NO. 91-7694

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK CHINESE T.V. PROGRAMS, INC.,

Plaintiff-Appellee,

v.

U.E. ENTERPRISES, INC., et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Taiwan Relations Act ("TRA"), 22 U.S.C. § 3301, et seq., continues in force the provisions of the Treaty of Friendship, Commerce and Navigation ("FCN Treaty") entered into between the United States and the then-recognized Republic of China ("ROC") for purposes of copyright protection under section 104(b)(1) of the Copyright Act, 17 U.S.C. § 104(b)(1), after derecognition of the Republic of China by the United States on January 1, 1979.

INTEREST OF THE UNITED STATES

At the request of the district court, the United States submitted a Statement of Interest, stating its view that the Taiwan Relations Act validly continues in force the provisions of

the FCN Treaty for purposes of copyright protection under section 104(b)(1) of the Copyright Act, 17 U.S.C. § 104(b)(1). Defendants-appellants U.E. Enterprises, Inc., et al. ("defendants") have challenged that conclusion on this appeal, a conclusion with which the district court generally agreed. App. 207, 224-38.[1] The United States has a continuing interest in the proper application of the Taiwan Relations Act by the federal courts and has participated either as amicus curiae or as intervenor in other appellate cases involving that statute. Millen Industries Inc. v. Coordination Council For North Am. Affairs, 855 F.2d 879, 880, 883-84 (D.C. Cir. 1988); Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment, 530 A.2d 1163, 1169-72 (D.C. App. 1987).

STATEMENT OF THE CASE

Plaintiff-appellee New York Chinese TV Programs, Inc. ("plaintiff") initiated this action, claiming that defendants' reproduction and sale of certain Mandarin language videotapes violated plaintiff's rights under the Copyright Act, 17 U.S.C. § 101, et seq., the Lanham Act, 15 U.S.C. § 1125(a) (1982), New York state law, N.Y. Gen. Bus. Law § 350 (McKinney 1988), and constituted common law unfair competition and interference with contractual relations. The district court granted plaintiff an ex parte temporary restraining order, which the parties subsequently agreed would remain in effect pending a decision on

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[1] All references to the Joint Appendix filed in this case shall be to "App."

plaintiff's motion for a preliminary injunction. In opposition to plaintiff's motion, defendants asserted, inter alia, that the TRA is unconstitutional to the extent it seeks to confer copyright protection on Taiwanese nationals pursuant to the FCN Treaty entered into between the United States and the then-ROC in 1948. App. 32-43. In response to a request from the district court, the United States filed a Statement of Interest, explaining that the Taiwan Relations Act validly continues in force the provisions of the FCN Treaty for purposes of copyright protection under U.S. law. App. 45-58. The matter was referred to the U.S. Magistrate (Kathleen A. Roberts) for decision. App. 1; 28 U.S.C. § 636(c) (1990).

On March 8, 1989, the Magistrate rejected defendants' liability defenses. App. 207-50. With respect to the constitutional issue, the Magistrate concluded that the FCN Treaty "is a 'copyright treaty' within the meaning of the [U.S.] copyright laws" and that she should defer to the Executive Branch's determination that, prior to 1979, the Republic of China (including the island of Taiwan) "was a party to [that] treaty." Id. 224, 229-30. Second, based on the language and legislative history of the TRA, the Magistrate concluded that "Congress intended the TRA to continue the provisions of the FCN Treaty in force between the United States and Taiwan," subsequent to derecognition of the ROC in 1979. Id. 234 (footnote omitted). She rejected defendants' argument that the TRA constituted an "amendment" to the FCN Treaty requiring further Senate action, noting that "such matters

fall within the recognition power of the Executive Branch" and the Executive Branch "has consistently maintained since the derecognition of the ROC that the FCN Treaty remains in force with the governing authorities on Taiwan * * *." Id. 235. Even if the TRA were construed as such an "amendment" or "an attempt to make an entirely new international agreement with Taiwan," however, she concluded that there "is no constitutional impediment to such action, because Congress and the President may constitutionally enter into 'legislative-executive agreements' that are as binding in United States law as treaties." Id. 236-37. Finally, she held that "the constitutional issues defendants seek to raise may properly be avoided by considering the TRA not as an amendment of a treaty or a 'hybrid' international agreement, but as a domestic law extending to Taiwan the provisions of the FCN Treaty pertaining to copyright protection despite derecognition and the cessation of formal diplomatic relations." Id. 237. Thus, "the TRA constitutionally continues in force those provisions of the FCN Treaty providing reciprocal copyright protection to Taiwanese nationals * * *." Id. 237-38.

