Loyola of Los Angeles Law Review

Volume 36
Number 1 *Symposium—Eldred v. Ashcroft: Intellectual Property, Congressional Power, and the Constitution*

Article 8

9-1-2002

Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts

Shira Perlmutter

PARTICIPATION IN THE INTERNATIONAL COPYRIGHT SYSTEM AS A MEANS TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS

*Shira Perlmutter**

I. INTRODUCTION

In *Eldred v. Ashcroft*,[1] the Supreme Court has been asked to decide what limits the "promotion of progress" phrase in the Copyright Clause of the Constitution[2] places on congressional power to legislate in the copyright arena. Petitioners argue that Congress's 1998 extension of copyright terms by a period of twenty years,[3] as applied to works already in existence, was unconstitutional. In their view, since the grant of an additional term for these works by definition could not provide incentives for their creation, it could not promote the progress of science.[4]

---

* Vice President and Associate General Counsel, Intellectual Property Policy, AOL Time Warner Inc.; former Consultant on Copyright and E-Commerce, World Intellectual Property Organization; former Associate Register for Policy and International Affairs, U.S. Copyright Office. The views expressed in this Article are solely those of the author

1. Eldred v. Ashcroft, No. 01-618 (U.S. oral argument Oct. 9, 2002).

2. U.S. CONST. art. I, § 8, cl. 8: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (hereinafter the "Copyright Clause"). Although counterintuitive, the term "Science" in this clause is understood in the eighteenth-century sense to refer to knowledge generally, and is viewed as relating to copyright ("Authors" and "Writings"), while the term "useful Arts" refers to science in the modern sense, and is viewed as relating to patents ("Inventors" and "Discoveries"). Accordingly, this Article will refer to "the progress of science" throughout.

3. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) [hereinafter CTEA].

4. *See* Brief for Petitioners at 22, Eldred v. Ashcroft, No. 01-618. Petitioners make other arguments as well, which are not addressed in this Article

This Article is premised on the belief that this approach to the Constitution is too narrow, and that the progress of science can be promoted in various ways, not solely through incentives for new creation.[5] I focus particularly on the benefits that can be gained through active participation in the international copyright system.[6] These benefits go well beyond the obvious "harmonization" goal that Congress explicitly espoused and petitioners discount. They include the ability to ensure adequate protection for U.S. works abroad, to enhance dissemination both within the United States and online, to encourage cross-border advances in knowledge and culture, and to assist in shaping appropriate international norms.

If these benefits are to be achieved, the Constitution should be interpreted with due regard to making them feasible. First, it should be recognized that given the realities of current technologies and markets, U.S. copyright policy cannot be wisely formulated in an insular manner; optimal progress requires responsiveness to the broader international context of evolving norms. Second, effective

---

(including with respect to the "limited Times" language in the Copyright Clause).

5. The text of the preambular phrase in the Copyright Clause does not limit the desired "progress of science" to "incentives for creation." Thus, even assuming the phrase operates as a substantive constraint on congressional power, it does not prevent Congress from considering the entire range of possible means by which progress may be promoted. Indeed, U.S. copyright law prior to 1976 made the enjoyment of federal copyright contingent on publication with notice or on registration (with unpublished and unregistered works being protected by state common law), providing incentives not primarily for creation but for the subsequent acts of publication or registration, both of which were perceived to benefit the public. *See* Act of Mar. 4, 1909, ch. 320, §§ 10, 12, 35 Stat. 1075; *see also* 17 U.S.C. § 303(a) (2002) (establishing limited term of federal copyright in works created but not published or copyrighted before January 1, 1978 (until then subject to perpetual protection under state common law), and providing the incentive of an extra forty-five years of protection (originally twenty-five years) for publication of the work during the basic term); H.R. REP. NO. 94-1476, at 139 (1976).

6. The means by which the progress of science may be promoted by the CTEA's application to existing works are not limited to these international aspects. They include the structural efficiency of establishing a single set of rules for as many works as possible, and the value of providing incentives to make investments in existing works, for example by maintaining, restoring, and disseminating them. Such considerations are discussed in the briefs of respondents and various amici, as well as other papers in this Symposium, and will not be addressed here.

leadership in this broader international context is only possible if U.S. diplomats and policy makers are able to act flexibly in pursuing a fair and workable global framework of national laws and connecting treaties. A demand that each element of that framework individually satisfy enhanced judicial review to establish that it provides incentives for new creation would be counter-productive. It would impede negotiators' ability to obtain structural, procedural, and long-term advantages for the United States in international copyright, undermining the ultimate goal of promoting the progress of science.

