
HARMONIZING COPYRIGHT'S INTERNATIONALIZATION WITH DOMESTIC CONSTITUTIONAL CONSTRAINTS

A quick glance through recent copyright legislation suggests that we are in the midst of a “second enclosure movement,” this time fencing off the “intangible commons of the mind” instead of the physical commons of the land.¹ In 1992 the Copyright Renewal Act² (CRA) abolished the longstanding renewal requirement for nearly all works; in 1998 the Sonny Bono Copyright Term Extension Act³ (CTEA) extended the term of copyright protection by twenty years and the Digital Millennium Copyright Act⁴ (DMCA) heightened penalties for copyright infringement on the Internet and provided copyright owners with an increased ability to control access to their copyrighted digital media. These are simply a few examples drawn from the larger set of copyright legislation enacted within the past two decades, a set that taken as a whole provides worrisome evidence of a one-way ratcheting up of copyright protection.

No surprise, then, that there is widespread feeling among many copyright scholars that Congress has unabashedly ceded to the lobbying pressures of the copyright industries and steadily cut into the heart of the public domain.⁵ Scholars have unleashed a flurry of articles in the past decade warning about the public harms of copyright extensions and, cognizant of the skewed political economy, calling for meas-

¹ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 37 (internal quotation mark omitted).

² Pub. L. No. 102-307, 106 Stat. 264 (1992).

³ Pub. L. No. 105-298, §§ 101–106, 112 Stat. 2827, 2827–29 (1998) (codified as amended at 17 U.S.C. §§ 301–304 (2000 & Supp. V 2005)).

⁴ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

⁵ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* (2004) (describing the political economy that leads to the creation of particular types of intellectual property laws and explaining the trend toward expansiveness as resting on asymmetric returns to increased exclusion); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001) (recounting the intense involvement of copyright industries in the drafting of copyright legislation); see also YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 413–18 (2006) (detailing lobbying efforts behind the DMCA and critiquing the Act); LAWRENCE LESSIG, *FREE CULTURE* 216–18 (2004) (describing copyright lobbying incentives); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERKELEY TECH. L.J. 519, 530–33 (1999) (chronicling lobbying efforts behind a broad set of laws enacted ostensibly to comply with the World Intellectual Property Organization Copyright Treaty). Some members of the public have also become frustrated by the expansive trajectory of copyright laws, and indeed, it is from this frustration that Linux and the free software movement were born. See generally STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* (2004) (describing the founding and subsequent development of open source software and Linux in particular).

ures by which to rein in Congress's legislative power in this domain.⁶ By far the most vocal call has been for the judiciary to step up its policing of copyright legislation by looking to constitutional limits imposed by the First Amendment and the Copyright Clause;⁷ the latter authorizes Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."⁸ Many of the arguments finding limitations in the Copyright Clause center upon original understandings of the Clause and, more generally, of the purposes of the copyright system and the role of government in that system.⁹

The fears of these scholars regarding the effects of the incessant expansion of copyright are well-founded. Copyright, or more precisely, the absence of copyright that defines the public domain,¹⁰ is inextricably tied to the social conditions that give rise to freedom of speech,¹¹ and more generally, to a "democratic culture."¹² Although copyright is

⁶ See, e.g., Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 613–32 (2006) (describing how the judiciary should construe copyright acts narrowly); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119; sources cited *infra* note 7.

⁷ See, e.g., C. Edwin Baker, Essay, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) [hereinafter Benkler, *Free As the Air*]; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173; Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. & ENT. L.J. 587 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

⁸ U.S. CONST. art. 1, § 8, cl. 8.

⁹ See, e.g., Heald & Sherry, *supra* note 6, at 1150 (describing the Founders' "general skepticism about protecting intellectual property" as a way to bolster the argument for limiting Congress's power to legislate in the copyright arena).

¹⁰ There is no single definition of the "public domain." See James Boyle, *Cultural Environmentalism and Beyond*, LAW & CONTEMP. PROBS. Spring 2007, at 5, 8 n.11 ("We do not have a single, unitary public domain, a single commons. There are competing and overlapping ones."). Loosely, it may be described as "the 'outside' of the intellectual property system, the material that is free for all to use and to build upon." James Boyle, *Foreword: The Opposite of Property?*, LAW & CONTEMP. PROBS. Winter/Spring 2003, at 1, 1; see also Boyle, *supra* note 1, at 60–61 (discussing various definitions of the "public domain").

¹¹ Indeed, the First Amendment's guarantee of free speech and the copyright monopoly are often described as inherently contradictory. See Benkler, *Free As the Air*, *supra* note 7, at 386.

¹² Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004) (defining democratic

intended to incentivize innovation, expansive copyright legislation threatens to impoverish the ability of individuals to create meaningful forms of personal expression. However, arguments for stepped-up judicial policing via the Constitution are bound to fail in practice so long as they focus exclusively on copyright as a domestic regime bounded by a national constitution. With the rapid expansion of the Internet and the easy copying and dissemination that follows, copyright is no longer an isolationist endeavor.

The recent seminal Supreme Court case *Eldred v. Ashcroft*,¹³ testing the power of the Copyright Clause to limit congressional power in the copyright domain,¹⁴ recognized this new internationalization of copyright: the legislation at issue was upheld as rational in part because it harmonized U.S. law with E.U. law and because the Court did not want to interfere with Congress in the realm of copyright lest the United States be too constrained to “‘play a leadership role’ in the . . . evolution of the international copyright system.”¹⁵ These rationales — repeated by lower courts — have largely been ignored by all but a handful of copyright scholars.¹⁶ This Note picks up where *Eldred* left off, and considers what role the judiciary should play in limiting copyright legislation passed within an indisputably international web of multilateral treaties, bilateral agreements, and unilateral demands. Recognizing a congressional need to respond to the international climate ought not to mean — as *Eldred* intimates — allowing Congress unlimited discretion to adopt copyright laws with nominally international-looking rationales. Instead, courts can effectively monitor Congress’s copyright power through a process of judicial review that balances international political realities with domestic constitutional concerns.

This Note proceeds in three parts. Part I details the recent internationalization of copyright, provides examples of domestic legislation passed in response to international obligations and standards, and canvasses recent cases that have taken stock of this new globalized copyright. Part II turns to the handful of scholars who have responded to the new international side of copyright, the majority of whom consider the intersection of the Copyright Clause and Treaty Clause to be a means to demarcate the bounds of congressional copy-

culture as one in which “individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals”).

¹³ 537 U.S. 186 (2003).

¹⁴ The Court also considered the limits imposed by the First Amendment. *See id.* at 218–21.

¹⁵ *Id.* at 206 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means To Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002)).