The Magistrate entered a permanent injunction in favor of plaintiff on March 27, 1989 (id. 251-54) and a final judgment, including damages, on July 3, 1991. Id. 259-63. On July 15, 1991, defendants filed a notice of appeal from this decision to this Court. Id. 7.

SUMMARY OF ARGUMENT

The basic premise of defendants' argument is that the FCN Treaty "lapsed" when the United States withdrew recognition of the Republic of China on January 1, 1979 and that nothing, for purposes of the Copyright Act, has taken its place. In defendants' view, section 104(b)(1) of the Copyright Act requires nothing less than a "treaty" conforming to Article II, section 2, clause 2 of the Constitution and neither the allegedly "lapsed" FCN Treaty nor the Taiwan Relations Act can meet this asserted "void." The Magistrate correctly rejected these arguments, on both constitutional and non-constitutional grounds.

First, it is unnecessary for this Court to even reach the constitutional issue defendants present. It is, of course, axiomatic that courts should "avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) citing, inter alia, Ashwander v. TVA, 297 U.S. 288, 346-38 (1936) (Brandeis, J., concurring). Since defendants have conceded, both here and before the district court, that copyright protection for Taiwanese nationals existed under section 104(b)(1) "until the derecognition of the Republic of China by the United States in 1979," Appellants' Br. 12; App. 224, 230, the plain language of the TRA simply requires that such copyright protection continue "in the manner that the laws of the United States applied * * * prior to January 1, 1979." 22 U.S.C.

§ 3303(a). In short, as a matter of domestic law, Congress in the TRA has continued copyright protection for Taiwanese nationals under section 104(b) after January 1, 1979. Whether the TRA qualifies as a "treaty" is irrelevant to that issue. Congress, for domestic purposes, has simply extended the effectiveness of a piece of domestic legislation (section 104(b)(1)) by another piece of domestic legislation (the TRA). Nor must Congress include the word "copyright" in such legislation, as defendants claim, in order to make it effective. In sum, as the Magistrate properly held, the TRA is "a domestic law extending to Taiwan the provisions of the FCN Treaty pertaining to copyright protection despite derecognition and the cessation of formal diplomatic relations." App. 237. That conclusion should be affirmed.

Even if this Court reaches the constitutional issue, however, defendants' claims are without merit. The Executive Branch has determined that no "lapse" of the FCN Treaty has occurred here, a determination with which Congress has agreed. That determination, which totally obviates defendants' "amendment" theory, is binding on this Court. Terlinden v. Ames, 184 U.S. 270 (1902). Further, a change in recognition status is, as a matter of international law, not normally considered an "amendment" requiring further Senate action. Finally, even if the FCN Treaty "lapsed" (as defendants claim), nothing precludes the Executive and the Congress, as a matter of constitutional law, from entering into a "Legislative-Executive agreement" concerning

the continued effectiveness of the FCN Treaty for purposes of the "treaty" language of section 104(b)(1). As the Magistrate correctly recognized, such an agreement is "as binding" in United States law as a treaty. App. 236. In sum, plaintiff is entitled to copyright protection under U.S. law and defendants' arguments to the contrary are without merit.

ARGUMENT

Defendants make three arguments in support of reversal of the district court decision. Pointing to the language of the Copyright Act extending copyright protection to works whose author "is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party," 17 U.S.C. § 104(b)(1), defendants argue that this language has not been satisfied in this case for three reasons. First, defendants argue, the TRA itself is not a "treaty" and cannot satisfy this requirement. Appellants' Br. 8-10. Second, while defendants concede (as they did below, App. 224) that the FCN Treaty provided copyright protection to Taiwanese nationals prior to derecognition of the ROC in 1979,[2] they argue that the TRA is unconstitutional under the "treaty clause" of the U.S. Constitution[3] to the extent it seeks to extend such

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[2] It is undisputed in this case that Article IX of the FCN Treaty provides for reciprocal copyright privileges, making it a "copyright treaty" under Section 104(b).

