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ABSTRACT

In this Article, Professor Jaszi suggests that there is a need to develop new, policy-grounded arguments against expansionist legislative and judicial tendencies in copyright that diminish the traditional public domain. In recent years, he contends, a new understanding of the purposes of a copyright system has emerged, which has changed the U.S. copyright discourse in support of increased proprietary rights. According to Professor Jaszi, the objective of this new understanding is to improve the competitive position of companies that have significant investments in inventories of copyrighted works. Recognizing the Uruguay Round Amendments Act (URAA) as an episode in this new process of copyright revision, Professor Jaszi uses a framework of constitutional analysis to review some of the various justifications posited for the most controversial URAA features—the copyright restoration for works of Berne Convention and World Trade Organization origin and anti-bootlegging provisions. Considering the newly emerging understanding of the essential terms of the Patent and Copyright Clause of the U.S. Constitution, it is possible, he argues, to justify, based on constitutionally-grounded reasoning, the URAA provisions and other innovations in copyright, including copyright justification for works of domestic U.S. origin. Professor Jaszi concludes that it is incumbent upon those who value the public domain to develop new ways of explaining how and why the maintenance of an intellectual commons matters.

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In the pages that follow, my goal is not to summarize the substantive provisions of the Uruguay Round Amendments Act (URAA)[1] related to copyright, nor to catalogue the many issues of interpretation to which those provisions give rise.[2] Instead, this Article focuses on the *future* of U.S. copyright, and, in particular, of U.S. copyright discourse in the post-TRIPS,[3] post-URAA legal environment. In what follows, I make no pretense not to be preaching to the converted—that is, to those who are concerned about the threats to society's shared informational commons posed by the ever more extensive incursions of copyright into the traditional public domain. My aim is to suggest that in today's new discursive climate, those who care about the survival of the public domain must begin to find new, and newly compelling, vocabularies with which to articulate their concerns. Unless they do so, they risk the consequences of discovering that familiar constitutionally-grounded arguments for limitations on proprietary rights will become irrelevant in tomorrow's intellectual property policy debates.

The attempt to demonstrate this claim is launched with an example that is, as yet, hypothetical though by no means far-fetched. In the domain of copyright, one inevitable consequence of the implementation of TRIPS through the URAA will be the pressure the to generalize the benefits which that legislation confers. Following the URAA's extension of lapsed copyrights in works of foreign origin, one can expect increasing political pressure to provide legislation for the restoration of copyright—on similar terms—in domestic works as well. Sooner or later, and more likely sooner than later, one will see legislation introduced in the U.S. Congress to restore protection for domestic works now in the public domain because of a pre-March 1989 failure of notice or a pre-June 1992 failure to renew.

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1. Pub. L. No. 103-465, 108 Stat. 4809 (1994).

2. For excellent discussions of these topics, see DAVID NIMMER, IMPOSSIBLE REALITIES: NIMMER ON COPYRIGHT (Supp. 1996) [hereinafter NIMMER, IMPOSSIBLE REALITIES]; MELVILLE D. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT (1995) [hereinafter NIMMER, NIMMER ON COPYRIGHT]; WILLIAM F. PATRY, COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT (1995); and Gloria C. Phares, *Retroactive Protection of Foreign Copyrights: What Has Congress Be-GATT?*, 7 J. PROPRIETARY RTS. 2 (1995).

3. Throughout this Article, this acronym refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], *reprinted in* RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 2-3 (GATT Secretariat ed., 1994).

Suppose now that such a bill were pending in Congress, and that one was convinced that the initiative would represent bad intellectual property policy—that, overall, it was more likely to impede than to advance culture and commerce in ideas. How, all things considered, could one go about making the argument? One appealing possibility would be to constitutionalize it—to assert, in other words, that legislation which grants protection for works *already in being* would not seem calculated to advance the progress of Science and the useful Arts[4] by encouraging authors to devote sacrificial days to creative enterprise, thus enriching the sum of knowledge available to the public at large.[5] But if my recent experience is any indication, this rhetorical choice might not prove a particularly promising one.

