-44; Report of Dr. Mihaly Ficsor, Former Assistant Director General of

has already been rejected by both this Court and the Tenth Circuit, and should be again here.

WIPO, Feb. 15, 2005, at ¶¶ 39, 48-50 (“Ficsor Report”). For that reason, generalized, abstract claims of injury resulting from a loss of works from the public domain are immaterial to the First Amendment analysis here, where the question of restoration itself is not at issue. As a matter of logic, if the alleged impairment of any conceivable interest in a newly restored work can give rise to a viable First Amendment challenge, even in the absence of a reliance interest, then the act of restoration itself becomes a nullity. And if the act of restoration is rendered a nullity, the United States has not legitimately satisfied its concededly important interest in complying with Berne.

Thus, the only remaining First Amendment question as to § 514 is whether its means of enforcing copyright in restored works as to parties who had developed reliance interests in such works prior to their restoration satisfies intermediate scrutiny. In that regard, the only provision of § 514 at issue is 17 U.S.C. § 104A(d)(2), which sets forth the protections available to reliance parties. The other provisions of § 514 – most notably the question of restoration itself – are in essence off the table under the First Amendment.³

II. THE SIGNIFICANT PROTECTIONS FOR RELIANCE PARTIES CREATED BY § 514 SATISFY INTERMEDIATE SCRUTINY.

As we explained in our opening memorandum, § 514 created several protections for reliance parties. Those protections, especially when viewed in conjunction with other protections provided by the Copyright Act, withstand First Amendment scrutiny.

³ As we have noted, Plaintiffs challenge the principle of restoration itself under the Copyright Clause, although they characterize it as a First Amendment argument informed by “the norms of the Copyright Clause.” See Note 1, *supra*. We will address it in turn. See Part III, *infra*.

A. AS A THRESHOLD MATTER, THE COURT SHOULD REJECT PLAINTIFFS' EFFORTS TO OBFUSCATE THE LEGAL STANDARD APPLICABLE TO THIS INTERMEDIATE SCRUTINY CHALLENGE.

A fundamental matter at the outset: This is a First Amendment challenge to a statute that is plainly content-neutral, as even Plaintiffs concede, see Pls.' Mem. at 10; thus, intermediate scrutiny applies. Under intermediate scrutiny, a regulation of speech will be sustained where it: “(1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests.” Turner II, 520 U.S. at 189 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)). “If a regulation on speech is intended to redress an actual or an anticipated harm to an important governmental interest, then the Government ‘must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.’” Time Warner Entm't Co. v. United States, 211 F.3d 1313, 1318-19 (D.C. Cir. 2000) (citing Turner Broadcasting Sys. v. Fed. Communications Comm'n, 512 U.S. 622, 664 (1994) (“Turner I”). Judicial review of the “predictive judgments” of Congress is deferential; the only relevant question is whether, “‘in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.’” Id. at 1319 (citing Turner II, 520 U.S. at 195). Finally, the Court must uphold a challenged regulation “‘if the important governmental interest in question ‘would be achieved less effectively absent the regulation’ and the regulation does not ‘burden substantially more speech than is necessary to further that interest.’” Id. (citing Turner II, 520 U.S. at 213-14).

Despite conceding that intermediate scrutiny applies, Plaintiffs make two apparent efforts to obfuscate this straightforward inquiry, both of which the Court should reject out-of-

hand. Plaintiffs' first effort – their suggestion that § 514 burdens “more speech than necessary,” and thus fails intermediate scrutiny, see Pls.' Mem. at 14-15 – can be dismissed with dispatch. Plaintiffs are incorrect as to the substance of their assertion; § 514 in fact burdens no more speech than is necessary to satisfy the important government interests it serves. See Part II.B, infra. But just as importantly, the standard is not as demanding as Plaintiffs suggest – a statute can burden more speech than necessary and still withstand intermediate scrutiny, as long as it does not burden substantially more speech than necessary. Turner II, 520 U.S. at 213-14. The distinction is important: when evaluating a content-neutral regulation, courts are not required to “sift[] through all the available or imagined alternative means of regulating [the subject] in order to determine whether the [regulatory] solution was ‘the least intrusive means’ of achieving the desired end.” Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989) (citing United States v. Albertini, 472 U.S. 675, 689 (1985)); see also Turner II, 520 U.S. at 217. “So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” Ward, 491 U.S. at 800; see also, e.g., Turner II, 520 U.S. at 218; Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (overnight camping ban upheld even though “there [were] less speech-restrictive alternatives” of satisfying interest in preserving park lands).