¹⁶ *See infra* Part II, pp. 1807–11.

right power. This Part focuses on one proposal in particular, from Professor Graeme Dinwoodie, which departs from prior proposals by attempting to take stock of international political realities. Part III argues that, while Professor Dinwoodie is correct in seeking a form of judicial review that is more cognizant of current copyright conditions, his proposal falls short by being both insufficiently attuned to the realities of the international copyright climate and insufficiently compatible with current Supreme Court philosophy. Therefore, Part III introduces a new method of judicial review that seeks to bridge these gaps and to respond to what may be the greatest danger of not substantively reviewing domestic laws purporting to comply with international obligations — that the United States will use its global clout to drive the enactment of international standards to which it can then point as justification for passing expansive domestic legislation. The proposed two-tiered system of judicial review would vary the level of deference afforded domestic copyright legislation according to the role the United States played in the development of the relevant international standards: courts would accord greater deference to laws passed to comply with international standards or obligations in whose development the United States did not play a substantial role and less deference to laws complying with international standards or obligations in whose development the United States was heavily involved.

I. THE INTERNATIONALIZATION OF COPYRIGHT

A. *The Emerging International Framework*

Until the last few decades of the twentieth century, the United States had been noticeably absent from the international copyright regime. In its early years, the country provided no federal protection to works of foreign authors, earning itself the dubious distinction of being termed the “Barbary coast of literature.”¹⁷ And when the Berne Convention for the Protection of Literary and Artistic Works¹⁸ (still the primary international copyright treaty)¹⁹ came into existence in 1886,

¹⁷ William Patry, Essay, *The United States and International Copyright Law: From Berne to Eldred*, 40 HOUS. L. REV. 749, 750 (2003) (quoting S. REP. NO. 50-622, at 2 (1888)) (internal quotation marks omitted).

¹⁸ Berne Convention for the Protection of Literary and Artistic Works, *adopted* Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3.

¹⁹ In 1994, the bulk of the substantive provisions of the Berne Convention was incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); indeed, the only provision which was not incorporated was the Convention’s requirement that member states provide moral rights to authors. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

the United States was noticeably absent from the list of signatory countries, preferring to “go[] it alone.”²⁰ Indeed, it was not until 1955 that the United States joined any multilateral copyright treaty — the Universal Copyright Convention,²¹ which was drafted to allow the United States to join with no changes to its domestic laws — and not until 1989 that the United States finally signed onto the Berne Convention.²² Yet recently the United States has taken an eager interest in the international copyright framework — hardly surprising given that the country has steadfastly moved from being a net importer to a net exporter of copyrighted works,²³ a shift that has made it increasingly important to secure protection for American authors abroad.

A substantial impetus for the United States’s shifting to an international conception of copyright came from the copyright industries. In his book *Information Feudalism*, Professor Peter Drahos details how those industries with an economic stake in intellectual property campaigned unrelentingly — and ultimately, successfully — for the expansion of exclusive rights internationally.²⁴ The United States, spurred on by these industries, adopted a three-fold strategy for escalating intellectual property rights: multilateralism, bilateralism, and unilateralism.²⁵ The latter two were short-term and flexible strategies that were effective at obtaining significant extensions of intellectual property rights in countries otherwise reluctant to provide them.²⁶ In contrast, multilateralism was a long-term strategy that culminated in the adoption in 1994 of the Agreement on Trade-Related Aspects of Intellectual Property Rights²⁷ (TRIPS), which remains the most important intellectual property treaty of the modern era and which substantially ratcheted up minimum intellectual property standards for members of the World Trade Organization (WTO).²⁸

TRIPS incorporated the Berne Convention almost in its entirety, a significant move for two reasons. First, TRIPS included an enforce-

²⁰ Patry, *supra* note 17, at 750.

²¹ Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 194.

²² Patry, *supra* note 17, at 751.

²³ R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 175 n.172 (2007).

²⁴ See generally PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002).

²⁵ See *id.* at 73; see also Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 746 (2001).

²⁶ See DRAHOS WITH BRAITHWAITE, *supra* note 24, at 73.

²⁷ TRIPS, *supra* note 19.

²⁸ See *id.* at 10, 73. TRIPS is administered by the WTO. The World Intellectual Property Organization (WIPO), the organization nominally responsible for international intellectual property treaties, was seen as the representative of “international socialism” insofar as it gave too much of a platform to the voices of developing countries. *Id.* at 61–62, 195.

ment mechanism at the WTO for countries delinquent in adhering to the treaty's provisions; henceforth aggrieved countries could respond to a transgressor's failure to fulfill copyright obligations with the imposition of trade sanctions.²⁹ Second, TRIPS substantially shifted the norms by which international copyright standards were to be implemented in member countries. Whereas the Berne Convention sought to respect each country's economic and cultural priorities and deferred to national autonomy for how each country was to comply with international standards, TRIPS shifted this framework toward greater rigidity in implementation and less deference to national priorities.³⁰

The incorporation of the Berne Convention into TRIPS furthermore provides a fossil record, in the text of the treaty itself, of the strength of U.S. international bargaining power. The only Berne Convention provision excluded from TRIPS was article 6*bis*, which required member countries to adopt moral rights for authors.³¹ This article had long been a sore point for the United States, which, unlike other developed countries such as Europe, had never provided any extensive protection of such rights.³² Copyright-intensive industries would protest vehemently against their inclusion in domestic copyright law, and the United States therefore had previously argued that a patchwork of state and federal causes of action coincidentally providing similar remedies to authors placed the country in compliance.³³

There is no dearth of other examples of the United States successfully persuading — or intimidating³⁴ — international bodies to adopt standards favored by the United States.³⁵ One of the more glaring in-

²⁹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *supra* note 19, Annex 2, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf. Article 33 of the Berne Convention did permit the referral of disputes regarding compliance to the International Court of Justice; however, unlike the TRIPS enforcement mechanism, this mechanism was never used: "This had much to do with the 'live and let live' attitude adopted by states in WIPO." DRAHOS WITH BRAITHWAITE, *supra* note 24, at 111.

³⁰ See Dinwoodie, *supra* note 25, at 746–47.

³¹ See TRIPS, *supra* note 19, art. 9; Berne Convention for the Protection of Literary and Artistic Works, *supra* note 18, art. 6*bis*. For a discussion of moral rights, see Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67 (2007).

³² Dinwoodie, *supra* note 25, at 741.

³³ *Id.* The fact that the United States could argue compliance through this patchwork of laws "rested as much on the deferential attitudes shown toward member state compliance with Berne obligations as on the substance of U.S. law." *Id.* (citing Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 655 (1986)).

³⁴ See generally DRAHOS WITH BRAITHWAITE, *supra* note 24; LITMAN, *supra* note 5.