Last fall, I was invited to testify before the Senate Judiciary Committee on another copyright bill[6] that has the same essential drawbacks and arguable vulnerabilities as would copyright restoration legislation. I explained my view of how the proposal failed to pass justificatory muster under Article I, section 8, clause 8 of the Constitution (Patent and Copyright Clause):

> Obviously, extending . . . protection for works already in existence cannot function as an incentive to their creation, neither as a practical matter can it add much to existing incentives for dissemination. No firm is likely to cease distributing popular works because they no longer are protected by copyright, and no firm is likely to re-commence distributing unpopular ones merely because the copyrights in them have been extended. Extending the term of protection for works made after the effective date of the legislation might produce some theoretical, highly attenuated effect on the creative practices of individuals. I say might, because I cannot imagine the instance in which a writer, for example, would be swayed to undertake a project by the mere possibility of 20 [more] years of posthumous royalties available only in the highly unlikely event that the work retains popularity among generations of readers yet unborn. . . .
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> [A]dding 20 [more] years to the already generous term of protection for works made for hire, would be highly unlikely to provide any measurable economic incentive to the corporate creation of new works. And prospective term extension would be just as unlikely

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4. U.S. CONST., art. VIII, § 8, cl. 2.

5. The recent *White Paper* on intellectual property of the Information Infrastructure Task Force spells out the proposition: As a result of the economic incentives offered by copyright, the public receives the benefit of literature, music, and other creative works that might not otherwise be created or disseminated. The public also benefits from the limited scope and duration of the rights granted. BRUCE A. LEHMAN, U.S. DEP'T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 23 (1995).

6. Copyright Term Extension Act of 1995, S. 483, 104th Cong., 1st Sess. (1995).

> to affect the practices of firms which distribute copyrighted works. No rational business makes economic decisions about present investment based on the mere possibility of income 75 or a hundred years in the future.[7]

Whether my analysis was correct or incorrect is beside the point, at least for purposes of the present discussion. Very much to the point, however, is the fact that my argument fell, for all intents and purposes, on deaf ears, as have other similar arguments addressed to other congressional panels during the course of the term extension debate.[8]

In the questioning that followed, no member of the panel sought to support or refute my claims that term extension, generally speaking, could not be understood to promote authorship as conventionally understood—particular creative investments in the making of particular works. At least as far as that hearing was concerned, the argument in which I made a calculated rhetorical investment was literally beside the point. By contrast, it was very much to the point that, unless the United States enacted term extension legislation, U.S. copyright owners would be deprived of royalty revenues that otherwise would be available from various countries subject to the European Union's (EU) term extension directive, pursuant to the operation of the rule of the shorter term. [9] As Chairman Hatch put it in his opening statement:

> According to this rule, a European country can hold [U.S.] works to the [U.S.] term, now Life Plus 50, while giving its own citizens 20 years more.
> This means that [U.S.] works will fall into the public domain before those of our trading partners, undercutting our international trade position, and robbing our creators of two decades of income that they might otherwise have.[10]

My arguments against legislating new incursions on the public domain, which could not be clearly justified in terms of new incentives to create or disseminate copyrighted works, represented an attempt to invoke a familiar—and very

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7. *The Copyright Protection Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 23 (1995) (testimony of Professor Peter Jaszi) (transcript provided by Federal News Service) [hereinafter *Hearings*].

8. *Copyright Term Extension Act of 1995: Hearings on H.R. 989 Before the Subcomm. on Courts and Intellectual Property Comm.*, 104th Cong., 1st Sess. (1995) (testimony of Dennis S. Karjala, representing United States Copyright and Intellectual Property Law Professors).

9. Council Directive 93/98, 1993 O.J. (L 290) 9. Since the directive requires countries of the EU to apply the rule of the shorter term to works originating outside the EU, U.S. copyright owners could enjoy these additional rights only if the United States conforms its provisions on copyright term with those of the EU.

10. *Hearings*, *supra* note 7, at 2 (statement of Sen. Orrin Hatch).

traditional—vision of the purposes of copyright. These arguments failed to persuade or even interest the members of the panel, because there was an effective consensus in the hearing room for an alternative vision of the goals of a copyright system. In this vision, the goal of copyright, so to speak, is to improve the competitive position of companies that have significant investments in inventories of copyrighted works. Of the witnesses that day, Jack Valenti of the Motion Picture Association of America probably captured this new vision most clearly:

> One of the great secrets of the [U.S.] dominance in the world is [its] ability to pour into a film enormous resources, the most talented people in the world cost money. . . . Unless we are able to protect what we own in our libraries, we will be unable [to do so] in the future, in the year 2010, and thereabouts, when the new technology has avalanched through this whole landscape, not in this country but around the world, then we are doing a terrible economic injustice to the Treasury of the United States.[11]

This is a vision of the purposes of copyright that will be discussed in greater detail below. For now, one should note that, it is this vision that also animates the URAA. This vision is likely to be more and more prominent in years to come, as the post-URAA U.S. copyright law continues to evolve. Although it is true that the last systematic general revision of the copyright laws was completed in 1976, an equally significant, if not equally systematic, overhaul of the system, which includes a recasting of its most basic assumptions, is underway today. The URAA is perhaps the most important episode to date in this new process of copyright "re-vision."

