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Recommended Citation

Derrick Wang, *Harmonizing All Around the World: Re-evaluating the Copyright and Treaty Powers in the Post-Golan Era*, 28 Md. J. Int'l L. 328 (2013).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/16>

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Harmonizing All Around the World: Re-evaluating the Copyright and Treaty Powers in the Post-*Golan* Era

DERRICK WANG[†]

All nations sing
Let's harmonize all around the world
—Michael Jackson¹

Ah, détentes!
Ah, détentes!
They're what everybody wants!
—Stephen Sondheim²

In Professor Amy Chua's 2011 memoir *Battle Hymn of the Tiger Mother*, Chua's pianist daughter Sophia Chua-Rubenfeld recalls performing a selection from Sergei Prokofiev's *Romeo and Juliet*³ as an eighth-grader making her 2007 Carnegie Hall debut: "I said good-bye to Romeo and Juliet, then released them into the darkness."⁴ What Ms. Chua-Rubenfeld, the daughter of a legal scholar, might not have known was the less poetic legal truth—that *Romeo and Juliet* had been recaptured in the United States in 1994 after decades of ostensible freedom, and that, as of January 2012, it and many other works would remain under copyright there for years to come.

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1. MICHAEL JACKSON, *HIStory, on HISTORY: PAST, PRESENT AND FUTURE*, BOOK I (Epic Records 1995).

2. STEPHEN SONDHEIM, *Please Hello, in PACIFIC OVERTURES* (1976).

3. SERGEI PROKOFIEV, *ROMEO AND JULIET: TEN PIECES FOR PIANO*, OP. 75 (1937).

4. AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* 140 (2011).

In 2012, the U.S. Supreme Court held in *Golan v. Holder*⁵ that Congress' enactment of section 514 of the 1994 Uruguay Round Agreements Act (URAA)—retroactively granting copyright protection to many works previously in the U.S. public domain (including “such favorites by the Russian composer Serge [sic] Prokofiev as . . . *Romeo and Juliet*”⁶) pursuant to Article 18 of the Berne Convention for the Protection of Literary and Artistic Works (Berne)—neither exceeded Congress' Copyright Clause power nor violated the First Amendment.⁷ By allowing Congress to “remov[e] material from the public domain,”⁸ the Court effectively expanded Congress' power under the Copyright Clause for the second time in ten years: in 2003, the Court had held in *Eldred v. Ashcroft*⁹ that the 1998 Copyright Term Extension Act¹⁰—which lengthened the term of existing and future copyrights by an additional twenty years—neither exceeded Congress' Copyright Clause power nor violated the First Amendment.¹¹

In both *Eldred* and *Golan*, the Court not only deferred to legislative authority¹² but also validated Congress' presumed rationale that the copyright practices of other nations (specifically, other signatories to the Berne Convention) warranted the expansion of U.S. copyright protection.¹³ This pressure to conform to (or “harmonize with”) international standards¹⁴ has also manifested itself in other recent legislative developments in intellectual property (IP) law, such as the Leahy–Smith America Invents Act (AIA).¹⁵ In this IP climate, characterized by increasing conformity to international agreements, the Court's explicit deference to Congress and validation

5. 132 S. Ct. 873, 889 (2012).

6. Complaint at 20–21, *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (No. 01-B-1854).

7. *Golan*, 132 S. Ct. at 889.

8. *Id.* at 906 (Breyer, J., dissenting).

9. 537 U.S. 186 (2003).

10. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

11. *Eldred*, 537 U.S. at 234.

12. *Id.* at 208 (“[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”); *Golan*, 132 S. Ct. at 888 (“[T]he [Copyright] Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’” (quoting *Eldred*, 537 U.S. at 222)).

13. *Eldred*, 537 U.S. at 205–06, 236 n.11 (2003); *Golan*, 132 S. Ct. at 889.

14. See *infra* Part II.

15. Leahy–Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.).

of such conformity raises an increasingly relevant question: if deemed necessary, can and will Congress use its power under the Treaty Clause to change U.S. copyright law further?

This Comment, using *Golan* as its touchstone, explores the potential application of Congress' treaty power to U.S. copyright law. Part I outlines, with respect to U.S. copyright law, Congress' historical shift from isolationism to harmonization based on international agreements and the manifestation of this shift in *Golan*. Part II examines how the recent importance of international copyright agreements may implicate the relationship between the copyright and treaty powers in the U.S. Constitution. Part III evaluates Professor Graeme Dinwoodie's comprehensive scholarly consideration of the relationship between the Copyright and Treaty Powers, analyzing how his own test on this issue might be applied in light of *Golan*.

I. *GOLAN V. HOLDER*: BACKGROUND, CASE, AND CONTEXT

A. *Background of Golan: U.S. Copyright Protection of Foreign Works*

1. The United States and the Berne Convention: From Isolationism to Accession (1790–1989)

Although *Golan* illustrates the importance the United States currently places on granting copyright protection to foreign works, this trend toward harmonization is a relatively recent development in U.S. copyright law: in fact, for much of its history, the United States did not grant copyright protection to foreign works.¹⁶ The first U.S. copyright statute, the Copyright Act of 1790, granted rights to “citizens of these United States, or resident[s] therein”¹⁷ and explicitly disqualified from protection any work “written, printed or published” outside U.S. jurisdiction by a non-U.S. citizen.¹⁸ Under this statute, many works written by foreign authors in foreign lands

16. See generally Barbara Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050 (1968); Hamish Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J.L. & ARTS 89 (1986).