[3] The Constitution authorizes the President "by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. Const., Art. II, sec. 2, cl. 2.

protection after derecognition. Id. 10-17. Third, defendants argue that the TRA itself cannot provide such protection domestically because it "is not an act of copyright legislation." Id. 17-19. Defendants' basic premise is that the FCN Treaty lapsed when the United States withdrew recognition of the Republic of China on January 1, 1979 and that nothing, for purposes of the "treaty" language of the Copyright Act, has taken its place. This premise is seriously flawed in numerous respects. The district court was correct in concluding that "the TRA constitutionally continues in force those provisions of the FCN Treaty providing reciprocal copyright protection to Taiwanese nationals" (App. 237-38). That decision should be affirmed.

I. THIS COURT NEED NOT DECIDE THE CONSTITUTIONAL ISSUE IN THIS CASE SINCE THE TAIWAN RELATIONS ACT VALIDLY CONTINUES THE FCN TREATY "IN FORCE" FOR THE DOMESTIC PURPOSE OF LIABILITY UNDER THE COPYRIGHT ACT HERE.

It is, of course, a "fundamental and longstanding principle of judicial restraint" that "courts avoid reaching constitutional questions in advance of the necessity of deciding them." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988) (collecting authorities) citing, inter alia, Ashwander v. TVA, 297 U.S. 288, 346-38 (1936) (Brandeis, J., concurring). Accord, Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522, 1525 (1991). Or, as this Court has stated:

> When the validity of an act of Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

United States v. Monsanto, 924 F.2d 1186, 1200 (2d Cir. 1991) (in banc) quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). While touching on aspects of the constitutional question, the district court ultimately concluded that the provisions of the TRA can be construed "as a domestic law extending to Taiwan the provisions of the FCN Treaty pertaining to copyright protection despite derecognition and the cessation of formal diplomatic relations." Id. 237. That conclusion, which avoids the constitutional question defendants seek to raise here, is correct and should be affirmed.

1. Congress, in the TRA, undoubtedly sought to continue in force the provisions of the FCN Treaty after January 1, 1979 -- at the very least for domestic purposes, whatever effect the TRA may have upon the international obligations of the United States. This is evident in both the language and legislative history of that statute. In section 4 of the TRA, Congress dealt with the "[a]pplication to Taiwan[4] of [U.S.] laws and international agreements." 22 U.S.C. § 3303 (footnote added). Congress provided in that section generally that,

> The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in

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[4] "Taiwan" is specifically defined in the TRA to include the people on the islands of Taiwan and the Pescadores and corporations and other entities organized under the laws applicable to those islands. Id. § 3314(2). Defendants have never questioned that, in this case, "Taiwan" includes the companies from which plaintiff, by means of license and assignment agreements, derives its copyright interest in the Programs at issue here. See App. 212-13 & n.4.

> the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

Id. § 3303(a). Thus, "[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." Id. § 3303(b)(1). And "laws of the United States" is defined by the TRA to include "any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States or any political subdivision thereof." Id. § 3314(1) (emphasis added).

Without question, section 104(b)(1) of the Copyright Act,[5] the statute at issue here, is a "law of the United States" for purposes of the TRA. Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment, 530 A.2d at 1170. And Congress, in the TRA, has mandated that section 104(b)(1) "shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979." Id. § 3303(a), (b)(1). Since it is uncontested by defendants that copyright protection for Taiwanese nationals existed under section 104(b)(1) "until the derecognition of the Republic of China by the United States in 1979," Appellants' Br. 12, the plain language of the TRA mandates that such copyright protection continue "in the manner that the laws of the United States applied * * * prior to January 1, 1979." 22 U.S.C. § 3303(a).

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[5] The Copyright Act was enacted in 1976, three years prior to enactment of the TRA. Pub. L. No. 94-553, Title I, § 101, 90 Stat. 2541, 2545.

In short, as a matter of domestic law, copyright protection for Taiwanese nationals continues under section 104(b)(1) after January 1, 1979. Such protection is fully applicable in this case.

2. This conclusion is reinforced by examination of other provisions of the TRA. In section 4(c) of the Act, Congress indicated clearly that the provisions of the FCN Treaty have continued in force, despite derecognition:

> For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements * * * entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

22 U.S.C. § 3303(c).[6] While this section approves the continuation in force of the FCN Treaty "for all purposes," only one purpose is at issue in this case -- defendants' liability under the Copyright Act, a piece of domestic legislation. Under the TRA, Congress has made clear that it regards the FCN Treaty as "in force" for the purposes of all domestic law, regardless of any constitutional issues which may exist concerning the interna-

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[6] In adopting this provision, Congress was merely concurring with the determination of the Executive Branch that, despite derecognition, "[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and their agencies beginning January 1, 1979, in accordance with their terms * * *." 44 Fed. Reg. 1075 (Jan. 4, 1979) (President Carter's December 30, 1978 Memorandum to all Executive Departments and Agencies concerning derecognition of the Republic of China).

tional obligations of the United States under that statute. See also 22 U.S.C. § 3303(b)(1).