Over much of the last twenty years, it has been possible for those who opposed expansionist legislative or judicial tendencies in copyright to couch their opposition in the seemingly neutral terms of a suggestion that those tendencies were inconsistent with the Macaulian economic and cultural bargain between authors and users, which is at the heart of U.S. law, as reflected in the Patent and Copyright Clause, and a parade of Supreme Court precedents explicating that clause.[12] This old religion of copyright substituted, all too often, for a careful articulation of what really was at stake in connection with particular amendments or interpretations of the statute. In recent years, however, the once stable consensus about what U.S. copyright was (and was not) seems to have substantially decayed, and there is no realistic prospect of anyone putting it back together. Today,

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11. *Id.* at 24 (testimony of Jack Valenti).

12. *See* T. Macaulay, Speech in the House of Commons (Feb. 4, 1841), *reprinted in* 1 SPEECHES, PARLIAMENTARY & MISCELLANEOUS 285 (London 1853).

another way of thinking and talking about why copyright laws should exist is taking its place, at least where legislative policy discourse is concerned.

Court challenges to the constitutionality of various significant provisions of the URAA, when and if they come, will help to test whether the traditional idea of the purposes of copyright has more staying power in the discourse of the judicial branch than in the legislative branch. Below, the framework of constitutional analysis will be used to review some of the various justifications that have been posited for the most controversial feature of the URAA: copyright restoration for works of Berne Convention and World Trade Organization (WTO) origin. But one should note that the framework is used mainly as a heuristic device to clarify the sorts of arguments that could, and presumably will, be made in the course of the next major congressional debate over new copyright legislation.[13]

However, it is unlikely that this crucial element of the URAA copyright provisions will be struck down. My pessimism about the likelihood that the URAA's restoration provisions will be deemed unconstitutional is consistent, insofar as the outcome of the analysis is concerned, with the results of David Nimmer's constitutional analysis of the issue. Where Nimmer and I part company is in the intervening analysis. Much oversimplified, Nimmer's view is that the Patent and Copyright Clause has been revealed as largely irrelevant as a source of significant limitations on current and future copyright legislation, given the availability of alternative constitutional rationales for this exercise of legislative power.[14] To the contrary, I argue that a new understanding of the essential terms of the Patent and Copyright Clause itself is emerging. This new understanding has already captured the imagination of Congress and, sooner or later, is likely to be memorialized in the jurisprudence of the U.S. Supreme Court. In addition, this understanding offers a justification of the URAA and a variety of other innovations in copyright as well, including, potentially, copyright restoration for

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13. In fact, that debate already is underway, focusing on H.R. 2441, 104th Cong., 1st Sess. (1995) and S. 1284, 104th Cong., 1st Sess. (1995), which are pending bills providing for the Copyright Protection Act of 1995. For more information, see on the internet http://home.worldweb.net/dfc.

14. NIMMER, IMPOSSIBLE REALITIES, *supra* note 2, §§ C.01[C], D.05. It is clear that alternative sources of congressional power for copyright or copyright-like legislation are not wholly precluded. *See* Authors League of Am., Inc. v. Ass'n of Am. Publishers, 790 F.2d 220, 224 (2d Cir. 1986) ("In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the Legislature's power to regulate commerce with foreign nations."). The question, of course, is what *limits* may apply to legislation of this type.

works of domestic United States origin. The emergence of this new understanding makes it incumbent on those who value the public domain to develop new ways of explaining how and why the maintenance of an intellectual commons matters, both in cultural *and* economic terms.

I approach the issue of the constitutionality of the copyright restoration scheme provided by the URAA by considering its provisions that give performers or their assigns an apparently perpetual cause of action (subject to no defined exceptions or limitations of any kind) against those who record (or otherwise fix) their previously unfixed performances or who traffic in such unauthorized fixations, including those made before the effective date of the URAA. These anti-bootlegging provisions implement language of Article 14(1) of the TRIPS Agreement, which in turn mirrors certain provisions of the 1961 Rome Convention[15] (to which the United States is not a party).