³⁵ See, e.g., Graeme B. Dinwoodie, Essay, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307, 307 (2000) (noting the "significant U.S. influence in the formation of contemporary intellectual property treaties").

stances is the 1996 World Intellectual Property Organization (WIPO) Copyright Treaty,³⁶ which required signatory countries to enact laws regulating both the circumvention of technological protection measures intended to prevent unauthorized uses of copyrighted works and the alteration of rights management information embedded into copyrighted works by copyright owners.³⁷ Inserting these obligations into international treaties was termed a “briar patch” strategy by one commentator: domestic copyright industries desiring these changes in national law feared that attempts to enact them through the normal domestic route would be strongly opposed.³⁸ Obtaining treaty obligations for the changes quelled domestic opposition and eventually gave rise to the DMCA,³⁹ an act that has spawned a slew of law review articles describing its harms and arguing its unconstitutionality.⁴⁰

B. Legislation in an International Framework

Many domestic copyright laws have been enacted with the justification of either harmonizing with international standards or complying with international obligations. For example, the CTEA enlarged the terms of existing and future copyrighted works by twenty years on the grounds of harmonizing U.S. copyright terms with those adopted by the European Union.⁴¹ Another example is section 514 of the Uruguay Round Agreements Act⁴² (URAA), which implemented article 18 of the Berne Convention and thereby provided copyright protection to some foreign works that were previously in the public domain.⁴³ Even the 1976 Copyright Act⁴⁴ — still the primary domestic copyright act — changed the prior copyright regime in order to conform with interna-

³⁶ Apr. 12, 1997, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 152 [hereinafter WIPO Copyright Treaty].

³⁷ *Id.* arts. 11–12; see also Patry, *supra* note 17, at 753.

³⁸ See Patry, *supra* note 17, at 753.

³⁹ *Id.*; Dinwoodie, *supra* note 25, at 744 n.47. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.); see also WIPO Copyright Treaty, *supra* note 36.

⁴⁰ See, e.g., Benkler, *Free As the Air*, *supra* note 7; Thomas A. Mitchell, *Copyright, Congress, and Constitutionality: How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV. 2115 (2004); Samuelson, *supra* note 5.

⁴¹ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, §§ 101–106, 112 Stat. 2827, 2827–29 (1998) (codified as amended at 17 U.S.C. §§ 301–304 (2000 & Supp. V 2005)); see also Council Directive 93/98, Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 7(1), 1993 O.J. (L 290) (EC) (conditioning protection of foreign works for full term on reciprocal protection).

⁴² Pub. L. No. 103-465, 108 Stat. 4809, 4976–80 (1994) (codified at 17 U.S.C. §§ 104A, 109 (2000)).

⁴³ *Id.* § 514.

⁴⁴ General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

tional law.⁴⁵ In order to comply with the Berne Convention, the 1976 Act began a process — completed by subsequent acts — of largely eliminating formalities; today, copyright arises the moment an expression is fixed in a “tangible medium of expression.”⁴⁶ Finally, recent calls for database protection reflect a similar motivation to harmonize U.S. law with that of the European Union.⁴⁷ In short, what we see now is the “blending of domestic and international lawmaking. International lawmaking demands attention to Washington; and domestic lawmaking cannot be conducted without regard for what is going on in Brussels, Geneva, Tokyo, and elsewhere.”⁴⁸

C. *Recent Cases Articulating an International Conception of Copyright*

The Supreme Court recently articulated an international conception of copyright when, in *Eldred*, it upheld as constitutional the CTEA's term extension. The Court deferred “substantially” when considering whether Congress had rationally exercised its legislative authority, noting that the Act “reflects judgments of a kind Congress typically makes.”⁴⁹ Part of this judgment, the Court continued, was Congress's desire to harmonize U.S. copyright terms with those of the European Union, which had increased its term protection to the life of the creator plus seventy years.⁵⁰ Harmonization in this sense had two benefits: First, because of a reciprocity requirement in the E.U. law, harmonization would ensure that American authors obtained protection in the European Union on the same terms as their European counterparts.⁵¹ Second, a longer term would arguably provide more incentives for both American and foreign authors to “create and disseminate” work in the United States.⁵²

To support this reasoning, the Court twice quoted a law review article by Shira Perlmutter, a media insider and former Copyright Office

⁴⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 264–65 (2003) (Breyer, J., dissenting) (noting that the 1976 Act “thoroughly revised copyright law and enabled the United States to join the Berne Convention”).

⁴⁶ 17 U.S.C. § 102; see also Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487–88 (2004).

⁴⁷ See, e.g., U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 86–88 (1997), available at <http://www.copyright.gov/reports/db4.pdf>.

⁴⁸ Dinwoodie, *supra* note 35, at 307–08; see also Perlmutter, *supra* note 15, at 327 n.10 (noting that “reports and testimony on [copyright] bills have almost invariably included an analysis of how the proposed law would relate to treatment of the issue abroad”).

⁴⁹ *Eldred*, 537 U.S. at 204–05.

⁵⁰ See *id.* at 205–06.

⁵¹ *Id.*; see also Council Directive 93/98, *supra* note 41.

⁵² *Eldred*, 537 U.S. at 206–07.

staffer.⁵³ The first quotation simply repeated the harmonization rationale independently articulated by the Court.⁵⁴ The second, however, asserted a new rationale for deference to Congress in its interpretation of how to promote the progress of science: “[T]he United States could not ‘play a leadership role’ in the give-and-take evolution of the international copyright system, indeed it would ‘lose all flexibility,’ ‘if the only way to promote the progress of science were to provide incentives to create new works.’”⁵⁵ Thus, the Court articulated three distinct internationally focused rationales⁵⁶ for why the CTEA was a rational exercise of congressional power and for why the judiciary, in policing the constitutionality of copyright legislation, should not unduly hamper Congress’s ability to respond to the international copyright community⁵⁷: a need to harmonize U.S. laws with international laws; a desire that the United States play a leadership role in the evolution of international standards; and, to effectuate the first two, a need for Congress to have sufficient flexibility.⁵⁸

Several lower courts have repeated *Eldred*’s international concerns when reviewing the constitutionality of recent congressional legislation. For example, in *Luck’s Music Library, Inc. v. Gonzales*,⁵⁹ the D.C. Circuit upheld the constitutionality of section 514 of the URAA.⁶⁰ Citing *Eldred*’s concern with the United States’s bargaining position abroad, the court upheld the challenged portion of the URAA for two internationally focused reasons: it helped secure better protection for American works abroad, reducing the “impact of copyright piracy on our world trade position,” and it was valuable as a bargaining chip.⁶¹

⁵³ Ms. Perlmutter wrote her article while serving as Vice President at AOL Time Warner; in addition, at the time of the CTEA’s enactment she was the Associate Register for Policy and International Affairs at the U.S. Copyright Office. *See id.* at 206 n.12; Perlmutter, *supra* note 15, at 323 n.*.