17. Copyright Act of 1790, § 1, 1 Stat. 124 (superseded by Copyright Act of 1909).

18. *Id.* § 5, 1 Stat. at 125 (“[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.”).

received no copyright protection in the United States—a result that British author Charles Dickens called a “monstrous injustice.”¹⁹

By the late nineteenth century, nations other than the United States were actively seeking to create a widely applicable international copyright treaty, and in 1886, ten countries—Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia—signed the first version of the Berne Convention for the Protection of Literary and Artistic Works.²⁰ The Berne Convention established a “universal procedural framework” for copyright law and set minimum standards of copyright protection that all signatories must provide.²¹ The United States, however, did not accede; although it sent a representative to Berne,²² it did not empower him to sign the Convention.²³

Instead, the United States addressed international copyright issues through its own International Copyright Act of 1891, which extended copyright protection to works by foreign authors not residing in the United States.²⁴ Such protection, however, was granted only if the President proclaimed that the foreigner’s “state or nation” satisfied one of two conditions: either the foreign state granted copyright protection to U.S. citizens on “substantially the same basis as [to] its own citizens,” or the foreign state was a “party to an international agreement” that both provided copyright reciprocity and was available for the United States to join.²⁵ Moreover, the International Copyright Act imposed, as a general prerequisite to copyright, stringent requirements relating not only to formalities (such as registration and deposit on or before the day of publication) but also to manufacture.²⁶ This Manufacturing Clause,

19. See Sandison, *supra* note 16, at 92 (quoting Letter from Charles Dickens to John Foster (Feb. 24, 1842)).

20. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 15 n.88 (1988). The first version of the Berne Convention was signed by these ten countries on September 9, 1886, and the Convention underwent a series of revisions over the course of the next century. See *infra* text accompanying note 29. When referencing the Convention, however, this Comment will refer the reader to its most current form: Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

21. See Berne Convention, *supra* note 20; Robert S. Chaloupka, *International Aspects of Copyright Law*, 15 INT’L HR J. 18, 18–19 (2006).

22. Thorvald Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 84 (1926).

23. Sandison, *supra* note 16, at 101.

24. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1909).

25. *Id.* § 13.

26. *Id.* § 3.

whereby every “book, photograph, chromo or lithograph” had to be made within the United States to receive U.S. copyright protection,²⁷ severely limited the copyright protection extended to foreigners.²⁸

Through most of the twentieth century, U.S. copyright law remained independent of the Berne Convention, which in turn underwent revisions in 1896 (Paris), 1908 (Berlin), 1914 (Berne), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), and 1971 (Paris).²⁹ The 1908 Berlin revision notably abolished formalities as a prerequisite to copyright protection, thus “ma[king] it impossible for the United States [which had codified formalities in its copyright statute] to join the Berne Union without substantial changes in its domestic law.”³⁰ Rather than conform to this abolition of copyright-related formalities, Congress instead passed the Copyright Act of 1909, a revised copyright statute that lessened the manufacturing requirement but nevertheless “retained . . . rigid notice formalities,” thus continuing to render the United States unable to accede to the Berne Convention.³¹ Accordingly, under the Copyright Act of 1909, many foreign works failed to secure U.S. copyright protection because they did not meet the statute’s formality requirements.³² Similarly, in 1952, rather than further revise its copyright statute to conform to the Berne Convention, the United States opted to sign the Universal Copyright Convention (UCC), a new multilateral treaty designed to be more compatible with existing U.S. copyright law.³³

Nevertheless, Congress did eventually pass the Copyright Revision Act of 1976, which—by reducing formality requirements and extending the term of copyright protection—brought U.S. copyright law closer to the Berne Convention standards.³⁴ Moreover, by the early 1980s, the U.S. government had become politically dissatisfied with the United Nations Educational, Scientific, and

27. *Id.*

28. See Ringer, *supra* note 166, at 1057 (“The requirements of the 1891 ‘manufacturing clause’ were so rigid that they made the extension of copyright protection to foreigners illusory.”).

29. Berne Convention, *supra* note 20.

30. Ringer, *supra* note 16, at 1057.

31. *Id.* at 1058.

32. See *Golan v. Holder*, 132 S. Ct. 873, 878 (2012) (“[T]he Uruguay Round Agreements Act . . . grants copyright protection to preexisting works of Berne member countries, protected in their country of origin, but lacking protection in the United States . . . [because] the author had failed to comply with U.S. statutory formalities . . .”).

33. See Sandison, *supra* note 16, at 99.

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

Cultural Organization (UNESCO), which happened to administer the UCC.³⁵ After withdrawing from UNESCO in 1984, the United States passed the Berne Convention Implementation Act of 1988,³⁶ making it a party to the Berne Convention beginning on March 1, 1989—over a hundred years after the Berne Convention was first signed.

2. Copyright Restoration and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Despite acceding to the Berne Convention in 1989, the United States still did not fully comply with the Convention, opting instead for a “minimalist approach” to implementation that applied “only those changes to American copyright law that [were] clearly required under the treaty’s provisions.”³⁷ For example, the Berne Convention mandates the recognition of “moral rights” whereby an author can object to any change in his work that “would be prejudicial to his honor or reputation.”³⁸ The United States, however, chose not to revise the U.S. copyright statute to conform to the Berne Convention’s moral-rights standards, instead claiming that certain of its cases and statutes already met moral-rights requirements and relying on the weakness and disuse of the Berne Convention’s dispute-settlement procedures to avoid any challenges to this claim.³⁹

The United States also initially avoided implementing the “copyright restoration” requirement deriving from Article 18 of the Berne Convention, which provides as follows:

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain *in the country of origin* through the expiry of the term of protection.

....

(4) The preceding provisions shall also apply *in the case of new accessions to the Union* and to cases

35. See Sandison, *supra* note 16, at 100.

36. See Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 [hereinafter BCIA] (codified as amended in scattered sections of 17 U.S.C.).