II. IN TODAY'S WORLD, PROGRESS IN SCIENCE THROUGH COPYRIGHT REQUIRES PARTICIPATION IN THE INTERNATIONAL COPYRIGHT SYSTEM

It has become a truism that we are living in an age of global markets and networked technologies. These undeniable facts are particularly significant for the development of good copyright policy. Works of authorship, whether entertainment, informational products, or functional software, travel around the world easily and appeal to audiences in many countries. When disseminated on the Internet, with or without the owner's consent, their enjoyment cannot be confined to a single jurisdiction. As a result, the scope of copyright protection available in other jurisdictions is highly relevant to a work's creator and owner, as a matter of both the level of profits, and the ability to determine the manner in which the work is disseminated.

From the perspective of those who write, apply, and enforce copyright law, national laws can no longer be viewed in a vacuum. Different countries' laws necessarily touch and affect each other, as they deal with intersectional issues such as parallel imports, jurisdiction and choice of law, and enforcement in the context of multinational piracy. It is increasingly clear that the copyright balance, and its effect on incentives and the public interest, cannot be confined to a purely domestic sphere. Accordingly, policy debates now take place largely on an international stage, involving conferences of experts and interest groups of different nationalities. Policy makers confer regularly with their counterparts in other countries, and are aware of and influenced by each others' choices. Lobbying spills over borders, with trade associations, consumer and nonprofit organizations, and ad hoc issue coalitions moving from one capital to another.

A similar phenomenon marks the production and distribution chain for copyrighted works. Companies that produce and distribute content are often multinational, or at least operate their businesses across national borders. The relationships between creators, intermediaries and distributors often span the globe. Blockbuster Video, for example, serves as an intermediary in buying, selling, and renting content in countries around the world, doing business with motion picture producers that disseminate films worldwide. How their relationship is structured in one country, and how successfully it functions, will affect their relationship elsewhere, and may determine the manner in which works are made available to consumers in different markets.

Only recently has the United States become an active and enthusiastic participant in the international copyright system.[7] After an initial period of blatant piracy, in the late nineteenth century we began to provide federal statutory protection to some foreign works.[8] Another century of foot-dragging came to an end with the realization that participation in the international system had the potential to provide great benefits, as the United States became more and more a net exporter of copyrighted works. In 1989 we finally joined the leading multilateral copyright treaty, the Berne Convention,[9] and full-fledged membership in the Berne community became the starting point for a new era of engagement. During the past decade or so, the United States has sought to play a leading role in shaping copyright policy around the world—including articulating an appropriate scope of rights in national laws, determining how to effectively enforce those rights, and establishing relationships among separate national systems (through treaty provisions as well as the application of principles of private international law).[10] This approach to foreign policy

7. *See generally* Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050 (1968).

8. *See* Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

9. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

10. This has been a two-way process; U.S. domestic policy has also been increasingly shaped by international considerations. *See generally* Graeme B. Dinwoodie, *The Integration of International and Domestic Intellectual Property Lawmaking*, 23 COLUM.-VLA J.L. & ARTS 307, 307-08 (2000). It is rare these days that international implications are not a part of congressional debate on proposed legislation. The most relevant example was the adoption of a life-

with respect to copyright has been executed consistently by successive administrations, with the full support of Congress.[11]

The benefits of international engagement have been myriad. The most obvious have been better protection abroad for U.S. works, providing stronger incentives to create and disseminate those works, plus a greater ability to make profits that can be re-invested in new creation, whether derivative or entirely original. Adequate and updated protection abroad also serves to encourage rightholders to engage in or authorize digital dissemination of their works—an activity that is inherently borderless.[12] The wider dissemination of U.S. knowledge abroad can both increase cross-cultural understanding and spark the development of new knowledge that in turn may benefit the public in the United States. Similarly, adequate rights in other countries will encourage the progress of science domestically, which can then spread to the United States.