Plaintiffs' second effort to cloud the intermediate scrutiny standard is somewhat more involved, but should be similarly rejected. To summarize, Plaintiffs appear to suggest that § 514 is “substantially overbroad” in its application, and thus must be declared unconstitutional even if it otherwise would satisfy intermediate scrutiny. See Pls.' Mem. at 12. As a practical matter, any

consideration of “substantial overbreadth” would essentially duplicate the second element of the intermediate scrutiny test – whether the challenged provision burdens “substantially more speech than necessary” to further the interests it serves. See Turner II, 520 U.S. at 189. For that reason, Plaintiffs’ suggestion probably would be harmless but for one thing. At the outset of the section discussing substantial overbreadth, Plaintiffs misstate the standard applicable to the doctrine, quoting a footnote from a 1984 Supreme Court decision to imply that a statute is substantially overbroad if, inter alia, it ““does not employ means narrowly tailored to serve a compelling government interest.”” See Pls.’ Mem. at 12 (quoting Secretary of State v. Munson, 467 U.S. 947, 965 n.13 (1984)). If by quoting this footnote from a twenty-five year old decision Plaintiffs mean to suggest that § 514 must among other requirements serve a “compelling” government interest – rather than the “important or substantial” interest required under intermediate scrutiny – they are wrong. Certainly, Plaintiffs could have cited more recent Supreme Court authority on the substantial overbreadth doctrine. See, e.g., United States v. Williams, — U.S. — , 128 S. Ct. 1830, 1838 (2008); Virginia v. Hicks, 539 U.S. 113, 119 (2003). Had they done so, it would have demonstrated that the standard is for determining substantial overbreadth requires a “showing that a law punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep.’” Hicks, 539 U.S. at 118-19 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)). This is not plainly different from the standard applicable to an intermediate scrutiny challenge such as this.

B. THE PROTECTIONS FOR RELIANCE PARTIES CREATED BY § 514 GO BEYOND BERNE’S REQUIREMENTS AND SATISFY INTERMEDIATE SCRUTINY.

As a threshold matter, Berne itself mandates no protection whatsoever for reliance parties; in fact, Berne makes no mention of reliance parties at all. See Berne Convention, art. 18(3). By contrast, of course, Berne requires that copyright “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 expiry of the term of protection.” Id., art. 18(1). How that express condition is applied as a mechanical matter Berne leaves up to each member nation (absent an agreement between or among any such nations). Id., art. 18(3). However, whatever protections a nation ultimately decides to provide to reliance parties, one point is clear under Berne: it must err, if at all, on the side of ensuring that such protections are temporary rather than permanent. Ricketson & Ginsburg, supra, at 343 (transitional protections for reliance parties do not authorize such parties “to continue their use indefinitely; a situation must eventually be reached when the work is protected in relation to all persons.”); Ficsor Report ¶¶ 65-66.

Thus, in enacting § 514, Congress was required to appropriately weigh the interests of restored copyright owners against the possibly conflicting interests of reliance parties, typically entities with vested economic interests in exploiting the original speech of creators whose work had fallen into the public domain. Two points are particularly salient here. First, as described above, Berne mandates the restoration of copyrights but is silent as to the interests of reliance parties. See Berne Convention, art. 18. Second, and even more important, the First Amendment provides less protection to parties that wish to exploit the original speech of others than it provides to the creators of that original speech. Eldred v. Ashcroft, 537 U.S. 186, 220-21 (2003).

As the Eldred Court explained, “[t]he 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.” Id. at 221.⁴

Given these principles, Congress reached a statutory result that satisfied the one fundamental requirement of Berne – the restoration of copyright for eligible works – while nonetheless protecting the interests of third parties that had expended economic (and sometimes artistic) resources in an effort to commercially exploit others’ original speech. That result is codified in the reliance party provisions of § 514, chiefly 17 U.S.C. § 104A(d)(2). There are four primary protections. First, § 514 immunizes reliance parties for any act committed prior to the restoration of a work that would otherwise have constituted infringement. Id. at § 104A(d)(1) – (2). Second, as a condition of enforcing the copyright, § 514 requires a copyright holder to notify reliance parties of his or her intent to enforce a restored copyright, either directly through notice to the reliance party or constructively by serving a notice of intent with the Copyright Office and the notice’s subsequent publication in the Federal Register. Id. at § 104A(d)(2)(A)–(B). Third,

⁴ Plaintiffs suggest that Eldred’s admonition does not apply here because § 514 operates outside of the “traditional contours of copyright protection.” Pls.’ Mem. at 13-14. But Plaintiffs misconstrue our point. Under the Tenth Circuit’s ruling in this case, § 514 restoration is subject to “ordinary” First Amendment scrutiny, to borrow Plaintiffs’ words; we do not suggest here that anything less than intermediate scrutiny applies, as Plaintiffs seem to imply. Rather, the point is this: when measuring the burden on speech that is necessary to the furtherance of the important government interest at issue, the Court must look to the specific kind of speech being burdened, among other factors. Where the burden falls largely upon the ability to “make other people’s speeches,” see Eldred, 537 U.S. at 221, that burden is lighter than when it falls disproportionately upon the freedom “to make – or decline to make – one’s own speech,” see id. Here, the burden that Plaintiffs allege is to their ability to exploit the speech of others, whether through mechanical reproduction for purely commercial purposes or through public performance for artistic or other purposes. Because such speech is that of others rather than their own, the First Amendment “bears less heavily” either within or outside the parameters of intermediate scrutiny.

§ 514 gives reliance parties one year after a notice of restored copyright to sell or otherwise use copies of a restored work that were already in existence at the time of the notice. Id. Fourth, the Act allows reliance parties to continue to exploit derivative works created prior to enactment of the URAA if they pay reasonable compensation to the holders of the restored copyrights in the original works upon which their derivative works are based. Id. at § 104A(d)(2)(B), (3). Absent notice, anyone may continue to treat a work as if it is not protected by copyright.

The protections provided by § 104A(d)(2) are augmented by other Copyright Act provisions that provide additional protections to reliance parties. For example, 17 U.S.C. § 107 codifies the fair use doctrine, which allows reliance parties (like the general public) to use not only facts and ideas contained in protected works, but also protected expressions themselves under certain circumstances. Section 107 provides: “[T]he fair use of a copyrighted work, including such use by production in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The fair use doctrine “affords considerable ‘latitude for scholarship and comment,’ and even for parody.” Eldred, 537 U.S. at 219-20 (citing Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985), and Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)). Likewise, 17 U.S.C. § 110 permits the performance or display of protected works under certain conditions for educational, religious, and charitable purposes, among others.

The individual circumstances of the Plaintiffs illustrate how the reliance party protections of § 514 operate, both on their own and when augmented by the other protections provided by the Copyright Act. As an initial matter, the reliance interests of the Plaintiffs are

relatively modest for the most part, in some instances almost negligible. For example, Plaintiff Ronald Hall, the owner and operator of Festival Films, sells both public domain and copyright-protected movies (in multiple formats including DVD, VHS, and 16mm film) and related movie memorabilia through a commercial website. Deposition of Ronald Hall, Feb. 4, 2005, at 35:1-8; 70:1-22 (“Hall Depo.”) (relevant excerpts attached at Tab A). Mr. Hall maintains virtually no inventory, essentially operating as a pass-through retailer by taking orders from customers and then filling them through various wholesale distributors. Id. at 63:16-25; 64:1-25; 65:1-15. With virtually no inventory, Mr. Hall’s reliance interest is basically limited to eight 16mm negatives of films that he purchased many years prior to the enactment of § 514, and which he used to make copies for customers who wanted those films on 16mm reels. Id. at 111:14-25 to 122:1-21. At his deposition, Mr. Hall estimated that each negative cost him between \$600 and \$700 at the time of purchase, and testified that in the years prior to § 514 he sold multiple copies of each at prices between \$500 and \$700. Id. On that basis, Mr. Hall had long since recouped his investment by the time § 514 was enacted, and he could have continued to sell copies of each film for up to one year after receiving notice that its copyright had been restored without infringing on any of the restored copyrights. 17 U.S.C. § 104A(d)(2)(A)(i), (ii). Had he wished to liquidate that investment, on the other hand, he could have simply sold the negatives within the same period, again without infringing. Id.

The reliance interests of Plaintiffs Lawrence Golan and the Symphony of the Canyons are likewise relatively modest, and in each case are also well protected by both § 514 and other Copyright Act provisions. Dr. Golan is a musician, teacher, and conductor who directs several orchestras, most if not all of which are educational or otherwise charitable in purpose. See Decl.

of Lawrence Golan, Nov. 2, 2004, at ¶¶ 3-5, 22 (“Golan Decl.”).⁵ The Symphony of the Canyons, which is directed by Kortney Stirland, is a non-profit volunteer orchestra comprised of amateur musicians of varying ages and skill levels, none of whom is paid or otherwise compensated for his or her time, except for reimbursement for travel and other expenses. Deposition of Kortney Stirland, Feb. 6, 2005, at 19: 23-25; 20:1-25; 38:8-25; 39:24-25; 40:1-25. At deposition, Dr. Golan was unaware of how many copies of restored works (scores, in musical parlance) were maintained by the libraries of his orchestras. See Deposition of Lawrence Golan, Feb. 12, 2005, passim (“Golan Depo.”). Mr. Stirland, on the other hand, was aware of only one copy of any such work owned by the Symphony of the Canyons. Stirland Depo. at 67:17-25; 68:1-25; 69:1 (“Stirland Depo.”) (relevant excerpts attached at Tab C). Whatever the number of restored works in each organization’s library, though, each could have continued to perform any such work as if it was unprotected for up to one year after receiving notice of restoration. 17 U.S.C. § 104A(d)(2)(A)(i), (ii). But even more importantly, each might well be able to perform any such work in public consistent with its mission as an educational or otherwise non-profit organization, even after the end of the one-year period provided by § 104A(d)(2)(A). See 17 U.S.C. § 110.