37. Golan v. Holder, 132 S. Ct. 873, 879 (2012) (quoting H.R. REP. NO. 100-609, at 7 (1988)).

38. Berne Convention, *supra* note 20, art. 6bis.

39. See Berne Convention, *supra* note 20, art. 33; Chaloupka, *supra* note 21, at 27 n.5; Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 741 (2001).

in which protection is extended by the application of Article 7 or by the abandonment of reservations.⁴⁰

In other words, according to the Berne Convention, if a work originates and is under copyright in a member nation, all other member nations must also grant copyright protection to that work as long as the copyright persists in the country of origin.⁴¹ Accordingly, if a foreign work had failed to secure or maintain U.S. copyright protection before the United States joined the Berne Convention, but that same foreign work still enjoyed copyright protection in its country of origin when the United States joined the Berne Convention, then the United States must grant to that work the U.S. copyright protection it previously did not receive.⁴²

After the United States deferred this issue of retroactive copyright protection, several other countries questioned this inaction, but—as with the moral-rights issue—the Berne Convention’s dispute-resolution mechanism was not strong enough to enforce compliance in this matter.⁴³

By contrast, upon joining the World Trade Organization (WTO), the United States necessarily subjected itself to harsher consequences for Berne noncompliance and was thus motivated to implement copyright restoration.⁴⁴ In 1994, the United States became party to the Marrakesh Agreement, thus concluding the Uruguay Round of international negotiations that converted the General Agreement on Tariffs and Trade (GATT) into the WTO.⁴⁵ In so doing, the United States also joined the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),⁴⁶ which in turn requires implementing provisions of the Berne Convention such as Article 18 copyright restoration.⁴⁷

40. Berne Convention, *supra* note 20, art. 18 (emphasis added).

41. *See id.*

42. *See Golan*, 132 S. Ct. at 878.

43. For a more detailed discussion, see *id.* at 879–81.

44. *See infra* notes 50–56 and accompanying text.

45. *See* Marrakesh Agreement Establishing the World Trade Organization, art. 1, Apr. 15, 1994, 1867 U.N.T.S. 154.

46. *See id.* art. 12 (“[A]ccession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.”).

47. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or

TRIPS had arisen as a catalyst for speedier expansion of international copyright law because the Berne Convention “adopt[ed] protections as international norms only after consensus was reached” and such consensus became increasingly difficult to obtain as the number of Berne signatories increased.⁴⁸ Therefore, to expand international copyright law more quickly, the United States and other developed countries had included the issue of intellectual property in the Uruguay Round.⁴⁹

Nevertheless, rather than be a mere copy of the Berne Convention, TRIPS is stricter than the Berne Convention in three significant respects.⁵⁰ First, TRIPS requires a higher minimum “floor” of protection for intellectual property rights.⁵¹ Second, TRIPS requires national legislation that effectively enforces those rights.⁵² Third, TRIPS requires submission of TRIPS-related disputes to the WTO’s Dispute Settlement Body (DSB), whose decisions are binding.⁵³ Although the Berne Convention has, in the International Court of Justice (ICJ), its own international body that enforces provisions and resolves disputes, the ICJ has never been compelled to discharge these duties; by contrast, violations of TRIPS have resulted in judgments by the WTO’s DSB.⁵⁴ Furthermore, under TRIPS, failure to comply with a DSB ruling can result in trade sanctions on the noncompliant party.⁵⁵

Faced with these stronger consequences for noncompliance under TRIPS than under the Berne Convention, the United States enacted the Uruguay Round Agreements Act (URAA), section 514 of which amended the U.S. copyright statute (in what are now sections 104A and 109(a)) to implement copyright restoration.⁵⁶

In summary, although copyright restoration constitutes a logical outgrowth of the Berne Convention’s national-treatment principle,

obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.”).

48. Chaloupka, *supra* note 21, at 20.

49. *Id.*

50. *Id.* at 21.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Uruguay Round Agreements Act, Pub. L. 103–465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. § 104A (2006)).

the United States nevertheless failed to implement copyright restoration until it joined the WTO.⁵⁷

B. Golan v. Holder: *The Case*

1. Constitutional Context: The Copyright Clause

Article I, section 8 of the U.S. Constitution enumerates Congress's powers in a list of clauses including the Copyright Clause and the Necessary and Proper Clause.⁵⁸ The Copyright Clause provides Congress the power "[t]o promote the Progress of Science [i.e. knowledge] and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁵⁹ The Necessary and Proper Clause provides Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁶⁰ The Tenth Amendment describes the limited scope of Congress's power, providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁶¹

2. Procedural History

The plaintiffs in *Golan v. Holder*⁶² were "orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works § 514 removed from the public domain."⁶³ Led by Lawrence Golan, the plaintiffs first sued the U.S. Attorney General in 2001, challenging section 514 of the URAA as unconstitutional under both the Copyright Clause and the First Amendment.⁶⁴ The district court

57. Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 358 (2007).

58. U.S. CONST. art. I, § 8. Clause 8 is commonly called the Copyright and Patent Clause because it refers to "Inventions." This Comment, focusing more narrowly on copyright-related language, calls it the Copyright Clause.

59. U.S. CONST. art. I, § 8, cl. 8.

60. U.S. CONST. art. I, § 8, cl. 18.

61. U.S. CONST. amend. X.

62. 132 S. Ct. 873 (2012).

63. *Id.* at 878.

64. See *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1218–20 (D. Colo. 2004), *motion for summary judgment granted sub nom. Golan v. Gonzales*, No. Civ. 01–B–1854(BNB), 2005 WL 914754 (D. Colo. Apr. 20, 2005), *aff'd in part*, 501 F.3d 1179 (10th Cir. 2007), *remanded in part to Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009), *rev'd*, 609 F.3d 1076 (10th Cir. 2010), *aff'd*, 132 S. Ct. 873 (2012).

granted summary judgment against the plaintiffs on both counts.⁶⁵ On appeal, however, the Tenth Circuit remanded to the district court the issue of whether removing works from the public domain implicated the First Amendment.⁶⁶

On remand, the district court granted summary judgment to the plaintiffs, asserting that section 514 was invalid because the government's interests—namely, conforming to the Berne Convention, strengthening foreign copyright protection for U.S. authors, or compensating foreign authors whose works had previously not received U.S. copyright protection—were not significant enough to warrant diminishing the U.S. public domain.⁶⁷ On appeal, the Tenth Circuit reversed, asserting that strengthening foreign copyright protection for U.S. authors was a significant government interest and that section 514 was sufficiently “narrowly tailored to serve [this] interest.”⁶⁸

The Supreme Court granted certiorari “to consider petitioners’ challenge to [section] 514 under both the Copyright Clause and the First Amendment.”⁶⁹

3. The Supreme Court’s Decision

The Supreme Court affirmed the Tenth Circuit’s decision, holding that section 514 of the URAA violated neither the Copyright Clause nor the First Amendment.⁷⁰ First, the Court relied on its previous decision in *Eldred v. Ashcroft*⁷¹—upholding the Copyright Term Extension Act (CTEA) that lengthened the duration of existing U.S. copyrights by twenty years—to explain that the “limited Times” language in the Copyright Clause did not prevent Congress from altering the duration of U.S. copyright.⁷² Accordingly, section 514, which merely granted copyright protection to certain works for a period commensurate with current U.S. copyright law, was not invalid.⁷³ Second, the history of U.S. intellectual property (IP) law showed that Congress had on multiple occasions granted protection

65. *Golan*, 2005 WL 914754, at *14, *17.

