IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854 (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
JOHN MCDONOUGH d/b/a TIMELESS VIDEO ALTERNATIVES INTERNATIONAL

Plaintiffs,

vs.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States, and MARYBETH PETERS, Register of Copyrights, Copyright Office of the United States,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S OBJECTION TO THE MAGISTRATE JUDGE'S RULING ON PLAINTIFFS' RULE 56(f) MOTION

Plaintiffs Lawrence Golan, Richard Kapp, S.A. Publishing Co., Inc. Symphony of the Canyons, Ron Hall, d/b/a Festival Films, and John McDonough, d/b/a Timeless Video Alternatives International (collectively "Plaintiffs"), through their undersigned counsel, oppose Defendant's Objection to the Magistrate Judge's Ruling on Plaintiffs' Rule 56(f) Motion ("Govt's Objection"). The Magistrate Judge's ruling was not clearly erroneous or contrary to law. It should be affirmed.

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 72(a), where objection has been made to an order of a magistrate judge on a non-dispositive motion, a district judge can modify or set aside a portion of that order only if it is found "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *Ariza v. U.S. West Commns. Inc.*, 167 F.R.D. 131, 133 (D. Colo. 1996). The decision of the magistrate must be affirmed unless "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Ariza*, 167 F.R.D. at 133 (citing *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)). As the honorable Judge Kane so succinctly put it, a magistrate's ruling should stand unless it "strike[s] me as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Id.* (internal citations and quotations omitted).

As discussed more fully below, there is no "dead fish" here. Defendant's objection should be overruled.

II. BACKGROUND

Defendant's objection to Magistrate Judge Boland's Order granting in part Plaintiffs' Rule 56(f) motion is another attempt to stonewall discovery on issues this Court has already decided are factually in dispute. *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1218-21 (D. Colo. Mar. 15, 2003) (C.J. Babcock). Despite this Court's denial of Defendant's motion to dismiss Plaintiffs' constitutional challenges to section 514 of the Uruguay Round Agreements Act, Defendant originally refused to serve initial disclosures and then argued to Magistrate Judge Boland that all discovery should be stayed pending Defendant's summary judgment motion. *See* Scheduling Order at 11-14, *entered* May 19, 2004 [Docket #32]. Judge Boland rejected

Defendant's argument, entered a schedule for fact and expert discovery, and, logically, set a deadline for the filing of dispositive motions to occur after the close of discovery. *See id.* at 14.

Undeterred, Defendant filed its summary judgment motion just one month into discovery and then sought to foreclose Plaintiffs' discovery. Def's Mot. for Summ. J., *filed* June 21, 2004 [Docket #35]. Rather than answering Plaintiffs' written discovery requests served in early July 2004, Defendant filed a motion for protective order seeking (again) to deny Plaintiffs of any discovery whatsoever. *See* Def.'s Mot. for Prot. Order Staying Disc., *filed* Aug. 5, 2004 [Docket #43]. In response to Defendant's summary judgment motion, Plaintiffs timely responded with a Rule 56(f) motion for discovery. Plfs' Rule 56(f) Mot. for Disc., *filed* July 12, 2004 [Docket # 37]. This Court referred Plaintiffs' 56(f) Motion to Magistrate Judge Boland, *see* Mem. Order, *entered* July 13, 2004 [Docket #38].

After an hour-long hearing, Judge Boland granted Plaintiffs' Rule 56(f) motion in part and rejected Defendant's second attempt to forestall discovery. H'g Trans., Aug. 17, 2004 at 38:17-19 (copy attached as Exhibit A). Noting that this "already is an old case," and a trial is scheduled for June, Judge Boland ruled that Plaintiffs are allowed to conduct discovery. Hr'g Trans. at 40:3-41:11; Order Aug. 17, 2004 (Aug. 17 Order) at 2 (copy attached as Exhibit B).[1] Judge Boland correctly concluded that Defendant's motion for summary judgment "does not go beyond the pleadings." Hr'g Trans. at 27:27:22. In fact, it advances the same arguments made in the motion to dismiss – which this Court has already rejected. *Compare* Mem. ISO Def.'s

[1] Defendant lodges no objection to Judge Boland's Order denying the protective order.