Of the Plaintiffs here, only Richard Kapp appears to have created any derivative works potentially affected by copyright restoration – in his case, a recording of fifteen compositions by Russian composer Dmitri Shostakovich that he published through his own record label, ESS.A.Y Recordings, in 1991. See Deposition of Richard Kapp, Oct. 31, 2004, at 86:10-25 to 103:1-21

⁵ Dr. Golan’s declaration is attached as Tab 1 to his deposition of February 12, 2005. A transcript of Dr. Golan’s deposition is attached hereto at Tab B.

(“Kapp Depo.”) (relevant excerpts attached at Tab D). It is unclear how many copies of that recording, if any, remained in ESS.A.Y’s inventory when it received notice that copyright had been restored to some or all of the works that comprised the recording. Nonetheless, had Mr. Kapp as the head of ESS.A.Y Recordings wished to continue selling copies of that recording after restoration, he could have done so by paying a reasonable compensation to the holder of the restored copyright. See 17 U.S.C. § 104A(d)(3). By contrast, under the United Kingdom model of copyright restoration, there is no right to continue exploiting a derivative work after restoration of copyright in the original work upon which the derivative work was based; instead, the holder of the restored copyright can immediately end any such exploitation by “buying back” the rights to the work. See Ficsor Report at ¶ 101.

In summary, two conclusions are apparent from this discussion. First, Berne does not require an acceding nation to provide any level of protection to reliance parties, yet Congress did so anyway. Second, in balancing the interests of copyright holders against those of unknown parties that had invested resources in exploiting theretofore unprotected works, Congress struck a compromise that made the restored copyrights effective while also affording generous protection to reliance parties. Taken together, these conclusions underscore that § 514 as a whole – and 17 U.S.C. § 104A(d)(2) in particular – satisfy intermediate scrutiny. The interests served by § 514 would be achieved “less effectively” without enforcing restored copyrights as against reliance parties, and the generous protections afforded reliance parties do not burden “substantially more speech than is necessary” to further those interests. Turner II, 520 U.S. at 189.

C. PLAINTIFFS’ VARIOUS ARGUMENTS DO NOT UNDERMINE THE CONCLUSION THAT THE RELIANCE INTEREST PROVISIONS OF § 514 SATISFY INTERMEDIATE SCRUTINY.

We now turn to the variety of arguments Plaintiffs raise to suggest that § 514 fails intermediate scrutiny (and is substantially overbroad in addition). Again, it is important to note that Plaintiffs’ arguments focus solely on the reliance party provisions codified at 17 U.S.C. § 104A(d)(2). Thus, the permissibility of restoration in and of itself is of no particular relevance here. What is relevant is that the reliance party protections provided by § 514 are more generous than required by Berne and represent a reasonable balancing of competing interests under the First Amendment. As we explain below, each of Plaintiffs’ arguments to the contrary fails.

1. THE LEGISLATIVE BACKGROUND PRECEDING § 514, INCLUDING CONGRESS’ EARLIER EFFORTS TO IMPLEMENT BERNE, DO NOT UNDERMINE THE CONCLUSION THAT § 514 SATISFIES INTERMEDIATE SCRUTINY.

Plaintiffs delve into various areas of the legislative background that preceded the enactment of § 514 in an effort to suggest that its reliance party provisions fail to withstand intermediate scrutiny. This effort includes two distinct arguments. First, Plaintiffs argue that certain statements made by legislators and others prior to the enactment of the Berne Convention Implementation Act in 1988 support the argument that the reliance party provisions of § 514 – enacted six years later – go beyond what Berne requires, and by extension, are unconstitutional. Second, Plaintiffs suggest that the legislative history of § 514 itself indicates that Congress did not adequately consider First Amendment questions prior to its enactment. Neither of these arguments is correct.

The first of Plaintiffs’ two arguments – that there was “broad agreement” prior to enactment of the Berne Convention Implementation Act of 1988 that Berne “did not require

restoration against reliance interests,” see Pls.’ Mem. at 18-21 – is simply wrong. Plaintiffs refer to a handful of persons or entities that made statements of some sort during that period, but cite no statement from any member of Congress or the Executive Branch that could be construed to mean that Berne itself does not require restoration of copyright against reliance interests (or that they even believed that to be the case). On the other hand, Professor Sam Ricketson, one of the world’s leading authorities on international copyright law – then and now – wrote in 1986 that not only does Berne require restoration of eligible copyrights as a general matter, it also requires that such restoration must ultimately be enforced against even reliance parties:

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

Sam Ricketson, International Copyright and Neighboring Rights: The Berne Convention and Beyond (1st ed. 1986) 675 (emphasis added). Nowhere in Plaintiffs’ opening memorandum do they identify even one person from that period – much less one with any authority – who stated on the record that Berne itself “does not require restoration against reliance interests.” Without even one such person, there certainly could have been no “broad agreement” on that point, as Plaintiffs assert.