⁵⁴ *Eldred*, 537 U.S. at 206 (“[M]atching th[e] level of [copyright] protection in the United States [to that in the EU] can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders.” (alterations in original) (quoting Perlmutter, *supra* note 15, at 330) (internal quotation marks omitted)).

⁵⁵ *Id.* (quoting Perlmutter, *supra* note 15, at 332).

⁵⁶ The Court also noted that there were demographic, economic, and technological reasons for the passage of the Act. *See id.* at 206–07.

⁵⁷ This is not to say that copyright legislation will only pass rationality review if it promotes these goals, nor that courts should or will always defer to legislation that promotes one or all three of them. These three rationales are, however, noteworthy insofar as they encompass international considerations.

⁵⁸ Although the Court discussed all three of these reasons in upholding the rationality of the CTEA, by invoking such vague concepts as congressional need for “leadership” and “flexibility,” the Court implicitly suggested that part of the very reason for according rationality-review deference to the legislature is precisely for these reasons: namely that strict judicial review would hamper the United States’s ability to play a meaningful role in the international copyright community.

⁵⁹ 407 F.3d 1262 (D.C. Cir. 2005).

⁶⁰ *Id.* at 1263.

⁶¹ *Id.* at 1264 (quoting S. REP. NO. 100-352, at 2 (1988)) (internal quotation marks omitted).

Similarly, in *Kahle v. Gonzales*,⁶² plaintiffs challenged the constitutionality of provisions in the CRA and the CTEA that changed the U.S. copyright system from an “opt-in” to an “opt-out” system (by removing formality requirements) and that extended copyright terms.⁶³ The Ninth Circuit affirmed the district court’s dismissal, finding that the Acts were constitutional without mentioning international concerns;⁶⁴ however, the district court, citing *Eldred*, based a substantial portion of its reasoning on the fact that the provisions were enacted to comply with international treaties and to harmonize with international laws.⁶⁵

In sum, several courts have justified their decisions regarding the constitutionality of copyright legislation in part by recognizing the new international copyright framework. As Congress justifies more copyright legislation on the ground that it complies with international norms, we can expect that courts will have to grapple more thoroughly with the Supreme Court’s internationally aware philosophy as articulated in *Eldred*.

II. PROPOSALS FOR INTERPRETING THE INTERSECTION OF THE COPYRIGHT CLAUSE AND THE TREATY CLAUSE

A. Past Proposals: Three Distinct Viewpoints

Scholars who decry the recent expansions in copyright and who seek to cabin congressional legislating power through the imposition of constitutional limits found in the Copyright Clause have largely failed to acknowledge the recent internationalization of copyright. They tether the vast majority of their theories to original understandings of both the Copyright Clause and the purposes of the copyright monopoly. However, these backward-looking arguments are insufficiently determinate⁶⁶ and, more importantly, insufficiently relevant to today’s dynamic global climate insofar as they are based upon an isolationist view of copyright.⁶⁷

A handful of scholars have taken note of Congress’s increasing tendency to conform to international copyright norms or obligations, and

⁶² 487 F.3d 697 (9th Cir. 2007).

⁶³ *Id.* at 698.

⁶⁴ *See id.* at 701.

⁶⁵ *See Kahle v. Ashcroft*, No. C-04-1127 MMC, 2004 WL 2663157, at *1895-1900 (N.D. Cal. Nov. 19, 2004).

⁶⁶ *See* Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006) (arguing that current widely shared perceptions regarding certain aspects of intellectual property history, including Thomas Jefferson’s views on intellectual property, are incomplete if not incorrect).

⁶⁷ *See* Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 20-21 (2002).

have accordingly considered whether the framework by which courts analyze this legislation under the Copyright Clause should shift as a result. In particular, in the past several years some scholars have begun to consider whether the Treaty Clause affords Congress an alternative source of lawmaking power such that legislation passed pursuant to this Clause need not satisfy limits found within the Copyright Clause.⁶⁸ Scholars answering this question generally fall into one of three camps⁶⁹: some see the Treaty Clause as subservient to the restrictions imposed by the Copyright Clause;⁷⁰ others take exactly the opposite view, arguing that the Treaty Clause is largely an autonomous source of lawmaking power, unconstrained by external limits found in the Copyright Clause;⁷¹ a third group takes a middle road, treating the Treaty Clause as an alternative lawmaking power, but one substantially constrained by the Copyright Clause.⁷²

This Note refrains from elaborating on each of these positions, in part because an excellent survey and accurate critique of them has been offered by Professor Dinwoodie in *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*.⁷³ Professor Dinwoodie rightly criticizes these three groups of scholars for not acknowledging the realities of the increasingly globalized copyright regime.⁷⁴ As his own framework of judicial review purports to take account of political realities in the international copyright sphere, this Note considers his framework in detail to determine whether it has appropriately bridged the gap his predecessors left open. Although Professor Dinwoodie is correct in his criticisms and the starting point for his theory, his framework of judicial review ultimately suffers from the same critique he levels against his predecessors: it fails to reflect fully the current political realities of the international copyright arena. In addition, it fails to respond to the *Eldred* majority's international concerns and therefore is not easily harmonized with current Supreme Court philosophy.

⁶⁸ See, e.g., Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355 (2007).

⁶⁹ *Id.* at 360.

⁷⁰ See, e.g., Heald & Sherry, *supra* note 6.

⁷¹ See, e.g., Caroline T. Nguyen, Note, *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079 (2006). These commentators find that the principal constraints on the treaty power emanate from affirmative prohibitions found in the Constitution, such as the First Amendment. See Dinwoodie, *supra* note 68, at 360–61.

⁷² See, e.g., Timothy R. Holbrook, *The Treaty Power and the Patent Clause: Are There Limits on the United States' Ability to Harmonize?*, 22 CARDOZO ARTS & ENT. L.J. 1 (2004).

⁷³ See Dinwoodie, *supra* note 68.

⁷⁴ See *id.* at 361–62.