Renewed Mot. To Dismiss, *filed* April 29, 2003 [Docket #21] *with* Mem. ISO Def's Mot. for Summ. J. ("Govt SJ Mem.") [Docket #36]; *accord Golan*, 310 F. Supp. 2d at 1218-21.

Expressly relying on this Court's Order denying Defendant's motion to dismiss, Judge Boland found "that there is a material issue of fact on the point of whether there was historical evidence of a historical tradition of removing works from the public domain." Hr'g Trans. at 38:19-23; *see also id.* 39:1-3 ("I do think that the upshot of [Judge Babcock's] order is to find that ... the issue of the history [of] restoration of copyrights into the public domain is a matter about which there may be a factual dispute"). Judge Boland also granted discovery on the First Amendment, substantive due process, and foreign law issues raised in Plaintiffs' Rule 56(f) Motion. Hr'g Trans at 40:1-41:11. As Plaintiffs' papers make clear, important discovery from Defendant and third parties is necessary in responding to all of the arguments raised in Defendant's summary judgment motion. *See* Plfs' 56(f) Mot. at 4-12 (regarding copyright clause challenges), 12-18 (regarding First Amendment challenges), 18-23 (regarding substantive due process challenges) and 23-24 (regarding foreign law issues); Gottschalk Aff. at ¶¶ 13-21; Plfs' Reply at 3-14.

In granting Plaintiffs' Rule 56(f) motion in part, Judge Boland denied Plaintiffs' request for the full period of discovery contemplated by the Scheduling Order (through January 5, 2005). Instead, Judge Boland ordered Plaintiffs to respond to Defendant's summary judgment motion by November 1, 2004. Hr'g Trans. 39:21-23; Aug. 17 Order at 2. As of the filing of this brief – with only six weeks before their summary judgment opposition is due – Plaintiffs have yet to receive from Defendant a single substantive response to their discovery requests that were served

in early July.[2] Because Defendant has failed to meet its burden of showing that Judge Boland's Order is in any manner "clearly erroneous," and because the Order represents the sound exercise of trial court discretion, this Court should overrule Defendant's objection.

III. JUDGE BOLAND'S ORDER REPRESENTS NO ERROR

A. Judge Boland's Order Comports With Rule 56(f) Standards.

Judge Boland's order comports with the normal standards in this Circuit concerning granting of Rule 56(f) motions. In the Tenth Circuit, motions for discovery under Rule 56(f) "should be treated liberally unless dilatory or lacking in merit." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (quoting James W. Moore & Jeremy C. Wicker, *Moore's Federal Practice* ¶ 56.24 (1988)); *see also Patty Precision*, 742 F.2d at 1265 (discovery allowed under Rule 56(f) where opposing party had indicated intent to refuse discovery requests of moving party). The moving party need not establish any evidentiary facts in its motion. *Campbell*, 962 F.2d at 1522. All the moving party needs to show is: (1) "why facts precluding summary judgment cannot be presented," including "the probable facts not available and what steps have been taken to obtain these facts," and (2) "how additional time will enable [the party] to rebut movant's allegations of no genuine issue of fact." *Id.* Moreover, a Rule 56(f) motion should be freely granted where, as here, the moving party has not had any opportunity for discovery. *See Burlington Northern,* 323 F.3d at 773 ("[w]here . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity

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[2] At the hearing on August 17, Judge Boland denied Plaintiffs' request for discovery responses from Defendant within 10 days of the denial of Defendant's protective order motion. Hr'g Trans. at 42:18-22; 43:17-20. Defendant's responses are due on September 17, 2004. *See* Aug. 17 Order at 2.

to pursue discovery *relating to its theory of the case*, district courts should grant any Rule 56(f) motion fairly and freely."); *see also, e.g., Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) (reversible error to grant summary judgment where plaintiff had no discovery related to First Amendment claim). As demonstrated in Plaintiffs' briefs in connection with the Rule 56(f) motion, and described in the Affidavit of Hugh Q. Gottschalk ("Gottschalk Aff."), Plaintiffs easily satisfy the requirements for Rule 56(f) relief. Judge Boland agreed.

Importantly, as noted in Plaintiffs' reply brief, much of the case law relied upon by Defendant in opposing Plaintiffs' Rule 56(f) motion involves a stay of discovery pending a motion to dismiss, ***not*** a summary judgment motion. *See* Govt 56(f) Opp. at 4-5; *see also* Plfs' 56(f) Reply at 13. This distinction is important because, here, this Court has already ***denied*** Defendant's motion to dismiss, found that there is a set of facts upon which the URAA can be found unconstitutional, ordered discovery to take place, set a schedule for the timely completion of discovery, and rejected Defendant's motion to stay discovery. Accordingly, Judge Boland's decision which provides only limited Rule 56(f) relief to Plaintiffs – requiring a summary judgment opposition to be filed on or before November 1, 2004 – is fully within the precedent binding on this Court and should not be disturbed.

B. The Existence Of An Alleged Historical "Tradition" or "Belief" Is A Controverted Fact On Which Plaintiffs Are Permitted Discovery.[3]

The centerpiece of Defendant's Objection lies with Judge Boland's finding that historical facts concerning the purported "historical tradition" or "belief" advanced by Defendants is a

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[3] Rather than merely repeat the lengthy argument in Plaintiffs' papers in support of the Rule 56(f) Motion, Plaintiffs summarize the key arguments here. This argument, concerning the copyright clause claims, is presented in greater detail in Plaintiffs' Rule 56(f) Motion at

disputed material fact that, with proper discovery, may preclude summary judgment. Judge Boland's finding is consistent with the Supreme Court precedent and does not represent clear error. It should be affirmed.

Simply stated, Defendant's summary judgment motion advances a storyline now familiar to this Court: that the Congress and the Executive "have evinced consistently, from the First Congress through the present, their belief that no constitutional principle prevents them from restoring copyright protection to works whose protection lapsed...." Govt SJ Mem. at 14. Defendant's motion goes on for eleven pages to describe this alleged "tradition" and "practice" which evidently reflects a "belief" in this country that any manner of works may be removed from the public domain without constitutional challenge. *Id.* at 14-25. This "belief," however, is not expressly manifest in any of the acts or proclamations cited by Defendant. It also directly contradicts the tradition of protecting the public domain which has existed since the inception of the Republic. *See generally, e.g.,* Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 Hastings L.J. 91, 115-16 (2003) (discussing historical origin of public domain and Framers' response to British abuses). Thus, Defendant's factual assertion of this "belief" or "tradition" is plainly material and one that Plaintiffs dispute by this lawsuit. Plfs' 56(f) Motion at 4-12.[4] Defendant even ***concedes*** that this factual dispute exists. *See* Def's Opp. at 12-13 &

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pages 4-12, Reply at pages 4-8, and in the supporting Affidavit of Hugh Q. Gottschalk at ¶¶ 3-21.

[4] Defendants' summary judgment argument goes well beyond an argument purely concerning legislative history or statutory construction. Its argument seeks to prove that a perception or "belief" existed at the founding of the Republic and continued on through nearly 200 years of history. It argues this "belief" was incorporated into the 1790 Copyright Act, and

n.8 (acknowledging "[t]he parties do disagree whether the historical tradition exists"). Accordingly, Judge Boland found that the facts in history advanced by Defendant can be refuted by Plaintiffs with other historical facts, and that discovery should continue for a limited time so that Plaintiffs may develop those facts. Hr'g Trans. at 38:17-39:25. This decision is a far cry from the "clear error" that this Court must find in order to modify or set aside the ruling. *See Ariza* 167 F.R.D. 133. Indeed, Judge Boland's reasoning is sound and justified under the binding precedent of the Supreme Court. *See e.g., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2003), *Hunter v. Underwood*, 471 U.S. 222 (1985), *Wheaton v. Peters*, 33 U.S. 591 (1834)). *See also* Plfs' 56(f) Motion at 4-12 (discussing these cases); Plfs' Reply at 4-8 (same).

Further, Plaintiffs' 56(f) motion explained in detail the discovery needed in order to present this Court with meaningful affidavits contradicting Defendant's factual argument of the purported "belief," "tradition," or "practice" of removing works from the public domain. *Id.; see also e.g.,* Gottschalk Aff., ¶¶14, 15, 17, 20. For example, to contradict Defendant's asserted "belief," in addition to the specific discovery sought from Defendant and described *supra* at

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other acts of Congress and the President. *See generally* Govt SJ Mem. at 14-25. If such a broad "belief" existed – one which conflicts directly with recognized tradition of a protected public domain (*see e.g., Bridge Publications, Inc. v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254 (D. Colo. 1998) ("Once a work enters the public domain, it remains there irrevocably."); *Jacobs v. Robitaille*, 406 F. Supp. 1145 (D.N.H. 1976) ("Once a work has been injected into the public domain, all of its copyright protection is lost permanently and cannot be restored or reclaimed.")) – one would expect evidence of this "belief" beyond the mere acts and presidential proclamations themselves. Plaintiffs have found no such evidence, and have asked Defendant's in discovery whether any exists. *See* Gottschalk Aff., Exh. Exh. 4 (Interrogatory Nos. 1-5 seeking, *inter alia*, titles of actual works purportedly removed from the public domain under the historical statutes and contemporaneous statements by Congress or Executive supporting the "historical tradition"). If Defendant has no evidence, this glaring omission of the purported wide-scale "belief" undercuts Defendant's argument. The Court should have the benefit of such discovery before making any rulings on summary judgment or at trial concerning this constitutional challenge.

footnote 4, Plaintiffs explained the need to obtain expert testimony challenging Defendant's description of the early Republic and to give context to the inclusion of printed works within the coverage of the 1790 Copyright Act. *See* Gottschalk Aff., ¶ 17; *see also id.*, ¶14 & Exhs. 4 (interrogatories), 5 (document requests). Judge Boland is not alone in his conclusion that Plaintiffs should have the opportunity to develop this evidence contradicting summary judgment. Courts have recognized that historian experts are useful in providing crucial insight on the historical context of old statutes, including the context in which the statue arose and later operated. For example, in analyzing a 1924 statute (the Pueblo Lands Act) on summary judgment, a district court in this Circuit exercised repeated reliance on testimony of a historical expert witness regarding a complex statutory history spanning from an 1848 treaty to the adoption of an the act in 1924. *United States v. Thompson*, 708 F. Supp. 1206, 1212-1213 (D.N.M. 1989) (relying repeatedly on "Plaintiffs' Ex. LCK" referring to affidavit of expert witness "Lawrence C. Kelly"). In that case, the expert historian was proffered *by the government*, the plaintiff in that action. *Id.* at 1210. In denying a motion in limine to exclude such evidence, the district judge soundly acknowledged that "in a case as historically complex as the one presently before it, the Court is at a loss to see how an adequate decision [on summary judgment] could be reached without expert historical testimony." *Id.* at 1211.

Here, like in the *Thompson* case and others, testimony concerning the relevant historical facts will assist the Court and jury to fully "understand the evidence" regarding the public domain and the passage of copyright laws in the early days of the Republic. *Id.* at 1211; *see also* Fed. R. Ev.d 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact understand the evidence or to determine a fact in issue, a witness qualified as an

expert...may testify thereto in the form of an opinion or otherwise")). In short, if Defendant intends to rely on this putative "historical tradition" or "belief" to support its summary judgment, it cannot deny Plaintiffs an opportunity to refute that historical claim with contradictory evidence and testimony.

Additionally, Defendant's argument (repeated in the Objection) that a "cursory glance" at recent Supreme Court cases supports its position was unconvincing to Judge Boland and should be unconvincing here. Plaintiffs agree that the Supreme Court may "use" history when interpreting the Constitution and statutory text, however ***none*** of the cases cited by Defendant stands for the broad proposition that evidence of historical facts must be confined to presentation in a legal brief. Judge Boland acknowledged precisely this argument and, in exercising his sound discretion, rejected it. Hr'g Trans. at 39:9-18 ("And while those arguments can be made and sometimes are made based upon treatises and books and the like, it is the fundamental function of a trial court to find facts where facts are disputed and can be found... I think there is or may be some historical facts necessary for the resolution of the issue of this historical tradition and removal of works from the public domain. So I'll allow discovery to proceed because I find there to be a potential fact issue on that point."); *accord United States v. Thompson*, 708 F. Supp. 1206. Thus, Judge Boland's order is not contrary to the law, and should be affirmed.

C. First Amendment, Due Process Clause Claims, and Foreign Law Issues[5]

Like its brief in opposition to Plaintiffs' 56(f) motion, Defendant's Objection fails to discuss the substance of Plaintiffs' need for discovery on the First Amendment and substantive due process clause claims. *See* Govt's Objection at 2 n. 2; Govt's Rule 56(f) Opp. at 16-17. In

their Rule 56(f) Motion, Plaintiffs explained their need for discovery to respond to the pending summary judgment motion as to Plaintiffs First Amendment and substantive due process claims. Plfs' 56(f) Mot. at 12-23. Defendant provided no response at all to Plaintiffs argument on these claims. Gov't Rule 56(f) Opp. at 16-(stating it "will not respond" to Plaintiffs' argument on First Amendment discovery because it involves a "legal argument" about the legal standard for proving these claims which are "irrelevant"); *id.* at 17 (same regarding substantive due process claims). Defendant offered no authority to support its unique assertion that legal arguments are improper in a Rule 56(f) motion. Not surprisingly, Judge Boland also rejected this unsupported argument.

As explained more fully in Plaintiffs' 56(f) Motion, the legal standard for proving a claim is undoubtedly relevant to a Rule 56(f) motion, because it helps to illuminate what genuine issues of fact remain to proving that claim. *See* Fed. R. Civ. P. 56(e), (f); *North Bridge Assoc.*, 22 F.3d at 1207-08 (discussing legal standard related to claims and defenses in granting Rule 56(f) motion). Plaintiffs set forth precisely why factual development is necessary to resolve their First Amendment and substantive due process claims under the ***correct*** legal standard, in light of this Court's order and relevant case law. *See* Plfs' 56(f) Mot. at 12-23; *see also Golan*, 310 F. Supp. 2d at 1220.[6] Indeed, Defendant implicitly concedes that, if Plaintiffs are right about the legal

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[5] *See also* Plaintiffs' 56(f) Motion at 12-25, Reply at 3-4 (First Amendment, substantive due process issues) 8-9 (foreign law issues).

[6] Even Defendant conceded that it "recognize[d] that, in denying its renewed motion to dismiss, this Court concluded that 'Plaintiffs' argument adequately distinguishes the free speech holding in *Eldred*' – which is the standard relied on by Defendant. Gov't SJ Mem. 34 n.19.

standards for the First Amendment and substantive due process claims, the "other facts" sought by Plaintiffs ***are*** relevant and proper for discovery. *See* Gov't 56(f) Opp. 2, 15, 17.

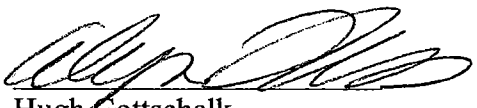
Finally, Defendant's argument to Judge Boland regarding foreign laws misunderstands how foreign laws are relevant to this case or why expert testimony and evidentiary submissions are necessary. *See* Gov't 56(f) Opp. at 18-20. Defendant repeatedly argued in its summary judgment motion that section 514 of the URAA is constitutional under the Copyright Clause and the Treaty Power because it supposedly "fully implements" the Berne Convention. Gov't SJ Mem. at 4, 5, 7, 8, 32. However, discovery of the practices of foreign countries within the Berne Union is expected to refute that argument. The intellectual property laws of other countries *are* foreign laws. Under Federal Rule of Civil Procedure 44.1, as even Defendant concedes (Gov't 56(f) Opp. at 18-19), evidentiary and expert submissions are entirely appropriate to assist the court's understanding of foreign laws. Fed. R. Civ. P. 44.1; *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999) ("expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined"). Because Defendant has opened the door to this issue, Plaintiffs must be afforded an adequate opportunity to respond with the practices of foreign countries in implementing the Berne Convention. These foreign practices are also material to this case because they bear on whether, under First Amendment scrutiny, section 514 of the URAA burdens substantially more speech than is necessary. Evidence of foreign countries' practice in ***protecting*** reliance parties will help to establish that section 514 burdens far more speech than is necessary to implement the Berne Convention. Accordingly, Judge Boland's orders present no "clear error" and Defendant's objection should be overruled.

IV. CONCLUSION

For the foregoing reasons, the Defendant's objection pursuant to Fed. R. Civ. P. 72(a) to Judge Boland's August 17 Orders should be overruled.

Dated: September 16, 2004

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S OBJECTION TO THE MAGISTRATE JUDGE'S RULING ON PLAINTIFFS' RULE 56(f) MOTION** by placing a true and correct copy in the United States mail, first-class postage prepaid and via e-mail, on this 16th day of September, 2004, to:

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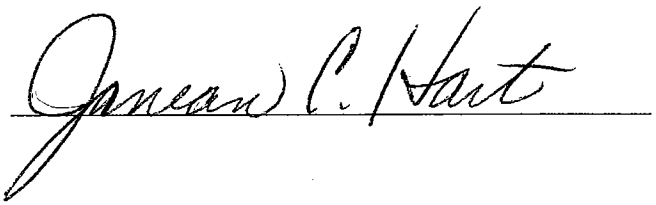

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Case No. 01-B-1854(BNB)

LAWRENCE GOLAN, et al.,

Plaintiffs,

vs.

JOHN ASHCROFT,

Defendant.

Proceedings before BOYD N. BOLAND, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 8:31 a.m., August 17, 2004, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

CAROLYN FAIRLESS, HUGH GOTTSCHALK and COLETTE VOGELE, Attorneys at Law, appearing for the plaintiffs.

JOSHUA RABINOVITZ, Attorney at Law, appearing for the defendant.

MOTIONS HEARING

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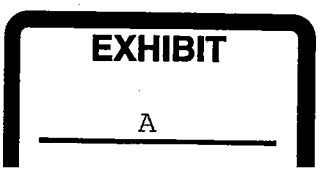

their opposition, but that's not a reason for granting discovery before opposing the motion for summary judgment.

So the motion to dismiss -- the denial of that -- has absolutely no relevance to whether plaintiffs have met their burden under Rule 56(f). They haven't met their burden, and the Court should, therefore, deny the motion in toto, require them to answer where we can get definitive rulings from Judge Babcock on the standards of review he's going to implement in reviewing the statute, and then, if anything survives, we will have directed discovery, we'll know what to do on the back end.

If Your Honor has no further questions.

THE COURT: Well, Ms. Vogele said that the filing of the motion for summary judgment at this time -- I don't know if she said it was aberrational, but --

MR. RABINOVITZ: She did.

THE COURT: -- something like that.

MR. RABINOVITZ: That's correct.

THE COURT: And while it's not aberrational, it's not common. What is the motivating factor for promptly, after denial of the motion to dismiss, filing a motion for summary judgment which doesn't go beyond the pleadings.