66. *Golan*, 501 F.3d at 1196.

67. *Golan*, 611 F. Supp. 2d at 1172–77.

68. *Golan*, 609 F.3d at 1083.

69. *See Golan*, 132 S. Ct. at 884.

70. *See id.* at 889.

71. 537 U.S. 186 (2003).

72. *Golan*, 132 S. Ct. at 884–85 (2012).

73. *Id.*

to works previously in the U.S. public domain; accordingly, section 514, which did the same, was not invalid.⁷⁴

Third, historical legislative and judicial practice demonstrate that the stated purpose of the Copyright Clause—to “promote the progress of Science [i.e. knowledge]”—can be satisfied by the mere dissemination of works.⁷⁵ Accordingly, even though section 514 applied to preexisting works and thus might not necessarily induce the creation of new works, section 514 was not invalid because it could “promote Science” by inducing the dissemination of preexisting works.⁷⁶ Finally, given that Congressional testimony demonstrated that full U.S. participation in the Berne Convention’s international copyright regime would “serve the objectives of the Copyright Clause,” the Court determined that it “ha[d] no warrant to reject the rational judgment Congress made.”⁷⁷

With respect to the First Amendment, the Court again relied on its decision in *Eldred*, which held that the CTEA did not violate the First Amendment because the copyright-term extension did not disturb U.S. copyright law’s two “built-in First Amendment accommodations,”⁷⁸ the idea/expression dichotomy (whereby copyright law protects expression, not underlying ideas) and the fair-use defense (whereby certain uses of copyrighted material do not constitute infringement).⁷⁹ Accordingly, because section 514 did not disturb these accommodations, section 514 did not violate the First Amendment.⁸⁰ Moreover, no historical evidence demonstrates that the public domain is inviolable; rather, given that Congress had removed works from the U.S. public domain in the past, section 514 does not offend the First Amendment in granting protection to certain works previously in the U.S. public domain.⁸¹

In a dissenting opinion, Justice Breyer argued that “the Copyright Clause [did] not authorize Congress to enact [section

74. *Id.* at 885–87.

75. *Id.* at 887–89.

76. *Id.* at 888–89.

77. *Id.* at 889.

78. *Id.* at 876 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

79. *Id.* at 889–91.

80. *Id.*

81. *Id.* at 891–93.

514]”⁸² because it induced neither the creation of new works nor the dissemination of the works to which section 514 restored copyright.⁸³

II. CONTEXT OF HARMONIZATION: *ELDRED*, *GOLAN*, AND THE LEAHY–SMITH PATENT REFORM ACT

By upholding section 514 of the URAA, *Golan v. Holder* represents a further step in the United States’ recent movement toward international harmonization of intellectual property law. In both *Eldred* and *Golan*, the Court not only deferred to legislative authority⁸⁴ but also validated Congress’ presumed rationale that the copyright practices of other nations (specifically, other signatories to the Berne Convention) warranted the expansion of U.S. copyright protection.⁸⁵

For example, the Court in *Eldred* explicitly validated Congress’ desire to keep pace with the European Union (EU) by extending the U.S. copyright term by an additional twenty years:

The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain. As respondent describes . . . a key factor in the CTEA’s passage was a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years.⁸⁶

Moreover, the EU directed its members “to deny this longer term to the works of any non-EU country whose laws did not secure the same extended term.”⁸⁷ Thus, by extending the baseline United States copyright term to life plus 70 years, Congress sought to ensure that

82. *Id.* at 900 (Breyer, J., dissenting).

83. *See id.* at 903 (“[Section 514] withdraws works from the public domain, brings about higher prices and costs, and in doing so seriously restricts dissemination, particularly to those who need it for scholarly, educational, or cultural purposes—all *without providing any additional incentive* for the production of new material.”).

84. *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (“[The Court is] not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”); *Golan*, 132 S. Ct. at 888 (“[T]he [Copyright] Clause ‘empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause.’” (quoting *Eldred*, 537 U.S. at 222)).

85. *See Eldred*, 537 U.S. at 205–06, 206 n.11; *Golan*, 132 S. Ct. at 889.

86. *Eldred*, 537 U.S. at 188 (internal citations omitted).

87. *Id.*

American authors' works would receive the same copyright protection in Europe as their European counterparts did in Europe.⁸⁸

Global trade issues have also exerted pressure on U.S. legislators to conform to international IP standards in areas beyond copyright retroactivity. The recent Leahy–Smith America Invents Act (AIA)⁸⁹ exemplifies the legislative tendency to adapt U.S. IP law (beyond copyright law) to international standards. In this reform of the U.S. patent system, signed into law in September 16, 2011, and effective March 16, 2013, Congress first proposed changes that would conform to foreign practice and only later added more patriotic, and largely symbolic, language. The bill, introduced in the Senate in January 2011 as the “Patent Reform Act of 2011,” included the key change that would bring the United States into alignment with foreign practice: the shift from first-to-invent to first-inventor-to-file.⁹⁰ Over a month later, the more patriotic title “America Invents Act” was proposed and approved.⁹¹ By June 2011, after the bill had been introduced in the House of Representatives, Congress had added two “senses of Congress,”⁹² non-binding provisions indicating a viewpoint useful for canon construction.⁹³ The first sense of Congress reproduced the Copyright/Patent Clause, presumably to promote the bill's constitutionality:

It is the sense of the Congress that converting the United States patent registration system from ‘first inventor to use’ to a system of ‘first inventor to file’ will promote the progress of science by securing for

88. *Id.* at 205–06 (“[O]ur Constitution says limited times, but there really isn’t a very good indication on what limited times is. The reason why you’re going to life-plus-70 today is because Europe has gone that way.” (citing *Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 230 (1995))).