Before considering the constitutional justifications available for the URAA provisions creating a right against bootlegging, an initial question is in order: whose right is this? On its face, the statute is exceedingly unhelpful. At first glance, the legislative history is also unhelpful, except to indicate that, by virtue of its rejection of a limitation of the anti-bootlegging right only to featured performers, Congress apparently intended it to belong to *all* performers.[16] At a practical level, this appears to raise all sorts of knotty questions.[17] Ultimately, however, all of this may matter very little, since the exercise of the rights provided for is likely to be ceded contractually by performers to the recording companies by which they are employed. A closer look at the legislative history discloses that the right was, in fact, intended not for the benefit of performers, but to secure the investments of record companies:

> The practice of bootlegging live performances of U.S. artists is a significant problem that, in the past, was addressed through various state anti-bootlegging laws, unfair competition laws, and common law copyright protection. While performers have been able to seek relief against acts taking place in individual states, recourse against international trade in bootleg sound recordings has been difficult. This trade has become more significant as bootleggers have become more sophisticated and performance

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15. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

16. *See* 140 CONG. REC. E2263 (daily ed. Oct. 8, 1994) (statement of Rep. William Hughes, chair of the House Subcomm. on Intellectual Property and Judicial Administration).

17. *See* PATRY, *supra* note 2, at 11-12 (discussing complexities of co-ownership).

> tours have become more international in character. The sound recording industry estimates that trade in bootleg sound recordings amounts to billions of dollars a year. Enacting a federal anti-bootlegging statute will supplement the current enforcement provisions in state laws, provide some uniformity in rights, and provide rights owners the possibility of preventing imports of 'bootleg' sound recordings.[18]

This said, one reaches the question of the constitutional warrant for the partial federalization of what historically has been the exclusive domain of state anti-bootlegging and anti-piracy laws. Clearly, this legislative initiative cannot be justified as an exercise in treaty implementation,[19] because the Final Act of the Uruguay Round of the GATT, including the TRIPS annex, is not a treaty, and was never presented to the U.S. Senate for ratification.[20] Almost as straightforward is the conclusion that the Patent and Copyright Clause is unavailable as a source of justification for the provision, because, by assigning rights in unfixed works, it extends protection to subject matter beyond the congressional powers deriving from that clause.[21] Readily enough, then, one comes to the only apparent possibility—the Article I Commerce Clause. And even though that rationale is not articulated anywhere in the legislative history, in so many words, it seems at least reasonably implicit in the rationale quoted previously.[22]

But there is a problem. While dealing with a creative activity, which has been acknowledged to represent a form of authorship,[23] the anti-bootlegging provisions go beyond what Congress could do if it were legislating under the Patent and Copyright Clause. This fact brings us to an unlitigated constitutional issue: whether there are *any* limits on the creation of quasi-copyrights, so to speak, enacted under a source of

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18. *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property & Judicial Administration of the House Comm. on the Judiciary and the Senate Subcomm. on Patents, Copyrights & Trademarks of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 133, 142 (1994) [hereinafter *Joint Hearing*] (testimony of Ira S. Shapiro, General Counsel, U.S. Trade Rep.).

19. That in appropriate cases Congress can take necessary and proper steps to implement treaties, even where it would lack an independent Article I basis to legislate absent an international agreement, has been clear since at least 1920, when the Supreme Court decided *Missouri v. Holland*, 252 U.S. 416 (1920).

20. *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1398 (1995).

21. *Cf.* Goldstein v. California, 412 U.S. 546, 561 (1973) ("[T]he word writings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.").

22. *See* PATRY, *supra* note 2, at 10-11.

23. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 56 (1976).

constitutional authority other than the Patent and Copyright Clause.

Obviously, the answer to the question, as posed, must be yes. Suppose, for example, there is a congressional attempt—explicitly premised on the importance of intellectual property to the U.S. balance of payments—to provide supplementary terms of protection of unlimited duration for works at the end of the statutory periods provided in Sections 303 and 304 of Title 17 of the U.S. Code. One would have little difficulty finding this to be an impermissible end-run around what is patently language of limitation in the constitutional grant.[24] Most students of copyright would concur, at some level, that the limited times language expresses more than an incidental or technical constraint on federal grants of intellectual property protection, at least where copyrightable subject matter is concerned.