Further, some discussion of the history of Berne in this country will help reiterate why Plaintiffs’ first argument is incorrect. Enactment of the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, §7 (“BCIA”) in 1988, six years before the enactment of the URAA, marked the United States’ entry into Berne. However, Congress did not adopt Berne in its entirety when it enacted the BCIA. Among the provisions Congress did not adopt at that

time was Article 18. Article 18, of course, is at the core of this case by virtue of its requirement that member countries restore copyright as to works that have not fallen into the public domain in their country of origin. Berne Convention, art. 18(1). In considering whether it should adopt Article 18 at that time, Congress determined simply that the decision could wait. Among other reasons, Congress noted that the question of restoration itself could raise potential constitutional questions, and that such questions would be better analyzed in light of information that Congress did not at that time possess: “The question of whether and, if so, how Congress might provide retroactive protections to works now in our public domain raises difficult questions, possibly with constitutional dimensions. These questions do not have to be addressed now and can be raised if and when presented in the context of specific facts.” Staff of the H. Comm. on the Judiciary, 100th Cong., Report on the Berne Convention Implementation Act of 1988 (Comm. Print) at 51. Further, the Judiciary Committee report stated: “[W]e remain persuaded that any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial and consumer considerations is possible.” Id. at 52.

That Congress was able to effectively table the question of restoration in enacting the BCIA in 1988 is at least partially explained by the lack of any real enforcement mechanism in Berne itself prior to the enactment of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”) in 1994. As we explained in our opening brief, TRIPs for the first time established a potentially effective mechanism for enforcing international trade obligations, including those of Berne. See Defs.’ Mem. at 12-15; see also Ficsor Report at ¶¶ 20-21. Prior to TRIPs, it was difficult if not impossible to effectively enforce the requirement that member

nations adopt provisions such as restoration. See Ficsor Report at ¶ 21. Even where member nations did implement Berne provisions prior to TRIPs, such nations possessed a greater amount of de facto license in interpreting Berne’s requirements than they do today, as Dr. Ficsor noted: “Due to the absence of an efficient dispute settlement mechanism, there had always been quite a liberal and easy-going atmosphere around the problems of interpretation and implementation of the Berne Convention.” Id. at ¶ 23. Thus, the United States did not implement restoration under Article 18 (among other provisions) until the passage of the URAA years later, and suffered no international consequences for its failure to do so.

Given that background, Congress’ decision to table the entire question of restoration should be construed as exactly that, no more and no less. The postponement of any decision as to the restoration of copyright pending further factual development is a far cry from deciding that the enforcement of restored copyrights as to reliance parties is not required by Berne. Plaintiffs’ suggestion that there was “broad agreement” as to the latter proposition preceding enactment of the BCIA is thus unfounded.

Plaintiffs’ second argument – that the legislative history of § 514 itself indicates that Congress did not adequately consider First Amendment issues – is likewise incorrect. Plaintiffs appear to premise this argument on the notion that when enacting a provision that bears on First Amendment rights to any degree, Congress must explicitly identify and address First Amendment concerns in the process. See Pls.’ Mem. at 26-27 (government’s argument points to no “First Amendment balancing in the entire legislative history of the URAA”).⁶ But that premise is not

⁶ Among other points, Plaintiffs note that neither a memorandum opinion by the Department of Justice’s Office of Legal Counsel (“OLC”) nor testimony by copyright scholars Shira Perlmutter and Eugene Volokh, all of them addressing constitutional implications of

correct. Section 514 is a content-neutral statute, as Plaintiffs concede. See Pls.’ Mem. at 10-11. By definition, a content-neutral statute is one “that serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others.” Ward, 491 U.S. at 791 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)); Golan, 501 F.3d at 1196. Numerous statutory provisions, many of which have only an incidental effect on speech in general, fall into that content-neutral category. A judicial requirement that Congress explicitly address First Amendment concerns during the process of enacting any such provision at the risk of failing intermediate scrutiny makes no sense. Certainly, courts have upheld statutes under intermediate scrutiny without the benefit of a legislative history showing explicit consideration of First Amendment principles. See, e.g., Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135-37 (9th Cir. 2000) (upholding Antiterrorism and Effective Death Penalty Act of 1996 under intermediate scrutiny without addressing whether Congress explicitly considered First Amendment principles).

2. PLAINTIFFS’ SUGGESTION THAT THE INTERESTS SERVED BY THE RELIANCE PARTY PROVISIONS OF § 514 ARE TOO SPECULATIVE TO WITHSTAND FIRST AMENDMENT SCRUTINY IS INCORRECT AS A MATTER OF LOGIC.