89. Leahy–Smith America Invents Act, H.R. 1249, 112th Cong. (2011) (as signed by President Obama, Sept. 16, 2011) (codified as amended in scattered sections of 35 U.S.C.).

90. Patent Reform Act of 2011, S. 23, 112th Cong. §§ 1(a), 2 (as introduced and referred to the S. Comm. on the Judiciary, Jan. 25, 2011).

91. See 157 CONG. REC. S1037, S1050 (daily ed. Mar. 1, 2011) (describing Senate Amendment 121 to Senate Bill 23, which changed the name of the bill to “America Invents Act”).

92. America Invents Act, H.R. 1249, 112th Cong. §§ 1(a), 3(p), 3(q) (2011) (as reported by the H. Comm. on the Judiciary, June 1, 2011).

93. See YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 33 (2008) (“‘Sense of Congress’ language . . . [is] appropriate if Congress wishes to make a statement without making enforceable law.” (citing, *inter alia*, *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225, 229 (1966); *State Highway Comm’n v. Volpe*, 479 F.2d 1099, 1116 (8th Cir. 1973))).

limited times to inventors the exclusive rights to their discoveries and provide inventors with greater certainty regarding the scope of protection granted by the exclusive rights to their discoveries.⁹⁴

The second sense of Congress explicitly cited “harmoniz[ation]” and “uniformity” as the basis for the new “first-inventor-to-file” system:

It is the sense of the Congress that converting the United States patent registration system from ‘first inventor to use’ to a system of ‘first inventor to file’ will *harmonize the United States patent registration system with the patent registration systems* commonly used in nearly all other countries throughout the world with whom the United States conducts trade and thereby promote *a greater sense of* international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.⁹⁵

Three weeks later, Representative Lamar Smith of Texas offered an amendment to the second sense of Congress, simultaneously rephrasing the current extent of harmonization while sharpening the language about uniformity:

It is the sense of the Congress that converting the United States patent system from “first to invent” to a system of “first inventor to file” will improve the United States patent system and *promote harmonization of the United States patent system with the patent systems* commonly used in nearly all other countries throughout the world with whom the United States conducts trade and thereby promote *greater* international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.⁹⁶

Another amendment, offered on the same day by Representative Jackson Lee of Texas, added yet a third sense of Congress,

94. H.R. 1249 § 3(p) (as reported by the H. Comm. on the Judiciary, June 1, 2011).

95. *Id.* § 3(q) (emphasis added).

96. H.R. REP. NO. 112-111, at 8 (2011) (emphasis added to indicate Rep. Smith’s amendments to the second sense of Congress).

addressing domestic economic concerns in constituent-friendly language appropriate to the renamed AIA (which Representative Smith offered that day to change to the “Leahy–Smith America Invents Act”⁹⁷):

SEC. 29. SENSE OF CONGRESS.

It is the sense of Congress that the patent system should promote industries to continue to develop new technologies that spur growth and create jobs across the country which includes protecting the rights of small businesses and inventors from predatory behavior that could result in the cutting off of innovation.⁹⁸

These amended senses of Congress remain in the enacted AIA.⁹⁹ These clauses, presumably intended to provide largely unenforceable reassurance to a U.S. audience that harmonization is not necessarily Congress’ only goal in reforming the U.S. patent system,¹⁰⁰ suggest that Congress prioritizes international trade concerns in intellectual property legislation. Moreover, the Supreme Court’s holdings in *Eldred* and *Golan* in effect endorse the viability of expanding copyright protection through international agreements to serve international trade.¹⁰¹ Therefore, even though Congress need not currently rely upon the Treaty Clause to alter or refine U.S. copyright law, the possibility still exists that the Treaty Clause may be harnessed to expand copyright protection further than can be contemplated under the already generous interpretation of the Copyright Clause.¹⁰²

97. *Id.* at 7.

98. *Id.* at 19.

99. See Leahy–Smith America Invents Act, H.R. 1249, 112th Cong. §§ 3(o)–(p) (2011) (as signed by President Obama, Sept. 16, 2011) (codified as amended in scattered sections of 35 U.S.C.).

100. See KIM, *supra* note 93, at 33 (“In the appropriate context ‘sense of Congress’ language can have the same effect as statements of congressional purpose — that of resolving ambiguities in more specific language of operative sections of a law — but if that is the intent the more straightforward approach is to declare a ‘purpose’ rather than a ‘sense.’” (citing, *inter alia*, *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225, 229 (1966); *State Highway Comm’n v. Volpe*, 479 F.2d 1099, 1116 (8th Cir. 1973))).

101. See *supra* notes 84–85 and accompanying text.

102. See, e.g., Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1385–90 (2012) (discussing the potential interaction between Congress’ IP and treaty powers).

III. THE COPYRIGHT AND TREATY POWERS IN A POST-GOLAN WORLD: PERSPECTIVES AND ANALYSIS

Given the importance of international agreements to contemporary IP legislation, could Congress use its powers under the Treaty Clause to pass copyright legislation exceeding the limits of the Copyright Clause? The United States Department of Justice (DOJ) seemed to think so: in moving to dismiss the case in *Golan v. Ashcroft*, the DOJ, citing *Missouri v. Holland*¹⁰³ for support, asserted that extant case law did not prohibit treaties from “exceed[ing]” the limits on Congress’s enumerated powers.¹⁰⁴ By contrast, the Supreme Court did not consider this issue when granting certiorari, instead ultimately construing the Copyright Clause itself to permit the enactment of section 514 of the URAA.¹⁰⁵

In the absence of settled law on the relationship between Congress’s copyright and treaty powers, I reevaluate one commentator’s comprehensive test on the issue in light of *Golan v. Holder*.