But if some quasi-copyrights would fail to pass constitutional muster, is this necessarily true of all quasi-copyrights? More specifically, how, if at all, can anti-bootlegging provisions that provide for potentially perpetual protection withstand constitutional scrutiny? The answers may lie in the fact that the performances to which the new provisions apply were, by definition, unfixed at the time the unauthorized fixation was made. If one were to apply here the technique of analysis developed for dealing with conflicts between state and federal law

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24. That the Patent and Copyright Clause is "both a grant of power and a limitation" is clear from *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). Professor Shira Perlmutter's claim that the logic of this passage applies only to patents (with which the Supreme Court was concerned in this particular case) strikes me as profoundly unconvincing. *See Joint Hearing*, *supra* note 18, at 203 (testimony of Prof. Shira Perlmutter). Elsewhere, Professor Paul Heald makes a strong claim for the proposition that where copyrights are concerned, the clause also intends significant limitations on congressional power:

> [The framers of the Constitution] worded the Intellectual Property Clause to prevent abuses like those perpetrated when the Stationer's Company exercised complete control over publishing in England. According to the clause, only authors may be granted a copyright, only for a limited time, and only for original works. Most importantly, the copyright law should promote the progress of science, which in the eighteenth century sense meant "knowledge." This progress is meant to benefit the public as a whole, and the Court has often spoken in economic terms to describe the benefit. . . .

Paul J. Heald, *The Vices of Originality*, 1991 SUP. CT. REV. 143, 174 (footnotes omitted). *See also* Jane Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, COLUM. L. REV. 338, 370-71, 371 n.154 (1992).

in the context of preemption,[25] one might conclude that the Commerce-Clause-based legislative intervention is permissible. Although it certainly provides anti-copying rights equivalent to those available under copyright, unfixed works are not, by definition, within the subject matter of copyright, because they do not qualify as "writings."

However, preemption analysis is one thing, but the parsing of constitutional limitations on quasi-copyrights is something else.[26] It remains for one to ask, then, how satisfactory are the results of the analysis just outlined—does it make any sense, as a matter of intellectual property policy, to provide protection of potentially far longer duration to unfixed productions than the United States provides to fixed works of the same general character? Perhaps so, if one assumes that unfixed works are, by their nature, likely to be works in progress—not readily susceptible to full commercialization. More fundamentally, is the constitutional "Writings" requirement any different in character from the reference to "limited times" in the Patent and Copyright Clause, so that one can contemplate quasi-copyrights for unfixed works (even ones of indefinite duration) while rejecting Commerce-Clause-based extensions of duration (where writings are concerned) beyond the constitutionally fixed limited times? Again, the answer may well be in the affirmative. The constitutional limits on copyright duration for protected writings seem to reflect an effort to demarcate private, proprietary works from those that are publicly accessible—a distinction that is difficult to understand except as language of limitation. By contrast, as it has been implemented through the criterion of fixation in the definition of copyrightable subject matter, the constitutional writings requirement appears to be concerned with assuring the efficient administration of a copyright system or, perhaps more straightforwardly, to reflect the structure of a historically publication-based system of copyright.[27] Arguably, it is language of grant rather than of limitation. And if, as a constitutional matter, one tolerates state law protection for

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25. For a general discussion of preemption under the 1976 Act and the methodology of analysis under 17 U.S.C. § 301, see CRAIG JOYCE ET AL., COPYRIGHT LAW 938-76 (3d ed. 1994). In order to be subject to preemption under the statute, a challenged state law must apply to subject matter that comes within the subject matter of copyright *and must* provide rights equivalent to exclusive rights within the general scope of copyright.

26. *See* Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution*, 18 SEATTLE U.L. REV. 259, 291 n.163 (1995) (cautioning that there are risks in conflating "the constitutional mandate of the Intellectual Property Clause . . . [and] the Copyright Statute Congress chose to enact.").

27. *See generally*, NIMMER, NIMMER ON COPYRIGHT, *supra* note 2, § 108[C][2].

unfixed sound recordings, it would seem perverse to rule out the creation of a federal scheme with the same effect.

The line of analysis just suggested has several significances. For one thing, as will be discussed below, it helps to set the stage for a constitutional analysis of copyright restoration. In passing, however, one should note that it also is likely to bear on the judicial consideration of any U.S. effort to legislate a new right against unfair extraction of compiled data, such as the one embodied in the proposed EU database directive.[28] In *Feist Publications, Inc. v. Rural Telephone Services, Inc.*,[29] the U.S. Supreme Court held that works consisting solely of methodically compiled data are constitutionally beyond the reach of copyright. Does it follow, then, that a Commerce-Clause-based statute *could* reach this material? The answer is "not necessarily."[30] The answer could depend on what a court—or ultimately the Supreme Court—concludes the *purposes* of these limitations were to have been. Unlike the administratively oriented fixation requirement for copyrightability, the originality requirement parsed in *Feist*, with its roots in constitutional notions of authorship, has a different character. It can be understood to represent an aspect of the fundamental notion of a public domain, guaranteeing the existence of an informational commons of accessible material beyond the reach of copyright. If so, an effort to create a Commerce-Clause-based data right would seem to share some of the potential infirmities of a statute providing copyrights of indefinite duration for fixed works on a Commerce Clause rationale.

The difficulty with the preceding conclusion, and the specific reason for dwelling on this issue of data rights in the context of a discussion of the URAA provisions, is that the Supreme Court does not say, or at least does not say very emphatically, that the demarcation of a public domain is what is at stake in *Feist*. To

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28. *See* Commission Proposal for a Directive on the Legal Protection of Databases, 1992 O.J. (C 156), 4, 1993 O.J. (C 308), 1. *See also* Common Position 7934/95 with a view to adopting Directive 95/EC of the European Parliament and of the Council on the Legal Protection of Data Bases, *adopted* July 10, 1995, 1995 O.J. (C 288) 14 (transmitted to the European Parliament on Sept. 21, 1995).

29. 499 U.S. 340 (1991).

30. Here, I differ from Professor Ginsburg, *supra* note 24, who keys her analysis of the constitutionality of a hypothetical data protection statute enacted under the Commerce Power to the differences between its coverage, on the one hand, and that of copyright on the other—differences, that is, in the nature of the rights conveyed. Given the importance of the policies reflected in the authorship requirement that *Feist* interprets, it is doubtful that the limitations on copyrightability it expresses can be so easily overcome. On balance, Professor Heald has the best of the arguments here. *See* Heald, *supra* note 24.

claim that it is, unfortunately, represents a mere interpretation of the decision, no matter how plausible or attractive it may be. Given the emphasis placed on the importance of enriching the public domain in traditional copyright policy discourse, one might have expected more from the Court in *Feist* than it actually delivered. In addition, the very indistinctness of the policy rationale for *Feist* means that, in years to come, advocates of the public domain have their work cut out for them.

Finally, before addressing the nature of the work that lies ahead, one should address the question of the constitutionality of copyright restoration under the URAA. Briefly, the legislation amends Section 104A of the Copyright Act to provide new protection in the United States for a variety of works of which the source countries are or may become members of the Berne Union or the WTO, or are the subject of a presidential proclamation of copyright restoration. Restoration is automatic (as of the effective date of the statute or a later date on which a given country becomes a qualifying source country) for works that are in the public domain by virtue of prior failures to comply with U.S. copyright formalities (including notice, renewal, and manufacturing requirements), because of national origin, or (in the case of sound recordings still protected in their countries of origin) by reason of having been fixed before February 15, 1972,[31] provided these works are protected in their source countries and were not first published (or published simultaneously with the first publication elsewhere) in the United States. Restored copyrights under new Section 104A apply for the balance of whatever would have been the applicable term had the work qualified for U.S. copyright in the first place. The statute also carves out a modest space for so-called "reliance parties," who are entitled to receive timely constructive or actual notice and who, upon notice, have a one-year grace period in which to liquidate their existing inventories of formerly non-infringing copies. In addition, certain reliance parties, whose uses of previously public domain works take the form of the distribution of derivative works, also may qualify for special treatment. They can continue to utilize those works after restoration upon the payment of a reasonable royalty, which may be juridically determined if necessary.

Obviously, this is legislation of great sweep and scope, which brings back into protected status in the United States literally thousands of untold foreign works, and some that might conventionally be thought of as domestic ones as well, like

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31. On this date, sound recordings first became copyrightable subject-matter in the United States. *See* 17 U.S.C. § 301(c) (1994).

productions of U.S. authors first published abroad. Its comprehensiveness distinguishes it dramatically from previous, narrowly targeted extensions of retroactive protection under U.S. law, none of which was ever subjected to constitutional review in the courts. As noted earlier, this remarkable legislative exercise cannot be justified as an exercise of the congressional treaty implementation power by reference to TRIPS, since the GATT itself is not a treaty. However, the TRIPS Agreement does commit signatory countries to honor the substantive provisions of the 1971 Berne Convention including Article 18, to which the United States has been a party since March 1, 1989.[32]

Presumably, the constitutionality of the Section 104A retroactivity provisions could be asserted on the basis that, unlike the anti-bootlegging provisions, this portion of the legislation *does* implement a treaty—the 1971 Paris Act of the Berne Convention. Notably, however, when the United States legislated to bring its laws into conformity with the minimal proscribed standard in the Berne Convention Implementation Act of 1988 (BCIA),[33] it explicitly declined to legislate for retroactive protection of works originating elsewhere in the Berne Union, relying on the Article 1F clause relating to conditions of application as a potential warrant for doing so.[34]