3. This construction (as the Magistrate recognized, App. 232-34) is borne out by the legislative history of the TRA. That history shows that Congress intended that all agreements in force between the United States and the Republic of China as of December 30, 1978, such as the FCN Treaty,[7] would continue in force, at the very least for purposes of domestic law. Indeed, that history specifically mentions the FCN treaty as such an example.

The House Report, H.R. Rep. No. 96-26, 96th Cong., 1st Sess. 10-11 (1979), describes the comparable provision in the House version of the legislation as:

> designed to make clear that all treaties and international agreements between the United States and the Republic of China which were in force before derecognition will continue to be in force. For example, the U.S.-ROC Treaty of Friendship, Commerce and Navigation, which provides a legal foundation for commercial relations between the United States and Taiwan, will continue without interruption. No United States-Republic of China treaty or international agreement would be terminated except that which is terminated under its terms or otherwise, pursuant to U.S. law.

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[7] Defendants have not challenged the Magistrate's conclusion that the FCN Treaty was in force between the United States and the then-Republic of China on December 31, 1978. App. 228-30. Indeed, the FCN Treaty was included in the January 1, 1978 edition of Treaties In Force, the State Department's official listing of all treaties and international agreements in force to which the United States is a party. Since derecognition of the Republic of China, the Executive Branch has continued each year to list the FCN Treaty -- now administered on a nongovernmental basis by the American Institute in Taiwan and the Coordination Council for North American Affairs -- in Treaties in Force. See, e.g., Treaties in Force 274 (1990). This practice confirms the understanding between the President and the Congress concerning the continuation in force of agreements that were in force as of December 31, 1978.

The Senate Report, S. Rep. No. 96-7, 96th Cong., 1st Sess. 25, reprinted in 1979 U.S. Code Cong. & Admin. News 36, 60, similarly describes the comparable Senate version as:

> added by the Committee to remove any doubt concerning the validity of the international agreements in force between the United States and the entity recognized as the Republic of China prior to the normalization of relations with the People's Republic of China. Its effect is to make clear that these agreements have not "lapsed" and that they continue in effect between the United States and the people on Taiwan.

The Conference Report, H.R. Conf. Rep. No. 96-71, 96th Cong., 1st Sess. 15, reprinted in 1979 U.S. Code Cong. & Admin. News 95, 99, describes the final bill as

> combin[ing] both the general House provisions and the more specific Senate provisions without weakening or narrowing the applicability of any of the provisions adopted. The House provisions applying United States laws to Taiwan are to be construed as all-inclusive * * * [while] [t]he Senate provisions are to be construed as fully applicable to the matters to which they are directed * * *. The conference substitute further provides that the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, between the United States and Taiwan which were in force prior to January 1, 1979 * * *. With regard to the issue of conditioning the right to sue and be sued on reciprocity, the Committee of Conference noted that * * * the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of China * * * continues in force.

4. Finally, consistent testimony by Executive Branch witnesses supports this reading of Section 4(c). See, e.g., Implementation of Taiwan Relations Act: Issues and Concerns, Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 12 (1979) (statement of Assistant Secretary of State Richard Holbrooke

noting that international agreements with Taiwan remain in force, with specific mention of the FCN Treaty); Taiwan, Hearings Before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 74, 77 (1979) (State Department response to questions by Sen. Stone noting that all international agreements, including the FCN Treaty -- and excepting the Mutual Defense Treaty and related agreements -- remain in force); id. at 106 (State Department Legal Adviser Hansell's response to question from Sen. Percy to the same effect).

In sum, the district court's conclusion that the TRA is "a domestic law extending to [plaintiff] the provisions of the FCN Treaty pertaining to copyright protection despite derecognition and the cessation of formal diplomatic relations" is undoubtedly correct. App. 237. That conclusion must be affirmed.