A. Constitutional Context: The Treaty Clause

In Article II, section 2 of the Constitution, the Treaty Clause provides that the President of the United States “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹⁰⁶ The Supremacy Clause in Article VI of the Constitution describes the potentially expansive nature of this power by providing that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁰⁷

In *Missouri v. Holland*, the Supreme Court held that an Article II treaty implemented by Congress “may override [the] power” given to

103. 252 U.S. 416 (1920).

104. See Defendant’s Reply in Further Support of His Motion to Dismiss at 19, *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. Jan. 16, 2001) (“The treaty-power decisions, which both sides cite, hold that treaties cannot negate constitutional prohibitions, such as those contained in the Bill of Rights — *not that treaties cannot exceed the limits on Congress’s enumerated powers.*” (emphasis added)).

105. See *Golan v. Holder*, 132 S. Ct. 873, 884 (2012) (“We granted certiorari to consider petitioners’ challenge to § 514 under both the Copyright Clause and the First Amendment . . .”).

106. U.S. CONST. art. II, § 2, cl. 2.

107. U.S. CONST. art. VI, cl. 2.

a State under the “general terms of the Tenth Amendment,” thus allowing Congress to exceed its Article I enumerated powers by implementing an Article II treaty.¹⁰⁸

Nevertheless, in *Reid v. Covert*,¹⁰⁹ the Supreme Court held that “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”¹¹⁰ The Court elaborated that

There is nothing in [the] language [of Article VI, Clause 2] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution [T]he reason treaties were not limited to those made in “pursuance” of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and *they cannot be nullified by the Executive or by the Executive and the Senate combined*.¹¹¹

108. *Holland*, 252 U.S. at 434. See also Fromer, *supra* note 102, at 1385–86 (“[E]ven if Congress lacks authority to regulate the killing of migratory birds with its Article I, Section 8 powers—particularly the Commerce Clause—that fact alone does not prohibit the federal government from exercising its Article II treaty-making powers to accomplish the same effect.”).

109. 354 U.S. 1 (1957).

110. *Id.* at 16.

111. *Id.* at 16–17 (emphasis added).

B. *The Dinwoodie Taxonomy: Theories of Subservience, Expansive Autonomy, and Limited Autonomy*

Relatively few commentators have directly addressed the relationship between the Treaty Clause and the Copyright Clause. One explanation for the relative dearth of scholarship in this area is that “any intellectual property regulation that would serve the United States’ international interests would be a regulation of foreign commerce and therefore could also fall within the commerce power, rendering reference to the treaty power superfluous.”¹¹² Such an explanation may assume (not necessarily inaccurately) that current U.S. policy tends to interpret copyright as commerce, even though commerce is not explicitly stated in the purpose of the Copyright Clause (which aims “to promote the progress of Science and the useful Arts”).¹¹³

Professor Graeme Dinwoodie, in his survey of extant scholarship on the relationship between copyright and treaty powers, classifies most commentaries on the topic as animated by one of two general theories, “subservience theory”¹¹⁴ and “autonomy theory,”¹¹⁵ both of which he criticizes.¹¹⁶

Subservience theory argues that the Treaty Clause is subservient to the Copyright Clause, and therefore Congress may not enact a treaty-implementing statute that exceeds the limits of the Copyright Clause.¹¹⁷ Subservience theory’s application to copyright derives from the more general proposition that constitutional limitations on legislative authority (such as the enumeration of congressional powers) “would be meaningless if Congress could evade them simply by announcing that it was acting under some broader authority.”¹¹⁸ Dinwoodie characterizes Professors Jaszi, Heald and Sherry, Benkler, and Pollack as supporters of subservience theory.¹¹⁹

112. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 279 n.18 (2004).

113. See U.S. CONST. art. I, § 8, cl. 8.

114. Dinwoodie, *supra* note 57, at 395.

115. *Id.*

116. *Id.* at 361–62.

117. *Id.* at 365.

118. See Rochelle Cooper Dreyfuss, *A Wiseguy’s Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 230 (1992).

119. Dinwoodie, *supra* note 57, at 366 n.50. See generally Peter Jaszi, *Say Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 VAND. J. TRANSNAT’L L. 595, 608–09

Dinwoodie, however, criticizes subservience theory on three grounds: first, that its implicit underlying federalist principles do not effectively apply to the already federal and international issue of copyright;¹²⁰ second, that it is not clear whether the Copyright Clause or the Treaty Clause is the more specific law (*lex specialis*) that should therefore trump the more general one (*lex generalis*);¹²¹ and finally, that the recent shift in U.S. copyright policy from a domestic to an international perspective may necessitate a shift in constitutional interpretation.¹²²

Autonomy theory, by contrast, argues that the Treaty Clause is autonomous, and therefore the treaty power conferred by Article II is not to be restricted by the limitations of Article I's Copyright Clause.¹²³ Autonomy theory itself encompasses two points of view, the "expansive"¹²⁴ and the "limited."¹²⁵ Expansive autonomy theory argues that the Treaty Clause grants a far-reaching authority that cannot be limited by the scope of an Article I enumerated power.¹²⁶ For example, Caroline Nguyen opines that limits on the treaty power do exist but only restrict violations of "affirmative prohibitions" in the Constitution, such as the violation of the Fifth and Sixth Amendments by the treaty at issue in *Reid v. Covert*.¹²⁷

Dinwoodie points out three weaknesses of the expansive autonomy theory.¹²⁸ First, the distinction between "affirmative prohibitions" and limitations from enumerated powers depends overmuch on a simplistic "parsing of syntax" to find either a

(1996); 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 (2000); 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, 538, 600 (2000); Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 SEATTLE U. L. REV. 259 (1995).

120. Dinwoodie, *supra* note 57, at 369–72.

121. *Id.* at 372–75.

122. *Id.* at 375–77.

123. *Id.* at 377.

124. *Id.*

125. *Id.* at 383.

126. See Caroline T. Nguyen, *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079, 1079 (2006).

127. *Id.* at 1112.