More fundamentally, engagement has enabled the United States to act as a leader in shaping the balance of the international copyright system to further those policies we believe to be advisable. In some countries, this has meant improving nonexistent or inadequate rights or remedies; in others, it has involved updating rights to ensure continued adequate protection by reflecting changes in technologies and markets. Sometimes U.S. influence has been used to secure new or broadened limitations on rights, as part of calibrating the overall balance. For example, in the course of negotiating the 1996 WIPO Internet Treaties, the United States supported adoption of a statement that existing exceptions to rights could and should be extended into

---

plus-50 term in the 1976 Act, *see* H.R. Rep. 94-1476, at 135-36 (1976), but reports and testimony on subsequent bills have almost invariably included an analysis of how the proposed law would relate to treatment of the issue abroad. *See, e.g.*, U.S. Copyright Office Report on Copyright and Digital Distance Education, 104-110 (May 1999), *available at* http://www.loc.gov/copyright/disted; U.S. Copyright Office Report on Legal Protection for Databases, 39-56 (August 1997), *available at* http://www.copyright.gov/reports/.

11. Congressional support has been demonstrated through ratification and implementation of treaties, as well as enactment of legislation with international dimensions (notably Special 301 of the trade laws). *See* Trade Act of 1974, 19 U.S.C. §§ 2411-2420 (2000).

12. *See* Barcelona.com v. Excelentisimo Ayuntamiento, 189 F. Supp. 2d 367 (E.D. Va. 2002) (acknowledging the inherently international nature of the Internet).

the digital environment;[13] during the review of the developed countries' copyright laws in the TRIPs Council of the World Trade Organization, the United States defended the legitimacy of a broad and flexible fair use exception;[14] and in the past few years, it has advocated adoption of appropriate limitations on potential copyright infringement liability of online service providers.

It should also be recognized that increased harmonization of copyright laws in itself provides certain benefits. Harmonization can remove potential impediments to the smooth functioning of global markets, especially in the online environment. Licenses and distribution agreements become simpler to conclude and enforce, uncertainty and transaction costs are minimized, and grants of worldwide rights are made more feasible. The difficulties inherent in choice of law analysis are minimized, since the choice is less likely to be outcome-determinative.[15]

U.S. efforts to influence copyright policy elsewhere have been remarkably successful, especially in the digital context. Many new technologies are conceived of and developed in the United States, and we are often the first to grapple with the appropriate treatment of their potential. Other countries and regions observe closely our efforts to strike reasonable balances, ensuring strong rights tempered by a healthy respect for the legitimate interests of users, with the ultimate goal of advancing the public interest. In recent years, the issues have included the following: the United States proposed legal protection against circumvention of technological measures used to

13. *See* World Intellectual Property Organization (WIPO) Copyright Treaty, art. 10 and agreed statement, S. TREATY DOC. 105-17 (1996) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, art. 16 and agreed statement, S. TREATY DOC. 105-17 (1996) [hereinafter WPPT].

14. *See* Shira Perlmutter, *Copyright and International TRIPs Compliance*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 83, 86-92 (1997).

15. In part for this reason, the EU has been quicker to establish rules to determine applicable law in cross-border transactions among Member States than has been possible in the broader international community (for example, through the Hague Conference on Private International Law). *See* Rome Convention 80/934/EEC of 19 June 1980 on the Law Applicable to Contractual Obligations, 1980 O.J. (L266) *available at* http://www.rome-convention.org/; Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, art. 1(2)(b), 1993 O.J. (L248) *available at* http://europa.eu.int/comm/internal_market/en/intprop/docs/.

protect copyrighted works in the administration's White Paper[16] in 1994; such a provision was included in both of the 1996 WIPO Internet Treaties.[17] The United States' approach to service provider liability has been influential, with many of its key elements adopted by the European Union as well as some other countries.[18] Other proposals currently under consideration in Congress have been the subject of interest and attention abroad, such as an exemption for digital distance education[19] and a new form of legal protection for databases.[20]

International acceptance has not been automatic, however. For example, a new exemption from the public performance right enacted in 1998 was challenged successfully by the EU and several other countries as overly broad and therefore inconsistent with the standards set in the Berne Convention and the TRIPs Agreement.[21] As to the important overarching topics of parallel imports, national treatment, and choice of law, the United States has had only mixed success in convincing other countries to follow our lead domestically, and has so far failed to achieve its goals in the adoption of international norms.[22]

Finally, there are advantages to the United States in ensuring that copyright protection here is as strong as, or stronger than, that

16. *See* Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure, 230-34 (1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

17. *See* WCT, *supra* note 13, at art. 11; WPPT, *supra* note 13, at art. 18.