B. A More Realist Account of the International Copyright Climate? Professor Dinwoodie's Alternative Proposal

Professor Dinwoodie offers a critique of each of the prevailing viewpoints that focuses first on their doctrinal failures and then, more generally, on their failure to appropriately value each of the two clauses as well as the “big picture” dynamics of the copyright sphere.⁷⁵ The Copyright Clause–dominant viewpoint, Professor Dinwoodie argues, underestimates the autonomous role of the Treaty Clause, but the Treaty Clause–dominant viewpoint ignores the current “entanglement” of domestic and international copyright lawmaking — in other words, as every domestic copyright legislation contains some “hint of internationalism,” to make the Treaty Clause wholly autonomous would essentially be to read the Copyright Clause out of the Constitution.⁷⁶

Professor Dinwoodie’s framework, in contrast, purports to accord proper value to the Treaty Clause while at the same time accounting for the current realities of copyright lawmaking. To this end, he would restrict the scope of the Treaty Clause by recognizing some limits inherent in the Copyright Clause.⁷⁷ He proposes a standard of review that would have courts look at three factors: (1) the strength of the international obligation with which domestic laws are purported to comply; (2) the political process by which international standards are adopted; and (3) the limitations of the Copyright Clause, some of which should be accorded more weight than others.⁷⁸

According to Professor Dinwoodie, the first factor — strength of the international obligation — is important because the “motivation of international compliance . . . go[es] to the heart of foreign affairs’ concerns — concerns that underlie historical deference to Treaty Clause action and thus should justify greater constitutional latitude.”⁷⁹ Courts should accordingly be more reluctant to find constitutional deficiencies when domestic laws are enacted to ensure compliance with “real international obligations.”⁸⁰ For Professor Dinwoodie, requiring some correlation between international obligations and domestic legislation, aside from giving weight to the Treaty Clause’s historical basis, prevents the United States from implementing treaties only to aggrandize Congress’s lawmaking authority — namely, it prevents Congress from “over-compl[ying]” with international obligations.⁸¹

⁷⁵ See *id.* at 365–85.

⁷⁶ See *id.* at 361–62.

⁷⁷ See *id.* at 362.

⁷⁸ See *id.* at 363.

⁷⁹ *Id.* at 387.

⁸⁰ *Id.* at 386.

⁸¹ *Id.* at 388.

However, in order to avoid creating unhealthy incentives for American negotiators, the existence of a direct international obligation such as a treaty should only “plac[e] a positive thumb on the constitutional scale.”⁸² Otherwise, American negotiators might be incentivized to obtain explicit treaty statements mandating specific requirements (potentially tracking American statutory language and content directly), contravening the general practice of international copyright norms setting only minimum standards and deferring to national autonomy for the exact requirements of domestic law.⁸³

The second factor — the political process by which international standards are adopted — is relevant in that it underlies the historical basis for deference to laws adopted pursuant to treaties.⁸⁴ Because the international lawmaking process has become more diversified and has come to resemble the process for enacting domestic legislation, courts should afford traditional Treaty Clause deference only to treaty-making that features heightened political checks.⁸⁵ Furthermore, to adequately account for international conditions, courts should consider not only domestic political checks but also international ones.⁸⁶ Thus, for example, Professor Dinwoodie proposes that courts afford more deference to laws enacted through multilateral treaties than to those enacted through bilateral trade agreements.⁸⁷ He argues that political realities are such that the United States can often exert substantial pressure on countries to adopt U.S.-friendly bilateral copyright agreements; such lawmaking contains few if any political checks, and the United States often obtains intellectual property concessions through promises having little to do with intellectual property, such as promises of foreign aid.⁸⁸ In contrast, multilateral treaties are enacted through a process of consensus that is “an important and powerful constraint that might provide courts some assurance that a genuine international concern has been addressed in a rational manner.”⁸⁹

Finally, Professor Dinwoodie suggests that some substantive limits in the Copyright Clause should “inform” the analysis of the constitutionality of domestic legislation based on international agreements,

⁸² *Id.*

⁸³ *See id.* at 387.

⁸⁴ *See id.* at 390. Because two-thirds of the Senate must ratify a treaty, *see* U.S. CONST. art. II, § 2, the decision to ratify is substantially politically constrained and checked. Therefore, laws adopted pursuant to such treaties receive significant deference.

⁸⁵ *See* Dinwoodie, *supra* note 68, at 390.

⁸⁶ *See id.* Professor Dinwoodie notes that this will have the additional benefit of casting a spotlight on the international lawmaking process and thus might aid the development of the international legal system. *Id.*

⁸⁷ *See id.*

⁸⁸ *See id.* at 390–91.

⁸⁹ *Id.* at 391.

“even if . . . they should not control that constitutional determination.”⁹⁰ Although some might propose a hierarchy of limits that looks to which limits are more fundamental to the spirit of the American democracy, Professor Dinwoodie instead would establish a hierarchy according to which limits are easier for the judiciary to police.⁹¹ Striking down legislation that transgresses the “limited Times” restriction would, for example, implicate fewer policy choices than would assessing the “bargain” between the public and an author⁹² or assessing whether a particular legislation “promotes the progress of science and the useful arts.”⁹³

III. CRITIQUE AND A NEW PROPOSAL

A. *Critique of Professor Dinwoodie’s Alternative Proposal*

Professor Dinwoodie criticizes current understandings of the overlap between the Treaty and Copyright Clauses in part because they fail to take appropriate account of the realities of international copyright lawmaking.⁹⁴ His concern that any theory be realistically situated within the international climate is well placed, for, as surveyed in Part I, the international copyright framework has undergone a radical shift in recent years, and courts are increasingly taking stock of that shift. However, Professor Dinwoodie’s alternative proposal, which he sets forth as better aligned with the international climate, fails on two counts. First, by failing to fully reflect current international political realities, his proposal suffers from the same critique he levels against his predecessors’ theories. Additionally, by being indifferent to the *El-dred* majority’s stated international concerns, Dinwoodie’s proposal is not easily harmonized with current Supreme Court philosophy.

Professor Dinwoodie’s first two factors — the strength of the international obligation and the nature of the political process — purport to take stock of the form of international lawmaking to which domestic legislation responds. Yet together they push toward a more objectionable form of international lawmaking, one that is particularly damaging to the intellectual property policies of developing countries. Think of the ideal international obligation under these two factors: it would be a very specific requirement found in a multilateral treaty, one that would be enforceable through some international mechanism (as en-

⁹⁰ *Id.*

⁹¹ *See id.* at 392.

⁹² *Id.* (citing Graeme W. Austin, *International Copyright Law and Domestic Constitutional Doctrines*, 30 COLUM. J.L. & ARTS 337 (2007)).

⁹³ *Id.*

⁹⁴ *See id.* at 361–62.

forceability renders the standard all the more “real” and “obligatory”). This is, in effect, what we see in TRIPS. Yet is TRIPS a laudable piece of international lawmaking, of a form and substance that we should incentivize U.S. negotiators to push for in future negotiations? Many would say no,⁹⁵ for good reasons.