Why, as a matter of the geopolitics of intellectual property, the United States should want to do now what it declined to do in 1988 is a topic beyond the scope of this Article. What seems important to note, however, is that the United States has moved from the minimalism of the BCIA to a distinctly maximalist approach to retroactivity. Understood as it seems to have been intended, the new, URAA-derived Section 104A of the Copyright Act not only fulfills the mandate of Article 18 but goes well beyond it. A good example is the decision to restore protection in the United States for otherwise eligible pre-1978 works that had been lost—prior to June 1992—as a result of nonrenewal at the conclusion of the initial twenty-eight-year copyright term.[35]

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32. Article 18 includes a mandate to apply the Convention to all works that, at the moment of their coming into force, have not yet fallen into the public domain in the country of origin through the expiration of the term of protection (unless, through the expiration of the term of protections that was previously granted, a work has fallen into the public domain in the country where protection is claimed) and are subject to the determination by respective countries of the conditions of application of this principle.

33. BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H.R REP. NO. 609, 100th Cong., 2d. Sess. 51 (1988).

34. *Id.*

35. NIMMER, IMPOSSIBLE REALITIES, *supra* note 2, § D.02[A][2].

This may be good or bad intellectual property policy, but it is hardly required to fulfill the mandate of the Berne Convention (incorporated by reference in TRIPS), thus throwing into doubt the question of whether *all* of the URAA restoration provisions (rather than merely some) can be justified as legitimate exercises of the congressional power to implement treaties. Obviously, not every legitimate exercise of this authority will be rooted in specific treaty language, but there must be a reasonable nexus between international obligation and domestic legislation in order for this rationale to apply. Whether this nexus requirement would be satisfied here is at least open to question.

Nimmer, however, suggests that to the extent that a treaty power rationale for extensive grants of retroactivity for foreign works might be wholly or partly unavailable, an alternative Commerce Clause rationale should apply. After all, the legislative history of the URAA, such as it is, makes it clear enough that considerations of commerce in general, and international commerce in particular, were very much on the mind of the members who participated in the statute's enactment. As Eric Smith of the International Intellectual Property Alliance stated it in his testimony before the joint House and Senate hearing:

> Obtaining protection for U.S. movies, music, sound recordings, software, books, and other copyrighted works on a "retroactive" basis has been one of the key objectives of the last three Administrations. The reason is simple: Vast libraries of valuable works remain unprotected in many countries that have been either late in passing copyright legislation or late in entering into copyright relations with the [United States].[36]

And retroactivity for foreign works under domestic laws is the essential quid pro quo, making it possible to argue for retroactive protection of U.S. works abroad.

Why then should one look farther into the very heart, as it were, of U.S. copyright—the Patent and Copyright Clause—to see if a treaty power justification supplemented by a plenary Commerce Clause rationale is available to justify the copyright restoration provisions of the URAA? The answer has already been suggested: the congressional authority to legislate copyrights and quasi-copyrights on alternative bases is not a plenary one; rather, it is constrained by other constitutional language (*e.g.*, the First Amendment and the Patent and Copyright Clause). Just as commerce power or the treaty power could not be used to create copyrights of perpetual duration without running afoul of a specific limitation rooted in that clause, legislation that does not

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36. *Joint Hearing*, *supra* note 18, at 248 (statement of Eric H. Smith, Exec. Dir., Int'l Intellectual Prop. Alliance).

fulfill the mandate to promote science and the useful arts also may be outside congressional competence, whatever source of authority is being invoked.

So here, one comes to the inescapable crux of the matter: is copyright restoration within the scope of those acts that Congress could undertake in furtherance of the Patent and Copyright Clause? Were Congress to consider legislation providing for *domestic* copyright legislation (like that hypothesized at the outset of this Article), the question would be squarely presented. But, as suggested above, it is also present where the URAA provisions for copyright restoration of foreign works are considered—at the base of any complete analysis. At first blush, the answer seems clear enough: *restoring* protection for works already in existence can hardly be understood as an incentive to creativity. The assumption that providing retroactivity for foreign works in the United States will lead (if it will lead) to retroactive protection for U.S. works abroad also does not seem to alter the calculus.

Here, however, the changing vision of the core purposes of copyright comes into play. In the emerging new understanding of what constitutes the progress of science and the useful arts, enhancing overall financial well-being of companies that invest in the production and distribution of copyrightable works contributes generally, if not specifically, to the promotion of creativity and authorship, especially in the form of works for hire. Register of Copyrights Marybeth Peters spoke to this effect at the recent hearings on copyright term extension:

> In attempting to evaluate how extending the copyright term would stimulate creativity, it is difficult to see how moving from a term of Life Plus 50 to Life Plus 70 will encourage authors to write. It could, however, provide additional income that would finance the production and publication of new works.[37]

In this analysis, whatever makes information and entertainment businesses more financially secure contributes to the progress of knowledge. If this is the vision that is dominant in the current congressional discussions of term extension, it also is the vision that animates the URAA copyright provisions. And it may well be the emergent understanding of the purposes of copyright that will control when and if the URAA ultimately is subjected to constitutional scrutiny.

In the aftermath of TRIPS and the URAA, individuals committed to what might loosely be called a user or public interest orientation in copyright policy can try to resist this

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37. *Hearings*, *supra* note 7, at 7 (testimony of Hon. Marybeth Peters, Register of Copyrights, U.S. Copyright Office).

revision of copyright. They may succeed today, but ultimately they could well fail. Unfortunately, a new understanding of the purposes of copyright, which focuses on promoting the well-being of the copyright industries rather than providing incentives to specific acts of creativity (or distribution), will gradually supplant the traditional understanding on which so much of our public interest rhetoric relies. If this occurs, how should those concerned about the public interest respond? One answer has already been suggested: they must refurbish the policy arguments for a vital, robust public domain.

In the current climate, it is no longer sufficient to derive indirect arguments for the preservation of the public domain from constitutional first principles, as it were. It is not enough to insist that because copyrights are constitutionally limited in duration, or constitutionally restricted only to original works of authorship, it follows that the Patent and Copyright Clause necessarily reflects pro-public-domain values on the part of the framers. A characteristic of recent expansionist arguments in the field of copyright has been to minimize or trivialize the public domain. Too often, defenders of the public domain have been overcomplacent in shaping their arguments, imagining that they do not have to make the case for the importance of the informational commons because it is somehow constitutionally secured. Today, however, defenders of the public domain can no longer rely on arguments cast in an essentially negative form: that some proposed piece of legislation, which will impoverish the public domain in order to contribute to the economic well-being of the U.S. information and entertainment industries, does not measure up to an abstract standard of constitutional justification because it fails to motivate the creation (or distribution) of particular new works.

This is all the more true because, in current copyright policy debates, trashing the public domain has become a favorite indoor sport among advocates of longer, stronger, and broader copyright protection. Thus, at the hearings on copyright term extension[38] several pro-extension witnesses effectively asserted that the public domain might better be described as an informational limbo than an information commons. In colloquy with Senator Dewine, the Commissioner of Patents and Trademarks, Bruce Lehman put the point this way:

> SEN. DEWINE: . . . [Y]our contention . . . was that many times going into the public domain was not necessarily to the benefit of the consumer. . . . How far do you take that? . . .

38. *See* discussion *supra* notes 7-8 and accompanying text.

> MR. LEHMAN: I can give you probably an example. I think that sometimes you go to bookstores and you'll see very old films that have fallen into the public domain. . . . Some of those films you'll see in a bookstore have been reissued and sold very cheaply as video cassettes maybe for six or seven dollars, something like that. And that would be an advantage, but you have to balance that off by the fact that there are probably a lot more films that have been lost to the public forever and never reissued at all [nor] made available because nobody had the economic incentive to do so.
> SEN. DEWINE: To preserve them.
> MR. LEHMAN: That's right. To preserve them and to put them out. Also, if you think of your own behavior when going into a bookstore, there are lots of books—Shakespeare is not under copyright anymore. Do you really see a big difference in price between the public domain stuff and the nonpublic domain stuff? Do you really—does that even enter into your consciousness as a consumer?[39]

This assault on the notion of the public domain as something of value is nothing new, but it seems to be gathering force.[40] To counter this momentum, defenders of the public interest must begin to develop evidence and arguments that function, at least to some extent, independently of the specific terms of the Patent and Copyright Clause, and carry on the work of explaining why and to whom the public domain matters.[41]

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39. *Hearings*, *supra* note 7, at 15 (testimony of Hon. Bruce Lehman, Commissioner of Patents and Trademarks, U.S. Patent and Trademark Office).

40. These arguments appear to stem, at least in part, from comments made by Irwin Karp during hearings leading up to the enactment of the Copyright Act of 1976. *See* HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: DISCUSSIONS AND COMMENTS 316-17 (Comm. Print 1963).

41. Outstanding examples of scholarship in this vein exist, but they are too few and far between. *See generally* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 L. & CONTEMP. PROBS. 147 (1981).