18. *Compare* Digital Millennium Copyright Act, Title II, Pub. L. No. 105-304, 112 Stat. 2860 (1998), *with* Directive 2000/31 EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, arts. 12-15, 2000 O.J. (L 178) 1.

19. *See* Technology, Education and Copyright Harmonization Act of 2001, S. 487, 107th Cong. (2001).

20. *See, e.g.*, Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (2nd Session 1996).

21. *See* WTO Panel Report on U.S.—Section 110(5) of the U.S. Copyright Act, June 15, 2000, WT/DS160/R, *available at* http://www.wto.org.

22. For recent examples, see WPPT, *supra* note 13, at arts. 4(1) and 8(2); WIPO Diplomatic Conference on the Protection of Audiovisual Performances, Dec 7-20, 2000, IAVP/DC/34 (Dec. 19, 2000), arts. 4 and 12, *available at* http://www.wipo.int/eng/document/iavp/index.htm. These issues tend to be particularly intractable, as they involve matters not merely of copyright theory but of sensitive political and economic import, relating in part to perceptions of U.S. market and cultural dominance.

provided elsewhere. First, it enhances our credibility in seeking to persuade other countries that providing similar rights will be beneficial, and our ability to hold out our law as a model. Second, it makes the U.S. market inviting, providing incentives to both nationals and foreigners to create and disseminate their works here. The result should be greater availability to U.S. audiences of more foreign works in genuine, higher quality copies. And our inclusive approach to the non-discriminatory principle of national treatment[23] puts us on high moral ground internationally, allowing us to urge other countries to match our generosity. When countries instead choose to rely on reciprocity as leverage to impose their own policy choices on others, as the EU did with term extension,[24] matching their level of protection in the United States can ensure stronger protection for U.S. works abroad and avoid competitive disadvantages vis-à-vis foreign rightholders.

III. IN ORDER TO PARTICIPATE EFFECTIVELY IN THE INTERNATIONAL COPYRIGHT SYSTEM, THE LEGISLATIVE AND EXECUTIVE BRANCHES NEED FLEXIBILITY IN FASHIONING APPROPRIATE BALANCES

In order to accomplish these goals and achieve these benefits for the progress of science, the United States must be able to act effectively on the international stage. This means that the executive and legislative branches, in their capacity in conducting foreign relations, must be empowered to deal meaningfully, authoritatively, and cooperatively with other governments and intergovernmental organizations,[25] without undue interference from the judiciary. While the

23. "National treatment" means treating foreign works as well as domestic works, providing their authors with at least the same rights as those granted to nationals. *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works, art. 5(1), S. TREATY DOC. NO. 99-27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention]. The other primary approach to the protection of foreign works is "reciprocity," which in essence means that a host country will only grant to authors of foreign works the same rights that the foreign works' country of origin would grant to authors of the host country's works.

24. *See* Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 7, 1993 O.J. (L290).

25. In the foreign policy sphere, Congress and the administration work closely together. In dealing with other countries, especially in treaty negotiations, the administration keeps Congress apprised of developments and takes its views into account. A painstakingly negotiated treaty could end up

Constitution of course sets outside limits, it should be interpreted to permit the achievement of this important objective.

Participating in the international copyright system, and particularly playing a leadership role, requires flexibility. To successfully advocate the adoption of a recommended approach to an issue, it is necessary not only to make a case for its benefits, but also to be able to respond to other countries' different cultural and economic concerns. As a matter of reality, this is often the only way to achieve compromise on harmonized norms or consensus standards. In the area of rental rights, for example, achieving consensus on treaty obligations has required sensitivity to attitudes toward authors' rights, existing and divergent market conditions, and varying legal structures—with a negotiated result that conditioned obligations on economic circumstances in each country, and permitted some ability to maintain inconsistent national laws.[26]

In the context of treaty negotiations, the considerations are particularly complex. Treaty negotiations often involve trade-offs of one issue against another—requiring sacrifices of particular policy goals, or acceptance of a resolution that furthers only the interests of another trading partner, in order to obtain a valuable concession. During the TRIPs negotiations, for example, the total copyright package included the acceptance of new rental rights for certain categories of works, combined with barring protection for facts and ideas, and ensuring that databases are treated as protected literary works only where they are original works of authorship.[27] Sometimes an IP issue may be traded for something that is not even IP-related, as occurs in WTO negotiations, where broad packages of issues are negotiated simultaneously in a large "round." In such circumstances, each individual element of the ultimate agreement may not be optimal from the perspective of any one participant, but together the trade-offs make it possible to adopt an overall system that,

---

meaningless, if it were not ratified and implemented by congressional action. The critical nature of this relationship between the legislative and executive branches was recently recognized by enactment of the Trade Promotion Authority Act. *See* Bipartisan Trade Promotion Authority Act of 2001, H.R. 3005, 107th Cong. (2001) (enacted).