The detailed story of the enactment of TRIPS cannot be retold in this Note;⁹⁶ however, a few general points are enough to dismantle any notion that TRIPS is a commendable example of international consensus-building. TRIPS was, at its core, nothing less than the culmination of the efforts of a group of developed countries — headed by the United States, which quickly brought on board the European Union and Japan — to obtain advantageous intellectual property protection abroad for their domestic intellectual property industries, no matter the costs to less developed nations.⁹⁷ Professor Drahos, in his detailed account of the “remarkable TRIPS story,”⁹⁸ goes so far as to suggest that one could easily label TRIPS an “unconscionable bargain.”⁹⁹ The U.S. coalition (whose agenda was substantially pushed for by U.S. industries dependent on intellectual property, such as drug and media companies¹⁰⁰) manipulated the treaty-building process in such a way that the final standards built into TRIPS were essentially dictated by the developed countries’ needs and desires.¹⁰¹ Consensus-building among all countries was a myth; the reality was consensus-building among developed countries.¹⁰² For example, the United States and the European Union privately negotiated many of TRIPS’s key provisions, such as how royalties from collective licensing were to be divided; knowledge of these “bilaterals” meant that developing countries soon realized that “they were wasting their time in the TRIPS negotiations.”¹⁰³ At the same time, “the GATT secretariat put relentless pressure on developing countries Key countries were hauled into small group consultations. The groups grew smaller and the strain of resistance greater, so much so that developing country negotiators began to refer to [these processes] as the ‘Black Room’ consultations.”¹⁰⁴

⁹⁵ See, e.g., DRAHOS WITH BRAITHWAITE, *supra* note 24.

⁹⁶ For a more detailed discussion of TRIPS, see generally *id.*

⁹⁷ See generally *id.*

⁹⁸ *Id.* at 73.

⁹⁹ *Id.* at 141.

¹⁰⁰ See *id.* at 72–73, 85, 118–19.

¹⁰¹ See *id.* at 133–42. Recall as well that developed countries moved the forum for the negotiation over TRIPS away from WIPO, which had the reputation of affording developing countries too much of a voice. *Id.* at 111–12, 195.

¹⁰² See *id.* at 141 (“Multiple levels of circles of consensus, which could be closed when needed, turned developing countries into outsiders when it mattered.”).

¹⁰³ *Id.* at 138–39.

¹⁰⁴ *Id.* at 135.

In the final analysis, “for the key players (the US and the European Community), TRIPS offered the opportunity to globalize their own domestic models of regulation”¹⁰⁵ in a form that provided an easy enforcement mechanism if countries were delinquent in adopting these regulations.¹⁰⁶ In addition, the enactment of TRIPS was made easier by earlier bilateral agreements negotiated by the United States: “Each bilateral brought [a] country much closer to [the] TRIPS agreement, so accepting TRIPS was no big deal.”¹⁰⁷

Thus the enactment of TRIPS, which appears to satisfy the two internationally oriented factors in Professor Dinwoodie’s proposal, hardly seems to be a process to which courts should afford special deference. Judicial review should not incentivize negotiators to pursue similar tactics — and there is no reason to assume TRIPS is an anomaly in international multilateral negotiations.¹⁰⁸ In the copyright context, history suggests that there may be little in reality that separates bilateral agreements negotiated with few political checks — to which Professor Dinwoodie would accord minimal deference — from multilateral treaties. Indeed, as mentioned above, the process of enacting bilateral treaties seems to pave the way for the adoption of multilateral treaties whose standards may differ little from those of their predecessors. In short, Professor Dinwoodie’s proposal — as he recognizes at certain moments¹⁰⁹ — would simply augment the reasons for the United States to obtain explicit treaty requirements tracking domestic regulation and to speed up the process by which international copyright lawmaking shifts away from a regime that respects each country’s national autonomy to implement domestic policies.

In addition, Professor Dinwoodie’s third factor, which seeks to incorporate some limitations of the Copyright Clause into the Treaty Clause, falls woefully short of providing any meaningful restriction on Congress through the Copyright Clause. He would have the judiciary police legislation only when its competence might not be called into question. Yet the only limit that Professor Dinwoodie proposes as sat-

¹⁰⁵ *Id.* at 143.

¹⁰⁶ This was a substantial change from prior intellectual property treaties. For example, while the Berne Convention contains an enforcement mechanism — possible action before the International Court of Justice — it has never been used. *Id.* at 111. Instead, “WIPO’s response to . . . problems was to manage the conflicts through the creation of groups of experts and committees to examine the issues.” *Id.*

¹⁰⁷ *Id.* at 105 (last alteration in original) (quoting from a 1994 interview with a former U.S. trade negotiator) (internal quotation marks omitted); see also *id.* at 121 (“[D]eveloping countries were being given a choice between a bilateral or multilateral negotiation. They were outgunned in the case of the former and not collectively prepared in the case of the latter.”).

¹⁰⁸ See *id.* at 139 (“For those who like subterfuge, manipulation, dissembling, hypocrisy and power plays, there can be few better places to ply these skills than a multilateral trade negotiation.”).

¹⁰⁹ See Dinwoodie, *supra* note 68, at 387.

isfying this “judicial competence” test is the “limited Times” restriction — a restriction that appears to be easily evadable after *Eldred*.¹¹⁰ In short, what may be the *easiest* for the judiciary to police may not be the *most appropriate* for it to police.

Professor Dinwoodie’s proposal also takes insufficient notice of *Eldred*’s three international concerns, which focus on a need to harmonize U.S. law with international standards, a desire to permit the United States to play a leadership role internationally, and a need for the United States to have sufficient flexibility in the creation of a copyright regime.¹¹¹ By pushing U.S. negotiators toward multilateral treaties, judicial review centered on Professor Dinwoodie’s factors would provide the United States with *less* flexibility with regard to forms of international agreements, standards within those agreements, and the substance of domestic laws enacted to comply with those agreements. By circumscribing the United States’s flexibility, this approach would also limit the means by which the United States could adopt a leadership role.¹¹² And finally, the very domestic law at issue in *Eldred* — which sought to harmonize domestic law not with strict international obligations but rather with a single E.U. directive — would receive minimal deference under Professor Dinwoodie’s proposal, contravening the deference actually afforded it by the Supreme Court.¹¹³

B. New Proposal for Judicial Review

Any new proposal for judicial review of domestic law enacted to comply with international standards or obligations must be mindful both of current international political realities in the copyright arena and of current Supreme Court philosophy. As the story of TRIPS makes clear, today’s political reality is that the United States has substantial — and likely unparalleled — power when it comes to negotiating the substance of international copyright agreements. Such power is cause for significant concern, especially when it comes to the treatment of developing countries; however, this Note considers only the judicial review of *domestic* legislation and hence must concern itself only with the dangers such expansive power poses for the enactment of domestic legislation that contravenes the public interest — concern for which, despite any internationalism of copyright, forms the *raison*

¹¹⁰ Justice Breyer noted in his *Eldred* dissent that the CTEA, whose term extension was upheld by the majority as constitutional, had an economic effect of making copyright terms “virtually perpetual,” *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting), by creating a term worth 99.8% of the value of a perpetual copyright. *Id.* at 255–56.