5. Defendants' non-constitutional arguments in response[8] are unpersuasive.

a. Defendants argue first that section 104(b)(1) can only be satisfied by a "treaty" and that "the TRA * * * does not qualify as a treaty for purposes of section 104(b)(1)." Appellants' Br. 9. Whether the TRA qualifies as a "treaty," however, is irrelevant to the question presented here.[9] That question is whether Congress can continue in force for domestic purposes

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[8] We will discuss defendants' errant constitutional theories at Point II infra.

[9] Indeed, under this approach, the "treaty" language of section 104(b)(1) is satisfied by the "treaty" conforming to the treaty clause of the Constitution -- the FCN Treaty. See App. 229-30.

after January 1, 1979 the copyright protection under section 104(b)(1) that Taiwanese nationals enjoyed prior to that date. In short, can Congress extend the effectiveness for Taiwanese nationals of section 104(b)(1), a piece of domestic legislation, by another piece of domestic legislation, the TRA? The answer to that question, as outlined above, is unquestionably "yes." Any holding to the contrary would cast into question numerous Acts of Congress which continue the effectiveness, for various purposes, of other domestic statutes. Compare, e.g., Pub. L. No. 99-80, § 6, 99 Stat. 186 (1985) (extending two provisions of the Equal Access to Justice Act -- Pub. L. No. 96-481, §§ 203(c), 204(c), 94 Stat. 2321, 2327, 2329 (1980) -- which had previously expired by their own terms); Pub. L. No. 101-100, §§ 101(a), 102(c), 103 Stat. 638, 640 (1989); Pub. L. No. 101-130, 103 Stat. 775 (1989); Pub. L. No. 101-154, 103 Stat. 934 (1989) (extending government appropriations).

b. Defendants' second non-constitutional argument borders on the frivolous. While conceding (as they must) that "domestic legislation can properly extend copyright protection * * * to nationals of another country," defendants argue that the TRA does not so qualify because it is "not an act of copyright legislation." Appellants' Br. 17, 18-19 ("independent copyright legislation"). Defendants' principal point in support of this argument appears to be that the TRA cannot extend copyright protection because it does not include the word "copyright." Id. ("The general language of the TRA has no reference at all to copyright

protection"). This is fatuous. As we have explained above, Congress, in the TRA, made clear its intent that all "laws of the United States" -- including the Copyright Act and innumerable other statutes, rules, regulations, etc. -- "shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979." 22 U.S.C. § 3303(a). There is no requirement that Congress must specifically identify each and every such statute in the TRA. In short, by referring in the TRA to the "laws of the United States," and including "any statute" within that ambit, Id.; 22 U.S.C. § 3314(1), Congress plainly meant all laws -- defendants' contrary claim of an "absence of explicit Congressional intent" on the matter (Br. 19) notwithstanding.

6. Thus, whatever the effect of the TRA on United States international obligations may be, there can be no dispute that the TRA requires that, for domestic purposes, the FCN Treaty is "in force" for purposes of application of 17 U.S.C. § 104(b)(1) to this case. That conclusion, which avoids the constitutional "treaty" issue defendants seek to present, is the preferred resolution of this case. See Ashwander v. TVA, 297 U.S. 288, 346-38 (1936) (Brandeis, J., concurring); United States v. Monsanto, 924 F.2d at 1200. The Magistrate's conclusion on this point (App. 237) should be affirmed.

II. EVEN IF THIS COURT REACHES THE CONSTITUTIONAL ISSUE HERE, DEFENDANTS' CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT.

In the event this Court believes, contrary to our submission above, that resolution of the constitutional issue is necessary

to the decision in this case, this Court should nevertheless affirm. Defendants' constitutional arguments are without merit.

The premises of defendants' constitutional argument are that: (1) the FCN Treaty "lapsed" when the United States withdrew recognition of the Republic of China on January 1, 1979; (2) section 104(b)(1) of the Copyright Act requires a "treaty" conforming to Article II, section 2, clause 2 of the Constitution (the "treaty" clause); and (3) neither the "lapsed" FCN Treaty nor the TRA can meet this "void in the post-derecognition relationship between the people of Taiwan and the United States" for purposes of copyright protection for plaintiff in this case. Appellants' Br. 10-17. These premises are seriously flawed.