Plaintiffs’ next argument is that the reliance party provisions of § 514 cannot withstand First Amendment scrutiny because the national interests they purport to serve are too speculative. From Plaintiffs’ perspective, the issue is not the permissibility of restoration itself; they concede that Congress “was [] plainly justified in believing that unless it enacted legislation to comply

restoration, address the First Amendment. This point does not help Plaintiffs’ position. In fact, it would appear to undermine it. Presumably, as independent actors each with strong knowledge of constitutional law principles, the OLC and Professors Perlmutter and Volokh had the freedom to raise any significant constitutional concerns they saw. Obviously, none identified any overwhelming concerns under the First Amendment.

with Article 18 [of Berne], other nations would not adequately protect American copyrighted works.” Pls.’ Mem. at 22. However, Plaintiffs suggest that such concrete justification does not extend to the enforcement of restored copyright as to reliance parties. In Plaintiffs’ own words, “[t]he question is . . . whether it was necessary to restore without adequate protection for reliance interests in order to induce other nations to enact or maintain protection for U.S. copyrights.” See id. In Plaintiffs’ view, the answer to that question is no. But Plaintiffs are incorrect as a matter of logic.

As a logical exercise, Plaintiffs’ argument is premised entirely on the suggestion that Congress went “beyond” Berne, and did so in a direction that penalizes reliance parties rather than benefitting them. This suggestion is essentially a semantic argument, and an odd one at that given the significant protections afforded reliance parties under § 514. At a basic level, the premise of Plaintiffs’ argument – that enforcement of restored copyright as to reliance interests goes beyond Berne in a way that harms those interests – is incorrect. As Plaintiffs concede, see Pls.’ Mem. at 22, Berne requires restoration. And any restoration that allowed reliance parties to continue exploiting otherwise restored works unchecked would not be much of a restoration, to put it mildly. See, e.g., Ricketson & Ginsburg, supra, at 343 (“[A] situation must eventually be reached when the work is protected in relation to all persons.”). On the other hand, as we have pointed out already, Berne itself never even mentions reliance parties, much less mandates a minimum level of protection for them. See Part II.B, supra. Clearly, a nation acceding to Berne now could enact provisions more or less protective of reliance interests than those enacted by a different nation, but measured against the baseline of what Berne itself requires, any degree of

protection at all is invariably more protective than what is required.⁷ Accordingly, if Congress could be accused of going beyond Berne, it would be in a direction that favors reliance parties by providing them protections not required by Berne. With its premise thus discredited, Plaintiffs' argument falls apart as a matter of logic.

The same faulty logic infects the remainder of Plaintiffs' argument. From Plaintiffs' perspective, "Berne does not require any restoration of rights against reliance parties like the Plaintiffs here." Pls.' Mem. at 2 (emphasis added). But we have already shown that a restoration of copyright that is ineffective as to reliance parties would essentially amount to an empty gesture – and one that would not satisfy Berne's requirements. See Part I, supra; see also Ricketson & Ginsburg, supra, at 343. In all likelihood, a "restoration" that allowed reliance parties in the United States to continue exploiting otherwise restored works of foreign authorship unchecked would do nothing to protect American works abroad. There is nothing speculative about Congress' logic in this regard.

Finally, Plaintiffs' suggestion that the United States' interest in correcting historic inequities to foreign authors is to some degree less than concrete, see Pls.' Mem. at 24, is also incorrect. Plaintiffs' suggestion seems to be premised at least in part on the vague notion that American authors were just as disadvantaged by the now-abandoned formalities once peculiar to

⁷ Plaintiffs assert that Berne "does not require any restoration of rights" in restored works against reliance parties such as themselves. Pls.' Mem. at 2. Apparently as a fall-back position, Plaintiffs have at least implicitly if not entirely consistently invoked the United Kingdom model for enforcing restored copyrights as to reliance interests as a preferable means of protecting such interests. We explain elsewhere that the United Kingdom model is not to any certain degree any more protective of reliance interests than § 514 is. See Part II.C.3, infra. More fundamentally, however, if Congress went "beyond" Berne in a way that disadvantages reliance parties relative to what Berne requires, there is no principled way to argue that the United Kingdom model did not also go beyond Berne in a similar fashion. At most, it would be a question of degree.

American copyright law as were foreign authors.⁸ But the record before Congress contradicts that notion. As explained by Shira Perlmutter, then-professor of law at Catholic University School of Law (later to become Associate Register of Copyrights for Policy and International Affairs at the United States Copyright Office):

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

Joint House and Senate Committee Hearings on the URAA, 103rd Cong. 191 (1994) (statement of Shira Perlmutter). In addition, Plaintiffs' argument ignores the other historical inequity that § 514 helped to correct – the loss of copyright protection to certain foreign authors whose own countries were not eligible for United States copyright at the time of publication.

3. PLAINTIFFS' ARGUMENT THAT § 514 FAILS INTERMEDIATE SCRUTINY BECAUSE ITS RELIANCE PARTY PROTECTIONS ARE NOT PERMANENT IS INCORRECT.