128. See Dinwoodie, *supra* note 57, at 379–83.

“positive or negative statement.”¹²⁹ Second, the presumptive political checks arising from the differences between Article II international treaty-making and Article I domestic lawmaking may not exist because the Supreme Court has allowed the treaty power to apply to nontraditional processes (such as congressional-executive agreements) that resemble too closely “ordinary domestic lawmaking.”¹³⁰ Finally, because treaties historically only applied to limited subject matter and because historical deference to the treaty power presumably derived from this subject-matter limitation, “the theoretical basis for deferential review of treaties has been eroded.”¹³¹

Limited autonomy theory, a minority view, argues that the Treaty Clause, though autonomous, is governed by its own internal limits, namely, “if the subject matter of the law in question is truly international.”¹³² Dinwoodie downplays this distinction from expansive autonomy theory, arguing that the limitedness of limited autonomy theory is obviated by the current “integration of domestic and international lawmaking.”¹³³

C. *The Dinwoodie Test: International Obligation, Political Process, and Copyright Clause Language*

Dinwoodie’s own ultimate assessment of the strength of the Treaty Power in relation to the Copyright Clause involves a test of at least three factors.¹³⁴ I now apply Dinwoodie’s three primary factors to the post-*Golan* U.S. copyright landscape to evaluate which of them might favor the Copyright Clause over the Treaty Clause.

The first major factor would have courts evaluate the “strength of the international obligation,” whereby “Treaty Clause-grounded laws should be most constitutionally favored when seeking to ensure domestic compliance with real international obligations.”¹³⁵ In this post-*Golan* world, Congress’s international copyright obligations are arguably very “real” because TRIPS is scrupulously enforced by a disciplinary body¹³⁶ and because *Eldred* and *Golan* legitimize

129. *Id.* at 380.

130. *Id.* at 381–82.

131. *Id.* at 383.

132. *Id.* at 383–84 (citing 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, 41 (2004)).

133. *Id.* at 384.

134. *Id.* at 363.

135. *Id.*

136. See *supra* notes 53–55 and accompanying text.

Congress's reliance on foreign and international copyright standards.¹³⁷

The second major factor would have courts evaluate the “political process by which international norms are adopted and expressed in U.S. law . . . giv[ing] more latitude to a law adopted through a process involving real political checks on legislative lawmaking [such as] formal multilateral treaty-making” and “rais[ing] the level of judicial scrutiny” when faced with “alternative processes.”¹³⁸ By this reasoning, then, courts should give less latitude to the URAA because it is a congressional–executive agreement rather than a “formal multilateral [Article II] treaty” and was adopted through an “alternative” fast-track process involving fewer “real political checks.”¹³⁹

Applying the second Dinwoodie factor in a post-*Golan* world, then, might seem to provide a promising way to prevent Congress from using the Article II treaty power as a means to circumvent the Copyright Clause—namely, disqualifying congressional–executive agreements such as the URAA (to which TRIPS is annexed) from serving as a source for that treaty power.¹⁴⁰

Although *Reid* held that constitutional prohibitions could not be overridden “by the Executive or by the Executive and the Senate combined,” the case did not expressly mention congressional–executive agreements, which require participation not only by the President and the Senate but also by the House of Representatives.¹⁴¹ From a historical standpoint, the Article II treaty power would not necessarily apply to all international agreements, although to what extent this power applies is not always clear. As Professor Laurence Tribe points out, “the Constitution expressly recognizes different categories of international agreements, some called ‘treaties,’ and some called ‘agreements’ or ‘compacts’ What the Founders saw as the precise definitions of treaties, alliances, confederations, agreements, and compacts is largely lost to us now.”¹⁴²

137. See *supra* notes 85–88 and accompanying text.

138. Dinwoodie, *supra* note 57, at 363.

139. See *id.*

140. See *id.*

141. See *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (emphasis added).

142. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1265–66 (1995).

The URAA was not passed as an Article II treaty—that is, a treaty made by the U.S. president and requiring approval by at least two-thirds of the Senate.¹⁴³ Rather, as an international trade agreement, the URAA was negotiable—and ultimately negotiated—as a congressional–executive agreement¹⁴⁴ ratifiable by a mere majority of both houses of Congress.¹⁴⁵ Moreover, President Clinton submitted the URAA bill to Congress in a “fast track procedure” that “discharge[d] automatically the proposed legislation from committee within a certain number of days, [barred] amendments to the proposal, and [limited] floor debate.”¹⁴⁶ This fast-track procedure, created by Congress in the Trade Act of 1974,¹⁴⁷ had been specifically extended to accommodate the Uruguay Round negotiations of the GATT.¹⁴⁸ Thus, as stated above, under the second factor of the Dinwoodie test, an international agreement less formal than an Article II treaty and implemented with fewer checks and balances than normal would receive stricter judicial scrutiny.¹⁴⁹

Moreover, other scholars assert, on similar grounds, that the URAA does not confer the Article II treaty power upon Congress. For example, Jaszi, acknowledging Congress’s treaty-implementation power under *Missouri v. Holland*,¹⁵⁰ warned opponents of copyright expansion of the possibility that Congress might create “quasi-copyrights . . . enacted under a source of constitutional authority other than the Patent and Copyright Clause.”¹⁵¹ Nevertheless, he asserted (though with respect to bootlegging, not copyright restoration) that such power would not apply to the URAA because

143. See U.S. CONST. art. II, § 2, cl. 2. For the rationale underlying this multiplicity of agreement types, see THOMAS JEFFERSON, *Report of the Secretary of State to the President*, in THE JEFFERSONIAN CYCLOPEDIA 879–80 (John P. Foley ed., 1900) (“It is desirable, in many instances, to exchange mutual advantages by Legislative Acts rather than by treaty: because the former, though understood to be in consideration of each other, and therefore greatly respected, yet when they become too inconvenient, can be dropped at the will of either party: whereas stipulations by treaty are forever irrevocable but by joint consent . . .”).

144. CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE U.S. SENATE 5 (Comm. Print 2001).

145. See *id.* at 25.

146. Cindy G. Buys & William Isasi, *An “Authoritative” Statement of Administrative Action: A Useful Political Invention or A Violation of the Separation of Powers Doctrine?*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 73, 77–78 (2004).

147. 19 U.S.C. § 2902(e)(3), § 2903 (2006) (application of implementing and “fast track” procedures).

148. *Id.* § 2902(e)(1).

149. See *supra* note 141 and accompanying text.

150. See Jaszi, *supra* note 119, at 602 n.19.

151. *Id.* at 602–03.

the URAA is “not a treaty, and was never presented to the U.S. Senate for ratification.”¹⁵² In addition, Professor Jeanne Fromer argues that the Copyright Clause “externally limits the government’s power to enact treaty-like congressional–executive agreements” such as TRIPS (and, by extension, the URAA) because such bicameral agreements are enacted under Article I, section 8 of the Constitution and are therefore “subject to Article I’s limitations, even when Article II treaties are not.”¹⁵³

Nevertheless, although TRIPS might be disqualified as a source of congressional power to expand the scope of U.S. copyright law, it is possible that Congress—aware of the potential difficulty of asserting its Article II treaty power under a congressional–executive agreement such as the URAA or TRIPS—might instead assert its power under the Berne Convention, which is a non-self-executing treaty ratified by the Senate.¹⁵⁴ Although Fromer, for example, has tentatively posited an argument whereby the Berne Convention’s non-self-executing status might render it limited by the Copyright Clause, she also acknowledges the probable impracticality of such a theory:

[E]ven if Article II self-executing treaties are not limited externally by the IP Clause, non-self-executing treaties [such as the Berne Convention] might be so limited. Although both kinds of treaties are made pursuant to Article II, the former become law without any need for Congress to activate them via Article I, whereas the latter come into effect only if Congress uses Article I’s Necessary and Proper Clause to enact appropriate legislation. Therefore, one might argue that whenever Congress uses its Article I powers to implement non-self-executing treaties—the only powers it has at its disposal to do so—the IP Clause externally limits the legislature to the [IP] Clause’s specified means This argument for different treatment, however, is weak, primarily because of the strange state of affairs that would result if Article II were to allow the United States to take on a treaty

152. *Id.* at 602.

153. Fromer, *supra* note 102, at 1388–89 (2012).

154. See BCIA, *supra* note 36, § 2 (“The [Berne] Convention . . . and all acts, protocols, and revisions thereto . . . are not self-executing under the Constitution and laws of the United States.”).

obligation that it could not then implement via Article I.¹⁵⁵

The third major factor would have courts more strictly construe the “limited times” language of the Copyright Clause than the Progress Clause because measuring the Progress Clause’s incentive “implicates harder and more uncertain policy choices.”¹⁵⁶ It is true that neither the Berne Convention nor TRIPS affirmatively give Congress the power to declare perpetual copyright in the United States; rather, by providing only a floor, they merely prohibit a term shorter than this minimum. Nevertheless, this particular recommendation by Dinwoodie might not be strictly followed in a post-*Golan* world because, even if a court gives more weight to “limited times” than to incentivizing creation or dissemination, that court must still contend with the vague dictionary definition of “limited” relied on in both *Eldred* and *Golan*: “confine[d] within certain bounds,” “restrain[ed],” or “circumscribe[d].”¹⁵⁷ In light of the copyright-expansion trend reinforced by *Eldred* and *Golan*, it seems unlikely that the limitation of “limited times” would substantially restrain the expansion of the scope of U.S. copyright.¹⁵⁸

CONCLUSION

As international agreements increasingly influence the scope of U.S. intellectual property law in general and copyright law in particular, scholars debate to what extent the Treaty Clause might supplement or supersede the Copyright Clause as a source of Congress’ power over copyrights.¹⁵⁹

The Supreme Court’s most recent copyright decision in *Golan v. Holder* expanded the scope of copyright protection in the United States under the Copyright Clause while leaving the Treaty Clause untouched.¹⁶⁰ Nevertheless, although the *Golan* opinion avoided explicitly addressing the Treaty Clause issue, the Supreme Court did find constitutional the restoration of U.S. copyright recognition to certain works as part of the United States’ accession to the WTO and,

155. Fromer, *supra* note 102, at 1388.

156. Dinwoodie, *supra* note 57, at 363.

157. *Golan v. Holder*, 132 S. Ct. 873, 884–85 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003)).

158. See *supra* notes 71–73 and accompanying text.

159. See *supra* Part III.B.

160. See *supra* Part I.B.

by extension, TRIPS and the Berne Convention for the Protection of Literary and Artistic Works. Therefore, the Court in effect—and not for the first time—endorsed the viability of expanding copyright protection through international agreements to serve international trade.¹⁶¹

This attitude may bolster Congress's existing tendency to prioritize international trade concerns in intellectual-property legislation, as in the misleadingly titled America Invents Act, which reformed patent law to harmonize with international norms.¹⁶² Therefore, even though Congress need not currently rely upon the Treaty Clause to alter or refine U.S. copyright law, the possibility still exists that the Treaty Clause may be harnessed to expand copyright protection further than can be contemplated under the already generous interpretation of the Copyright Clause.¹⁶³

Professor Dinwoodie has provided a useful taxonomy of diverse scholarly viewpoints on this issue.¹⁶⁴ In addition, as an alternative to arguing simply for one clause to trump the other, he has created a flexible test that emphasizes three factors—international obligation, political process, and constitutional language—in determining whether the Copyright Clause or the Treaty Clause should prevail in a given situation.¹⁶⁵ Nevertheless, although the Dinwoodie test might have allowed for greater flexibility in case-specific determinations at the time it was first published, the precedents set or reinforced by *Golan v. Holder* now suggest that this test today could not strongly support an argument that the Copyright Clause should limit the Treaty Clause.¹⁶⁶

161. See *supra* Part II.

162. See *supra* Part II.

163. See *supra* Part III.A.

164. See *supra* Part III.B.

165. See *supra* Part III.C.

166. See *supra* Part III.C.