¹¹¹ *See id.* at 206 (majority opinion).

¹¹² Professor Dinwoodie recognizes that multilateral treaties — agreements his proposal favors — are becoming more and more “impossible to conclude.” Dinwoodie, *supra* note 68, at 391.

¹¹³ In fact, Professor Dinwoodie appears to recognize as much. *See id.* at 386 n.128.

d'être of the copyright monopoly. The principle danger in this sphere is that the United States will use international lawmaking as an end-run around domestic constraints. In other words, the United States might use its global clout to drive the enactment of international agreements to which it can then point as justifications for domestic laws that it would have had trouble promulgating — perhaps either for political or constitutional reasons — in the absence of an international obligation. Indeed, many argue this is precisely what occurred with the passage of the WIPO Copyright Treaty and the subsequent enactment and justification of the DMCA.¹¹⁴

A two-tiered form of judicial review could be structured to police against this form of end-run: courts would accord greater deference to domestic laws complying with international standards or obligations in whose development the United States did not play a substantial role (hereinafter termed “U.S.-neutral international standards”), and less deference to domestic laws complying with international obligations in whose enactment the United States wielded a heavy hand (hereinafter termed “U.S.-driven international standards”).¹¹⁵ Thus, for example, courts would largely defer to Congress when it substantially abolished copyright formalities in order to comply with the Berne Convention,¹¹⁶ or when it extended copyright terms to comply with a similar extension in Europe.¹¹⁷ Courts would, however, afford less deference to review of the DMCA. This proposal admittedly places little emphasis on doctrinal arguments regarding the relative supremacy of the Treaty

¹¹⁴ See *supra* notes 36–40 and accompanying text. Professor Pamela Samuelson describes the Clinton administration’s attempt to push through WIPO a digital agenda for copyright that was almost identical to the copyright laws it had tried to push through the U.S. Congress (and that proved so controversial that the bills were not even reported out of committee). Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 373 (1997). She writes that “[h]ad this effort succeeded in Geneva, Clinton administration officials would almost certainly have then argued to Congress that ratification of the treaties was necessary to confirm U.S. leadership in the world intellectual property community and to promote the interests of U.S. copyright industries in the world market for information products and services.” *Id.* at 374.

¹¹⁵ At first glance, distinguishing between these two standards might appear difficult. In practice, however, the instances in which the United States plays a substantial role in pushing through an international or bilateral agreement are apparent. There is a visible difference between an E.U. directive debated and ratified by E.U. countries, and, for example, the enactment of TRIPS or the WIPO Copyright Treaty — both well-documented examples of the United States pressuring the international community. See generally DRAHOS WITH BRAITHWAITE, *supra* note 24; Samuelson, *supra* note 114. And indeed, the “political process” prong of Professor Dinwoodie’s proposal would require an even more searching inquiry into international politics, as he would have U.S. courts look into the details of the international lawmaking process. See Dinwoodie, *supra* note 68, at 390.

¹¹⁶ Cf. *Kahle v. Gonzales*, 487 F.3d 697, 700–01 (9th Cir. 2007) (citing *Eldred* — and the Court’s deference to Congress in that case — as foreclosing plaintiffs’ challenge to the constitutionality of the Copyright Renewal Act, which transformed the copyright system from an opt-in to an opt-out regime by eliminating renewal requirements).

¹¹⁷ See *Eldred v. Ashcroft*, 537 U.S. 186, 204–05 (2003).

Clause versus the Copyright Clause; however, given the amount of controversy that exists over just how subservient one clause should be to the other, and the polar extremes of the answers provided by scholars to this question,¹¹⁸ a function-driven analysis that attempts to accord some respect to the principles underlying each clause seems particularly apposite. In such an analysis, Congress's ability to legislate with an international eye must not be too greatly constrained, yet the constitutional limits of the Copyright Clause cannot be wholly ignored.

The level of deference in the suggested two-tiered form of review corresponds to how closely courts will scrutinize legislation for constitutional violations of the Copyright Clause, and how the limitations in the Copyright Clause should be interpreted.¹¹⁹ Much has been written about the inherent restrictions of the Copyright Clause, and the arguments will not be repeated here except to note that the two main potential restrictions flow from the "limited Times" and "To promote the Progress of Science and useful Arts" language.¹²⁰ The "limited Times" restriction can be relatively easily policed by courts, and the internationalization of copyright should not allow Congress to bypass this clear textual limitation by enacting, for instance, perpetual or nearly perpetual copyright terms.¹²¹ Even within this easily policed limit, however, courts should afford more leeway to domestic laws enacted pursuant to U.S.-neutral international standards and less to laws enacted pursuant to U.S.-driven international standards. Thus, for example, if the CTEA were adopted without the justification of harmonization with E.U. law, a reviewing court would need to carefully consider whether the expansion of copyright terms complies with the "limited Times" restriction.¹²²

¹¹⁸ See *supra* notes 70–72 and accompanying text.

¹¹⁹ This Note confines itself to a consideration of judicial policing of limitations found in the Copyright Clause. A distinct, though at times interrelated, question involves limitations derived from the First Amendment. For a discussion of how these two constitutional clauses interact, including judicial analysis of that interaction, see Baker, *supra* note 7; Netanel, *supra* note 7; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

¹²⁰ U.S. CONST. art. I, § 8, cl. 8.

¹²¹ Professor Dinwoodie's proposal describes this Copyright Clause limitation as a relatively easy one for courts to police. See Dinwoodie, *supra* note 68, at 392. Of course, a difficult hypothetical could be imagined for what would count as "close enough" to a perpetual term as to transgress the "limited Times" language. For example, would perpetual minus one day count? See Lessig, *supra* note 7, at 1065 (quoting Congresswoman Mary Bono as appearing to support a proposed copyright term of "forever less one day"). *Eldred* sidestepped this thorny issue by simply noting that the CTEA's term extension did not approach this hypothetical. *Eldred*, 537 U.S. at 209–10.

¹²² It appears that one reason the Court did not fully engage the question of what type of term extension would violate the "limited Times" language was that it recognized that under the CTEA the length of the term was determined in part by reference to a European standard. See *Eldred*, 537 U.S. at 206 n.11.