Finally, Plaintiffs argue that Congress should have legislated permanent protection for reliance parties when it restored copyright, and that because it did not, § 514 fails intermediate scrutiny (and substantial overbreadth). See Pls.' Mem. at 25-26. This argument fails for at least

⁸ For example, § 304 of the 1976 Copyright Act at one time required authors to renew their copyrights by application to the Copyright Office within one year prior to such copyrights' expiration. See Pub. L. 94-553, 90 Stat. 2573. In addition, § 401 of the 1976 Act required that a copyright notice appear on all publicly distributed copies of a work. Id. Foreign authors, many of them unaware of these and other technical nuances of United States copyright law, frequently lost their copyrights for failure to adhere to such provisions. Congress has since repealed both requirements, but such legislation did not affect copyrights that had already been lost. See Copyright Amendments Act of 1992, Pub. L. 102-307, 106 Stat. 264, §102(a)(2)(A)(ii); Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, §7.

two reasons. First, truly permanent protection for reliance parties would violate Berne, at least as Plaintiffs appear to envision permanent protection. Second, it is doubtful that any “permanent” protection that might satisfy Berne’s requirements would represent an actual advantage to reliance parties; to the contrary, it might well be less protective.

What Plaintiffs mean by “permanent” protection for reliance parties appears to be clear: in their view, “[B]erne does not require any restoration of rights against reliance parties like the Plaintiffs here.” Pls.’ Mem. at 2 (emphasis added). This is incorrect; insofar as Plaintiffs believe that reliance parties should be permanently entitled to exploit otherwise restored works free of any recourse, they are wrong. As explained by Professors Ricketson and Ginsburg in their treatise on international copyright law, one immutable requirement under Berne is that restored works must eventually be protected against exploitation by all parties, including those with reliance interests:

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

Ricketson & Ginsburg, supra, at 343.

Of course, Plaintiffs have from time to time also implied that they view the United Kingdom model for enforcing restored copyrights as to reliance parties as preferable to § 514’s reliance party protections. See, e.g., Pls.’ Mem. at 25-26. If the United Kingdom model is their fallback position, though, it is unclear what that gets them, as it is arguably less protective of reliance interests than § 514 is. Certainly, as we noted in our opening memorandum, reliance

parties in the United Kingdom may continue using restored or “springing” copyrights until the owner of the restored copyright comes forward to “buy out” the reliance party. See Declaration of Professor Lionel Bently in Supp. of Pls.’ Opp. to Defs.’ Mot. for S.J., November 1, 2004, at ¶¶ 13-15 (“Bently Declaration”). Nonetheless, it is unclear whether the reliance party actually benefits from that scheme. For one thing, there is no grace period, as there is in the United States under the URAA; that means that the owner of a restored copyright in the United Kingdom can immediately exercise its right to buy out a reliance party. See Ficsor Decl. at ¶ 101. If an owner’s demand to buy back his or her springing copyrighted work does not succeed, the next step is mandatory binding arbitration. See id. at ¶ 84 (quoting Article 7(2) of the Copyright (Application to Other Countries) Order 1999). While the reliance party apparently may continue to exploit the copyrighted work during any such arbitration, the costs of immediate arbitration would potentially be quite burdensome.

For another thing, there appears to be no special protection under the United Kingdom approach for authors of “derivative works” based on original works whose copyrights have been restored. See id. at ¶ 101. In that respect, the United Kingdom approach would appear to be more burdensome upon speech. Under the United States approach, an author of a derivative work can continue to exploit that work as long as he or she wants, subject only to the payment of reasonable compensation to the owner of the restored copyright in the original work. 17 U.S.C. §104A(d)(3). Under the United Kingdom approach, by contrast, the owner of the restored copyright may “at any moment from the entry into force of the restored rights, put an end of the use and exploitation of the derivative work by the ‘reliance party’ through ‘buying back’ the rights in it.” See Ficsor Rep. at ¶ 101.

III. PLAINTIFFS' CHALLENGE TO THE PRINCIPLE OF RESTORATION ITSELF, OSTENSIBLY ASSERTED UNDER THE FIRST AMENDMENT, ACTUALLY IS A CHALLENGE UNDER THE COPYRIGHT CLAUSE AND SHOULD BE REJECTED BASED BOTH ON THE LAW OF THE CASE AND AS A MATTER OF SUBSTANCE.

At the end of their opening brief, Plaintiffs finally challenge the core of § 514 – the restoration of copyright for eligible works under Berne. See Pls.' Mem. at 30-34. That this is the capstone of Plaintiffs' brief underscores the curious structure of their argument. As a matter of First Amendment logic, 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. Obviously, if restoration itself cannot withstand First Amendment scrutiny, the manner in which copyright in a restored work is enforced is no longer material. Presumably, a plaintiff with relative confidence in its position as to the constitutionality of restoration itself would follow that logical order. Here, though, Plaintiffs have flipped the sequence, asserting a challenge to restoration after almost thirty pages of arguing that § 514's means of enforcing restored copyright against reliance interests do not satisfy intermediate scrutiny.