MR. RABINOVITZ: Well, the reason is -- and, again, we spoke about this at the scheduling conference, Your Honor, we told you -- we told you and the plaintiffs then

summary judgment have already been rejected. That's not a reason for discovery before opposing the motion for summary judgment; that's a reason for denying the motion for summary judgment. And they can make that argument to Judge Babcock it they think it will be successful. But in no way, shape or form does the fact that they think that Judge Babcock has already rejected these arguments indicate that they need discovery before opposing our motion for summary judgment.

At best, it means that Judge Babcock should deny the motion for summary judgment. But that's not the function of this Court, that's not the reason why Judge Babcock referred the Rule 56(f) motion to Your Honor. Plaintiffs point to no reason why they need discovery; they point to a reason why they think the motion for summary judgment should be denied. That's not a reason for discovery. Thank you.

THE COURT: The plaintiffs' Rule 56(f) motion for discovery filed July 12th, 2004 is granted in part. I'm going to allow discovery to proceed. And in doing that, I am convinced that there is a material issue of fact on the point of whether there was historical evidence of a historical tradition of removing works from the public domain.

Judge Babcock's order does not indicate that there's an issue of fact as clearly as Ms. Vogele states it

in her brief, but I do think that the upshot of his order is to find that there -- the issue of the history restoration of copyrights into the public domain is a matter about which there may be a factual dispute.

I understand the attorney general's argument about proving history, I just disagree with it. I think that there can be historical facts concerning the effect of laws and the, quote, historical tradition, end quote, which may be subject to factual evidence. And while those arguments can be made and sometimes are made based upon treatises and books and the like, it is the fundamental function of a trial court to find facts where facts are disputed and can be found. And that is the argument made by the plaintiffs here, and I think there is or may be some historical facts necessary for the resolution of the issue of this historical tradition and removal of works from the public domain. So I'll allow discovery to proceed because I find there to be a potential fact issue on that point.

I don't think that it requires through the end of the discovery period in January of 2005 to do the discovery necessary to address that issue. So what I will do is order that the plaintiffs respond to the motion for summary judgment within 75 days of today. That allows 60 days for discovery and 15 days after the discovery is completed within which to make sense of it and submit a brief.

I'm less convinced that there are factual issues on the other matters, but since I'm going to allow discovery to go forward, I'll allow discovery to go forward. I'm going to deny the motion to stay discovery -- I'm sorry, the motion for protective order staying discovery, filed by the attorney general on August 6th, 2004.

In denying that motion, I begin by noting that this already is an old case, having been filed in 2001. Now, I don't stay discovery to allow the determination of dispositive motions absent something extraordinary. I don't, because dispositive motions are filed in many, if not most, of the civil cases here, and denied in most of the cases where they are filed. So I -- absent something persuading me to the contrary, I don't think it's an efficient fact or an efficient process to stay discovery while a dispositive motion is pending. If I did that, every case would be delayed a number of months, and that would be contrary to the Rules of Civil Procedure which assert that cases should be promptly determined.

Here there is a trial set in June of 2005, and I'm not convinced that, were I to stay discovery, a decision on the motion for summary judgment could be made with sufficient time left for the necessary discovery to be completed for the trial to proceed in June of 2005. In other words, I think if I stayed discovery while the motion

for summary judgment was decided, it would very likely necessitate a delay in the trial date, which I'm not willing to do.

Nor has anything been argued to me which makes this case extraordinary. This isn't a case like the many which assert qualified immunity where, in its wisdom, the Congress has decided that discovery shouldn't occur. This is simply a case where if the motion is granted, which most are not, it would streamline the discovery, but it also would lead probably to a delay in the trial. So I'm not willing to take that risk.

MR. RABINOVITZ: Your Honor, if I may quickly?

THE COURT: Yes.

MR. RABINOVITZ: We would move at that point then to stay Your Honor's order on Rule 56(f) pending objections that we intend to file with Judge Babcock. Especially given that Your Honor does not believe that the Rule 56(f) discovery that is requested should be granted in toto, but is doing it only as a practical matter, we would request that we have the ten days within which to file objections, plaintiffs then respond, and then Judge Babcock can answer -- can resolve the motion -- the objections as quickly as he sees fit, and that that will not lead to an extended delay, and that that's the least the Court can do by way of mandating efficiency in this case. Because if Judge Babcock

does deny the Rule 56(f) motion, then we would not be going forward (inaudible).

THE COURT: The oral motion to stay my order on discovery is denied. In an appropriate case, I will stay a discovery order to allow objections to proceed. But, again, that's not just in any old case, it's in a case that warrants it. So, for example, where my order requires the disclosure of allegedly or arguably privileged material, and not to stay my order would, in essence, unring the bell -- or, rather, ring the bell which couldn't be unrung, I'm willing to stay the order to allow the objection to proceed.

I see no similar necessity here, and the argument that Mr. Rabinovitz makes would be equally applicable in every discovery order I make, which is, maybe you're wrong, the district judge needs a chance to find out. I just don't see the necessity here, so the motion's denied.

Ms. Vogele, anything more?

MS. VOGELE: Yeah, a couple of quick things. Excuse me. We have outstanding discovery and now that the motion for protective order has been denied, we would like those responses to be made as soon as possible. Our motion -- or our -- so on that issue, we'd like it within ten days.

Secondly, we would like -- because we find that the government's motion for protective order in the first instance was an abuse of procedures in this court, we have

asked in our opposition that all objections be waived to those -- those discovery requests. There are ten interrogatories and two document requests. They are attached to our opposition to the protective order motion.

THE COURT: Okay. Let's talk about when a response to the discovery may be provided. Mr. Rabinovitz, how much time do you think you need?

MR. RABINOVITZ: I think there is no way we can do it in less than 30 days. We're talking about discovery from the entire Department of Justice. I have no idea which components might be likely to have information on this. My intuition is that none would, but I've to do it, I've got to check. And to do so from a 9,000 person law firm, essentially, is simply impossible to do in ten days. It's hard to do in 30 days, but that's what the rules require and that's what I'll try and do.

THE COURT: I'll order that responses to discovery be provided within 30 days of today. I deny the request to sanction the government -- or, I'm sorry, the attorney general -- by disallowing objections.

Mr. Rabinovitz, anything more?

MR. RABINOVITZ: No, Your Honor.

THE COURT: Thank you very much. We're in recess.

MS. VOGELE: Thank you, Your Honor.

MR. RABINOVITZ: Thank you, Your Honor.

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FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

AUG 18 2004

GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Civil Action No. 01-B-1854 (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,
JOHN MCDONOUGH d/b/a VIDEO ALTERNATIVES INTERNATIONAL,

Plaintiffs,

v.

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

Defendant.

ORDER

This matter is before me on the following motions:

(1) **Plaintiffs' Rule 56(f) Motion for Discovery** (the "Rule 56(f) Motion"), filed July 12, 2004;

(2) Defendant's **Motion for Protective Order Staying Discovery** (the "Motion to Stay Discovery"), filed August 6, 2004; and

(3) Defendant's oral motion to stay my orders on the Rule 56(f) Motion and on the Motion to Stay Discovery.

I held a hearing on the motions this morning and made rulings on the record, which are incorporated here. In summary and for the reasons stated on the record:

IT IS ORDERED that the Rule 56(f) Motion is GRANTED IN PART. The plaintiff shall

EXHIBIT
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have to and including **November 1, 2004**, within which to respond to the Defendant's Motion for Summary Judgment [Doc. No. 35-1, filed 6/22/04]. The defendant shall respond to the plaintiffs' outstanding discovery on or before **September 17, 2004**.

IT IS FURTHER ORDERED that the Motion to Stay Discovery is DENIED.

IT IS FURTHER ORDERED that the defendant's oral motion to stay my orders granting the Rule 56(f) Motion and denying the Motion to Stay Discovery is DENIED.

Dated August 17, 2004.

BY THE COURT:

Boyd N Boland
United States Magistrate Judge