1. First, the FCN Treaty did not "lapse" upon derecognition, as defendants claim. In his Memorandum For All Departments And Agencies concerning derecognition, executed on December 30, 1978, President Carter explicitly stated that "[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and their agencies beginning January 1, 1979, in accordance with their terms * * *." 44 Fed. Reg. 1075 (Jan. 4, 1979). There is no question in this case that the FCN Treaty was included in that determination.[10] As explained

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[10] The FCN Treaty was included in the January 1, 1978, version of Treaties in Force, the State Department's official listing of all treaties and international agreements in force to which the United States is a party. That listing constitutes a formal Executive Branch determination that the treaty was in force as of that date, a determination to which this Court should (continued...)

above, Congress concurred in that determination. 22 U.S.C. § 3303(c); S. Rep. No. 96-7, 96th Cong., 1st Sess. 25, reprinted in 1979 U.S. Code Cong. & Admin. News at 60 (effect of TRA "is to make clear that these [international] agreements have not 'lapsed'").

Further, the Executive Branch has reaffirmed that determination by continuing to list the FCN Treaty in every subsequent edition of Treaties In Force. See Treaties In Force 274 (1990); App. 109-122 (1987 ed.), App. 228 (Magistrate's conclusion). The Supreme Court has made clear that, "on the question whether [a] treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance." Terlinden v. Ames, 184 U.S. 270, 285 (1902). Here, the Executive has determined that no "lapse" of the FCN Treaty occurred, a determination with which Congress has agreed. That determination is binding on this court. Terlinden v. Ames, 184 U.S. 270 (1902). See also Charlton v. Kelly, 229 U.S. 447 (1913).[11] Thus, the

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[10](...continued)
defer. See, e.g., Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 682 (9th Cir. 1983); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (Bork, J., concurring); Hoi-Pong v. Noriega, 677 F. Supp. 1153, 1155 (S.D. Fla. 1988) ("the United States considers the treaty binding and has demonstrated that fact by recording the treaty in its official publication, Treaties in Force").

[11] The recognition of governments is an exclusive Executive Branch function. U.S. Const., art. II, § 2, cl. 2, and § 3; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) United States v. Pink, 315 U.S. 203, 230 (1942); Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 201-02 (3d Cir.), cert. denied, 479 U.S. 914 (1986); Restatement (Third) of the Foreign Relations Law of the United States § 204 (continued...)

Magistrate's conclusion here that "because the Executive Branch has consistently maintained since * * * derecognition * * * that the FCN Treaty remains in force * * * and * * * Congress has concurred in that view, the FCN Treaty may constitutionally continue in force with Taiwan" is entirely correct. App. 235. That conclusion should be affirmed.

2. Persisting in their contention that the FCN Treaty "lapsed" upon derecognition, defendants claim that the TRA constitutes an "amendment" to the FCN Treaty "to substitute the 'governing authorities on Taiwan' as the new High Contracting Party -- with the United States -- instead of the 'Republic of Taiwan' [sic][12] the original High Contracting Party," and thereby continue copyright protection after derecognition for the works of Taiwanese nationals. Appellants' Br. 14-16. As the Magistrate acknowledged, however, "such matters fall within the recognition power of the Executive Branch." App. 235. In short, whether a "lapse" has occurred or an "amendment" is necessary is, first and foremost, a matter for the Executive Branch to

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[11](...continued)
(1988). See also National City Bank v. Republic of China, 348 U.S. 356, 358 (1955); United States v. Belmont, 301 U.S. 324, 329-31 (1937); Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938). Indeed, it is questionable whether this Court, independent of the political branches, could determine for itself whether a treaty has "lapsed" in the manner defendants suggest. See Goldwater, et al. v. Carter, 444 U.S. 996 (1979) (dismissal of complaint by members of Congress concerning termination of mutual defense treaty with Taiwan); id. at 1001 (Rehnquist, J., joined by Burger, C.J., Stewart, and Stevens, JJ.) (treaty termination issue is a nonjusticiable "political question").

[12] We believe this should read the "Republic of China."

determine. The Executive's determination that no interregnum, such as defendants claim, has occurred in this case is dispositive of that claim. See cases cited pp. 18-19 supra.[13]

Further, defendants' view of the relevant principles of international law is simply mistaken. As the Magistrate held, "a change in the name of one of the parties to a treaty, as a result of succession or modification of states * * * or changes in recognition, is not normally considered an 'amendment' requiring further Senate action." App. 235, citing App. 55n.4. Accord Arnbjornsdottir-Mendler v. United States, 721 F.2d 679 (9th Cir. 1983). In short, defendants' "amendment" theory is plainly wrong as a matter of international law and must be rejected.