With respect to the “progress” limitation, judges should not simply throw up their hands, cry judicial incompetence, and refuse to enforce this constraint.¹²³ However, this judicial enforcement must take account of the internationalization of copyright and the fact that the copyright “bargain” can no longer be viewed as a purely domestic one.¹²⁴ Therefore, courts reviewing domestic laws enacted pursuant to U.S.-neutral international legislation should largely defer to Congress — as the *Eldred* Court did¹²⁵ — for Congress’s interpretation of how “progress,” in light of copyright’s internationalization, can be furthered. Only laws that blatantly fail to further any form of progress whatsoever, even when “progress” is understood to involve a complex weaving together of international concerns, should be struck down. Yet domestic laws enacted pursuant to U.S.-driven international standards *should* be reviewed with a more domestic-centered interpretation of “progress” and the copyright “bargain.” After all, by definition, these international standards were advanced by the United States, and judicial review should prevent an end-run around constitutional limitations by domestic legislation enacted pursuant to U.S.-driven international standards. However, even here the courts should take some stock of the internationalized form of copyright, and should allow the United States some ability to maneuver internationally even when the strict domestic understanding of a copyright “bargain” is not furthered.¹²⁶

Additionally, for both types of domestic laws — those enacted pursuant to either U.S.-neutral or U.S.-driven international standards — courts should review carefully legislation that “over-compli[es]”¹²⁷ with international standards in a direction that is constitutionally problem-

¹²³ See, e.g., *id.* at 212 (stressing, with respect to the “progress” language in the Copyright Clause, “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”).

¹²⁴ The copyright quid pro quo bargain holds that authors create goods that improve the overall wealth of society, and, in return, society grants authors monopolies for a limited period of time. See, e.g., LITMAN, *supra* note 5, at 13. The notion of a “quid pro quo” in copyright stems from the requirement that copyright laws further the progress of science and the arts. See Bohannon, *supra* note 6, at 617–18.

¹²⁵ See *Eldred*, 537 U.S. at 212.

¹²⁶ For example, Justice Breyer in his *Eldred* dissent conducted a searching inquiry into the CTEA’s benefits and harms to ascertain whether the Act promoted the progress of the sciences and arts. *Eldred*, 537 U.S. at 254–63 (Breyer, J., dissenting). Figuring into his balancing were international concerns, such as his view that “the statute does *not* create a uniform American-European term with respect to the lion’s share of the economically significant works that it affects.” *Id.* at 257; see also *id.* at 257–60 (discussing international aspect of the CTEA). Indeed, Justice Breyer concluded his opinion by noting that his view of the CTEA did not automatically call into question the constitutionality of the 1976 Act, in part because the 1976 Act allowed the United States to enter the Berne Convention, so that “the balance of copyright-related harms and benefits there is far less one sided.” *Id.* at 264–65.

¹²⁷ Dinwoodie, *supra* note 68, at 388.

atic. Such review will hopefully help curb Congress's practice of using international law to justify expansions of the domestic copyright regime.¹²⁸ At the same time, review for overcompliance would not indiscriminately scrutinize domestic legislation for its "fit" to international obligations, and thus would pose less of a danger than Professor Dinwoodie's proposal of disrupting the international historical trend of respecting national autonomy when it comes to complying with international standards. Finally, courts should always review whether the stated justification of compliance with international standards is, in fact, true.¹²⁹

This proposal does a better job than does Professor Dinwoodie's of respecting current Supreme Court philosophy regarding the internationalization of copyright. First, it grants greater latitude to Congress to harmonize with international standards, such as the E.U. directive at issue in *Eldred*, when the United States plays little role in the creation of those standards. Second, it does not distinguish between the form and substance of international standards and hence allows for more flexibility in the international sphere, as opposed to incentivizing the creation of multilateral treaties of a specific nature. Finally, it respects the global nature of the copyright sphere and Congress's flexibility within that sphere by not requiring strict adherence to Copyright Clause limitations for domestic laws enacted pursuant to U.S.-neutral international standards.

It must be admitted, however, that this form of judicial review does, to some degree, constrain the United States's ability to "'play a leadership role' in the give-and-take evolution of the international copyright system"¹³⁰ insofar as it looks less favorably on laws enacted in response to standards that the United States had a large role in formulating. However, this concern is minimal. First, the *Eldred* Court was primarily concerned that the United States's leadership role would be constrained "if the only way to promote the progress of science were to provide incentives to create new works."¹³¹ The form of judicial review advocated in this Note does counsel courts to take into some consideration an internationalized version of the copyright bargain.

Second, the judicial review proposed here is mainly concerned with preventing Congress from making end-runs around the Constitution

¹²⁸ See *id.* at 388 ("Over-compliance' with international obligations is not uncommon in recent copyright history."); Samuelson, *supra* note 5, at 533 (describing how the United States adopted an "overbroad[] and maximalist set of anti-circumvention regulations" to comply with the WIPO Copyright Treaty, despite being able to assert that its laws were already in compliance).

¹²⁹ Cf. *Eldred*, 537 U.S. at 257 (Breyer, J., dissenting) (scrutinizing the majority's justification for upholding the CTEA upon international grounds and concluding that "in this case the justification based upon foreign rules is surprisingly weak").

¹³⁰ *Id.* at 206 (majority opinion) (quoting Perlmutter, *supra* note 15, at 332).

¹³¹ *Id.* (quoting Perlmutter, *supra* note 15, at 332) (internal quotation marks omitted).

by first enacting international standards. The United States is still free to play a leadership role in the international arena, but it must do so with an eye toward its domestic constitutional limitations; thus, for example, nothing hampers the United States from leading the charge in providing greater access to copyrighted works for developing countries, or (for better or worse) in attempting to persuade other countries to adopt certain types of domestic legislation. As for domestic legislation enacted pursuant to U.S.-neutral international standards, the United States is not relegated to sitting on the sidelines watching other countries institute progressive copyright reforms — it can remain on the forefront of such standards without much obstruction from courts. And in any case, if the “leadership role” of the United States were interpreted too expansively, then *no* limitations whatsoever would be imposed on domestic legislation enacted pursuant to international obligations, since any limitation would constrain the potential of the United States to be a leader. However, such an interpretation would read the Copyright Clause out of the Constitution, as almost no domestic legislation is enacted today without some regard for international concerns.¹³²

CONCLUSION

Globalization is upon us, and copyright has been swept up, irreversibly, in this new development. No longer can we strictly look to what the Framers, living in an isolationist copyright society, understood the Copyright Clause and the copyright monopoly to encompass, and no longer can their antiquated principles drive judicial review of domestic copyright legislation. Instead, a meaningful proposal for judicial policing of copyright legislation must take into account the internationalization of copyright and the needs of Congress when legislating within this new framework. However, although Congress’s hands should not be tied by an overly inward-looking form of judicial review, it also should not be given free rein to legislate without constraint from any limitations found in the text of the Copyright Clause. Judicial review of legislation enacted with an eye toward international compliance must, therefore, balance domestic ideals with international realities.

¹³² See Perlmutter, *supra* note 15, at 326 n.10 (noting that in the copyright arena “[i]t is rare these days that international implications are not a part of congressional debate on proposed legislation”).