26. *See* Agreement on Trade Related Aspects of Intellectual Property Rights, art. 11, 1869 U.N.T.S. at 299, 33 I.L.M. at 1125 (1994) [hereinafter TRIPs]; WCT, *supra* note 13, at art. 7; WPPT, *supra* note 13, at arts. 9 and 13.

27. *See* TRIPs, *supra* note 26, at Part II, Section 1.

as a whole, provides meaningful benefits for the progress of science. This is true even in bilateral negotiations; when negotiations are multilateral, there are multiple backgrounds, policies and approaches to cultural, legal and economic issues that must be taken into account.[28]

These realities, against the backdrop of the separation of powers, should inform the constitutional analysis. As a practical matter, it would be virtually impossible for the United States to play a leadership role if each individual element in each negotiation had to independently promote the progress of science in order to make implementing legislation constitutional.[29] And if the only way to promote the progress of science were to provide incentives to create new works, we would lose all flexibility. We could not, for example, agree to provide new rights in existing works in return for something of greater overall value, even if the new rights were clearly not detrimental to the public interest.[30] We could not agree to changes in the treatment of existing works that would lead to greater dissemination of those works in new forms and new markets. The mere fact of heightened judicial scrutiny of every legislative enactment would be a significant impediment to Congress's ability to deliver on executive branch promises to other countries.

The same reasoning should hold true outside the context of formal treaty negotiations. The evolution of copyright norms at the international level is the result of a process of give and take over time. Countries consult with and seek to convince each other to adopt their views, in varying fora. They may use informal contacts or trade

28. *See id.* at Part I, art. 1(1) (recognizing that different countries may choose different legal means to implement treaty obligations, depending on their particular systems and circumstances).

29. *Cf.* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 859 (5th Cir. 1979) (the Constitution does not mandate that Congress require that each individual work promote the progress of science and useful arts, as opposed to copyright protection for works of authorship generally).

30. Petitioners focus on term extension in this case, but the logic of their arguments could apply equally to the provision of new rights in existing works. Yet over the history of U.S. copyright law, when adding new rights to the bundle of rights comprising a copyright, Congress has extended the new rights to all works, including those already in existence, without constitutional challenge. Recent examples include rental rights in sound recordings and computer programs, see 17 U.S.C. § 109(b) (2000), and digital performance rights in sound recordings, see *id.* § 106(6). An earlier example was the right to prepare translations (now generalized to the right to prepare derivative works). *See id.* § 106(2).

pressure, such as Special 301.[31] They may participate in structured intergovernmental action plans or private sector dialogues. Treaties too vary greatly in scope and procedure, whether bilateral, regional or multilateral, and whether focused on intellectual property specifically or the broader subject matter of investment or free trade. In responding to developments in copyright law in other countries, Congress and the administration may choose to cooperate in certain respects in order to gain some later substantive or interactional advantage.

If petitioners' narrow interpretation of the Constitution were adopted, the impact on international copyright relations could be substantial. If the "incentive" argument were taken literally, the message of U.S. negotiators would become: (1) we can't agree to any expansion of rights or remedies in U.S. law for works already in existence; (2) we can't agree to extend protection to existing foreign works not currently protected in the United States; and (3) any promises we make may be undone by the courts if they disagree with our assessment of the balance of policy benefits. Such a message would tie the negotiators' hands and render them largely ineffective—they would be perceived as having restricted powers and offering no security in their commitments.[32]

Indeed, a key element of all major copyright treaties today is the requirement that new treaty obligations must be applied to existing works.[33] This principle, sometimes referred to as "retroactivity,"[34] is one of the chief motivations for a country to join a treaty. Future

---

31. *See generally* Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 32-62 (1995).