A read-through of Plaintiffs' argument explains this approach: What Plaintiffs characterize as a First Amendment challenge to restoration is not in fact a First Amendment challenge, but rather a challenge under the Copyright Clause. Intermediate scrutiny aside, they argue, the First Amendment bars Congress from restoring any copyright “when one recognizes that an independent constitutional bar would render any interest in favor of restoring a copyright no longer a legitimate ‘government interest.’” See Pls.' Mem. at 30-31. That “independent constitutional bar,” of course, is the Copyright Clause. See id. at 31. Plaintiffs must recognize their argument for what it is: a Copyright Clause challenge ineffectively disguised as a challenge under the First Amendment.

That being the case, this argument requires little in the way of response other than citation to the law of the case. In 2004, this Court rejected Plaintiffs' claim that the Copyright Clause barred the restoration of copyright implemented by § 514 pursuant to the requirements of Berne. Golan v. Ashcroft, 310 F. Supp. 2d 1215, 1218 (D. Colo. 2004). On appeal, the Tenth Circuit upheld that ruling as to Plaintiffs' Copyright Clause challenge, explaining that the power to restore works to copyright, at least on the basis of the facts of this case, is not outside of the authority granted to Congress under the Copyright Clause. Golan v. Gonzales, 501 F.3d 1179, 1186-87 (10th Cir. 2007). In rejecting Plaintiffs' suggestion that absent a ruling in their favor, "Congress could adopt a practice of copyrighting works as they fall into the public domain," the Tenth Circuit explained: "[T]his argument is similar to one the Eldred plaintiffs raised, and, like the Eldred Court, we are mindful that a 'regime of perpetual copyrights is clearly not the situation before us.'" Id. at 1186. On that basis alone, this Court should summarily reject Plaintiffs' Copyright qua First Amendment Clause argument.

Of course, Plaintiffs demur, suggesting that this is a First Amendment challenge animated by the norms of the Copyright Clause. In Plaintiffs' words, they "do not here argue that restoring works from the public domain violates the Copyright Clause directly." Pls.' Mem. at 32 (emphasis added). "Instead, Plaintiffs' argument is simply that the norms of the Copyright Clause should inform the scope of legitimate government interests under the First Amendment. And that the norm of protecting a public domain must therefore constrain the legitimate interests recognized under the First Amendment." Id.

That is too fine a distinction. In reality, Plaintiffs' position amounts to an argument that they can reassert the same direct challenge previously rejected by this Court (a holding affirmed

by the Tenth Circuit) as long as they do so indirectly. They cannot. But assuming arguendo that they could, the question becomes whether the Copyright Clause norms that Plaintiffs invoke would invalidate the restoration of copyright under the First Amendment.

The law of the case aside, the answer to that question is no: There are no Copyright Clause norms that would invalidate § 514 under the First Amendment. The same intermediate scrutiny standard we have already discussed applies here: A provision will be sustained where it “(1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests.” Turner II, 520 U.S. at 189. We have already established that § 514 satisfies the second element of that test. See Part II.B, supra. It also meets the first. Plaintiffs’ argument is this: If Berne requires restoration, compliance with Berne ipso facto cannot serve an important governmental interest, because the sanctity of the public domain trumps any interest that could only be met by removing one or more works from the public domain. But that very argument has been rejected by this Court and by the Tenth Circuit in this very case (albeit under the Copyright Clause). Golan, 501 F.3d at 1186-87; Golan, 310 F. Supp. 2d at 1218. If removal of works from what Plaintiffs view as an inviolate public domain does not by itself violate the Copyright Clause, it cannot by itself disqualify compliance with Berne from representing an important government interest under the First Amendment’s intermediate scrutiny standard.

Plaintiffs attempt to escape this inevitable conclusion by resorting to a parade of horrors. In particular, Plaintiffs suggest a hypothetical under which Congress determines that it will reduce the national debt – probably an important government interest – by “auctioning off” the public domain one work at a time. See Pls.’ Mem. at 32. But Plaintiffs’ attempted analogy

fails. 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.

In the end, Plaintiffs cannot have it both ways. They cannot concede that compliance with Berne represents an important government interest under the First Amendment, Pls.’ Mem. at 2 (“It may be important to comply with Berne, and Berne no doubt requires restoration.”), yet contend elsewhere that Copyright Clause norms mean that any interest in complying with Berne would be illegitimate under the First Amendment, see id. at 32-33. Whether it represents the law of the case or simply controlling authority, the Tenth Circuit’s ruling in this case means that Plaintiffs’ First Amendment challenge to the core of § 514 – the principle of restoration itself – must stand or fall on its own. As we have shown here and in our opening brief, it falls.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening memorandum, the Court should uphold § 514 against Plaintiffs' First Amendment challenge, and enter summary judgment in favor of Defendants.

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