3. Finally, even assuming that the FCN Treaty "lapsed" (as defendants claim), nothing precludes the Executive and the

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[13] The authorities cited by defendants for the proposition that the TRA is an "amendment" which requires the advice and consent of the Senate (Br. 14-15) are inapposite. Rather, both of the cited cases concern whether a court, through the guise of interpretation, may alter or amend the clear terms of a treaty. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134-35 (1989); Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705, 707 (2d Cir. 1990). That, obviously, is a far different question from the question presented here -- i.e., whether a court, when faced with the unanimous determination of the Legislative and Executive Branches that no such treaty "lapse" has occurred nor that any "amendment" is necessary, may hold to the contrary.

Defendants' secondary authority (Br. 15n.3) is also miscited. Professor Lobel's discussion of the Justice Department's position is in the context of the assertion that "the President does not have the authority to conclude an executive agreement that violates a treaty duly ratified by the Senate." Lobel, The Limits Of Constitutional Power: Conflicts Between Foreign Policy And International Law, 71 Va. L. Rev. 1071, 1123n.268 (1985) (emphasis added). Obviously, no such "conflict" is present in this case and therefore this discussion also is simply inapposite.

Congress as a matter of constitutional law from entering into a "Legislative-Executive agreement" concerning the continued effectiveness of the FCN Treaty for purposes of the "treaty" language of section 104(b)(1). Defendants claim that, since section 104(b)(1) of the Copyright Act uses the term "treaty," it cannot be satisfied by anything less than a "treaty" concluded under the provisions of Article II, section 2, clause 2 of the Constitution. Appellants' Br. 10 citing Weinberger v. Rossi, 456 U.S. 25, 29 (1982). Weinberger, however, held that the term "treaty" can "extend[] to executive agreements as well as to Art. II treaties," noting that "Congress has not been consistent [in federal statutes] in distinguishing between Art. II treaties and other forms of international agreements." Id. at 30-36. Plainly, as the Magistrate recognized, "[n]othing in the Copyright Act suggests [the] rigid requirement" that only an Article II "treaty" is sufficient for the purposes of section 104(b)(1) of the Copyright Act. App. 237.

Nor is there any constitutional impediment to the Executive Branch and the Senate agreeing that the FCN Treaty is presently in effect for purposes of that language. Such "Legislative-Executive agreements" are "as binding in United States law as treaties," App. 236 citing App. 55[14] -- as even defendants'

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[14] Weinberger v. Rossi, 456 U.S. at 31-36; B. Altman & Co. v. United States 224 U.S. 583 (1912); Star-Kist Foods, Inc. v. United States, 169 F. Supp 268 (Cust. Ct. 1958), aff'd, 275 F.2d 472 (C.C.P.A. 1959) (Congress has authority to authorize the President to enter into executive agreements). See also Treaties and Other International Agreements: The Role of the United

(continued...)

counsel below, Professor Lawrence Tribe, agreed. See L. Tribe, American Constitutional Law § 4.5, at 228n.18 (2d ed. 1988) ("settled" that Presidential action supported by Joint Resolution of Congress "is coextensive with the treaty power"). In short, even if the FCN Treaty "lapsed" at some point as a matter of international law (a matter we vigorously dispute), the determination of the Executive that it continues in force, 44 Fed. Reg. at 1075, when coupled with Congress' concurrence in the TRA, amounts to an "Legislative-Executive agreement" that the FCN Treaty provisions remain in effect for purposes of section 104(b)(1) of the Copyright Act. Such an "agreement" is as binding in U.S. law as a treaty and is binding upon this Court. Consequently, plaintiff is entitled to copyright protection under U.S. laws and defendants' arguments to the contrary are without merit.

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[14](...continued)
States Senate, A Study Prepared for the Senate Comm. on Foreign Relations, 98th Cong., 2d Sess. 71-77 (1984); McDougal and Lans, Treaties and Congressional-Executive Agreements: Interchangeable Instruments of National Policy, 54 Yale L.J. 181, 217 (1945); Restatement (Third) of the Foreign Relations Law of the United States § 303(2) (1988).

CONCLUSION

For the reasons stated above, the decision of the district court extending the protection of U.S. copyright laws to plaintiff should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 1991, I served two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE by first class mail, postage prepaid upon:

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