32. Negotiators even today must be cognizant of the limitations on their freedom to commit, including the political difficulties of seeking any change in current copyright law in Congress. But sensitivity to political realities, and an awareness of broad constitutional constraints leave leeway for much more flexibility than the rigid restrictions the petitioners' analysis would impose.

33. *See* Berne Convention, *supra* note 23, at art. 18; TRIPs, *supra* note 26, at arts. 9(1) and 14(6); WCT, *supra* note 13, at art. 13; WPPT, *supra* note 13, at art. 22(1).

34. Despite its common use, the term "retroactivity" here is a misnomer. The principle embodied in the treaties requires prospective protection only of works that are in existence at the time the relevant treaty takes effect as to the respective countries. It has nothing to do with legislation that alters rights and obligations among parties after the fact.

benefits are nice, but policy makers are primarily concerned about their existing rightholders' present interests (protection for the country's entire stockpile of cultural heritage and creative product). This is the source of the economic and political pressure that is needed in most countries to provide the impetus for treaty ratification. It has therefore not surprisingly been a central issue in debates over the consistency of national laws with treaty obligations, including bilateral TRIPs disputes and WTO accession negotiations.[35] As a result, when the United States has become a party to one of these treaties, we have provided new protection in this country for existing foreign works from countries that are also members of the treaty—despite the fact that protection can provide no additional incentives to create those works.[36]

Again, it is important to bear in mind that influence among countries can go in more than one direction, depending on the issue and the context. The same country may seek stronger protection in certain respects, and the adoption of greater limits on protection in others. The United States, for example, known as a proponent of strong protection, has also used its influence to export concepts of appropriate limitations on rights, including exemptions in the digital environment and service provider liability, as noted above.[37] After careful consideration, Congress has chosen to follow the lead of the EU in certain areas, such as term of protection, but not others, such as *sui generis* intellectual property rights for databases and artists' resale royalties.[38]

---

35. *See, e.g.*, Matthijs Geuze & Hannu Wager, *WTO Dispute Settlement Practice Relating to the TRIPs Agreement*, 2 J. INT'L ECON. L. 347 (1999).

36. *See* 17 U.S.C. §§ 104, 104A (2000).

37. Nor have U.S. courts always interpreted congressional enactments to require the broadest possible protection for U.S. rightholders abroad. *See* Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097-98 (9th Cir. 1994) (en banc) (refusing to apply U.S. copyright law extraterritorially to allow copyright owner to sue for acts of infringement taking place entirely overseas: "we think it inappropriate for the courts to act in a manner that might disrupt Congress's efforts to secure a more stable international intellectual property regime unless Congress otherwise clearly has expressed its intent," and expressing "concern that action by the courts could interfere with Congress's efforts to secure a multilateral regime of intellectual property protection").

38. In both of these areas, the EU has sought to influence U.S. adoption of similar new rights through the technique of reciprocity, but without success. As to databases, Congress has been considering a less protective,

This does not mean that there are no constitutional constraints on international copyright policy. Obviously, the Constitution imposes certain limits on executive and legislative flexibility. Legislation enacted pursuant to the Copyright Clause, whether implementation of treaty provisions or other legislation intended to further international copyright relations, cannot provide terms that are not "limited"; cannot protect unoriginal material; cannot eliminate the accommodations of First Amendment guarantees built into the copyright law; and if the preamble of the Copyright Clause is held to have substantive force, may be required to "promote the Progress of Science." But if the Constitution is read to impose too heavy a hand, it will cripple the United States in its international role and end up undermining the Framers' goals by impeding progress rather than promoting it.[39]

misappropriation-based approach for a number of years. *See* Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (2nd Session 1996); U.S. Copyright Office Report on Legal Protection for Databases (August 1997), *available at* http://www.copyright.gov/reports/. As to resale royalties, or *droit de suite*, Congress has so far accepted the 1992 Copyright Office recommendation that no justification had yet been shown to adopt such a system in the United States. *See* DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY: A REPORT OF THE REGISTER OF COPYRIGHTS 149 (1992). Although subsequent adoption of an EU Directive harmonizing resale royalties could in theory change this conclusion, there is no indication at present that Congress is reconsidering. *See* Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L272) *available at* http://europa.eu.int/comm/internal_market/en/intprop/docs/.

39. *Cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 358-59 (1991) (reading the Copyright Clause to impose meaningful but minimalist limits: "the originality requirement is not particularly stringent. . . ," ruling out protection for only "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent").