

ESSAY

THE UNITED STATES AND INTERNATIONAL COPYRIGHT LAW: FROM BERNE TO *ELDRED*

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I. BACKGROUND OF THE U.S. ROLE IN INTERNATIONAL
COPYRIGHT LAW

From 1791 until 1891, there was no federal protection available to works of foreign authors first published outside the United States, a situation that led the United States to be described as the "Barbary coast of literature," and its citizens as "buccaneers of books."¹ The reason for the lack of protection for foreign authors was pragmatic: for the first century of our copyright laws, the United States was a substantial net importer of works, principally English books. By permitting U.S. publishers to skim off the cream of English books and without any royalty obligations, inexpensive editions of the best English books were readily available to the American public.

Another effect of the policy of permitting free use of English books was to create domestic industries that thrived in a royalty-free environment. These interests, which included printers and bookbinders in addition to publishers, became quite entrenched and represented a formidable roadblock when changes in the law were proposed in 1837. Indeed, it took until 1891 to overcome the opposition, and then only with a very high price: the manufacturing clause. This clause granted protection to works of foreign authors, but only if the foreign works were printed, bound, and published from scratch by U.S. companies.

This high cost of protection nevertheless permitted the United States to enter various bilateral treaties providing for reciprocal protection. However, it should be noted that by 1891, the Berne Convention was already four years old. Rather than change U.S. law to join Berne, the United States steadfastly remained committed to a U.S. approach to copyright law. The approach was an anathema to the rest of the world, though, because it consisted of rigorous formalities not permitted under Berne. The fact that the United States was going it alone was for quite a long stretch of time viewed as a source of pride, not shame. The argument that other, particularly European, countries did it differently was of no consequence.

Other than hemispheric treaties in the Americas, the United

1. S. REP. NO. 50-622, at 2 (1888).

States remained outside the multilateral copyright treaty system until the very late date of December 16, 1955, when the United States adhered to the Universal Copyright Convention (UCC). Adherence to the UCC did not mean that changes to U.S. law occurred; to the contrary, the UCC was drafted to permit U.S. adherence without making changes.

It was not until March 1, 1989, that the United States adhered to the Berne Convention. Berne adherence was significant because the UCC was the poor stepchild, a convention to which Berne countries adhered in order to reach the real prize—establishing multilateral relations with U.S. membership in the Berne Convention. One would assume that obtaining the prize required the United States to make significant changes to its Copyright Act: after all, if only minimal changes were necessary to join Berne, why hadn't the United States joined Berne many decades before?

II. BERNE ADHERENCE: SELECTIVE ADHERENCE

The changes made in the Berne Convention Implementation Act were, while not inconsequential, hardly earth-shattering. The changes included abolition of the mandatory notice provision, abolition of the requirement that transferees record their assignment before suing, and an oddly structured phased repeal of the jukebox compulsory license. Additionally, the § 411(a) requirement that copyright owners must register their works before instituting a suit was “two-tiered”—that is, it exempted works of Berne origin, but retained it for U.S. works.

None of these changes had a strong constituency pushing for their retention, and the two-tier requirement was a concession wrung by the Library of Congress to ensure a steady flow of free deposit copies. The Berne adherence sparks flew over a different issue altogether: moral rights. Article 6^{bis} of Berne requires member countries to grant to Berne authors—not to domestic authors—certain noneconomic rights. To all but the most partisan advocate, it was crystal clear that U.S. law provided no such rights, and for a simple reason: the copyright industries opposed them. As a result, the World Intellectual Property Organization (WIPO), which administers Berne, looked the other way as the United States joined without express moral rights. I say “express” because the Reagan Administration and Congress engaged in the charade of claiming that the United States *already* had adequate moral rights to permit adherence. Thus, in the one area where there was a need for the United States to belly up to the bar and join the international community, the

United States stayed home.

A second area of selective adherence concerned retroactivity. This requirement ensures that works of foreign origin that had been in the public domain for any reason other than expiration of term in the country of origin will be protected upon a country's adherence to Berne. Any other rule would reward countries for decades of past failures to protect works. On this point, Congress simply threw up its arms and said the issue was "too difficult" and needed to be studied more, an unusual opt-out procedure for treaty compliance.

Berne adherence was not motivated by a desire to improve U.S. domestic law; instead, it was pushed by the copyright industries tired of seeing poor protection overseas in a global market due to the United States's unfavorable treatment of foreign authors. The copyright industries managed to get their cake and eat it too by encouraging the United States to join Berne, thereby giving them a high level of protection overseas, while simultaneously blocking any changes in U.S. law that they would dislike.

III. THE 1996 EUROPEAN UNION DATABASE DIRECTIVE

The European Union's (E.U.) influence in copyright matters began with its 1991 Directive on computer programs. The reverse engineering provisions of the Database Directive were highly controversial, mirroring debates in the United States. In 1996, five years after our Supreme Court's decision in *Feist*, the European Union's Directive on database protection became effective. This Directive has two parts: one copyright and one unfair competition for unoriginal works. Protection for the latter is granted on reciprocal terms only. If the United States does not grant foreign creators of unoriginal databases unfair competition-like protection, U.S. database creators will not be entitled to such protection in the E.U.

U.S. database creators sought legislation for unoriginal databases and came close to succeeding after a bill passed in the House. Opposition has grown over the years, and now twelve years after *Feist* and seven years after the Database Directive, the sky-is-falling argument has fallen flat.

The Database Directive is still noteworthy, though, for its use of reciprocity. Reciprocity, an anathema to Berne, is based upon national treatment, and is a device by which foreign authors are "assimilated" to domestic authors, that is, foreign authors are treated the same as domestic authors. In the realpolitik of E.U.-U.S. relations, though, the E.U. has proved

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itself quite willing to jettison one of Berne's pillars in favor of whipsawing the United States to conform its laws to those of the E.U. While use of reciprocity was not successful in the Database Directive due to substantial domestic opposition in the United States to *sui generis* database protection, it was successful in term extension, as we shall see below.

IV. 1994 GATT IMPLEMENTATION BILL

In 1994, as part of compliance with the requirements of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), Congress enacted an enormous piece of fast-track legislation. One very tiny part of this package was a provision complying with the Berne retroactivity requirement noted above. The legislation—as passed and as subsequently amended—resurrects from the public domain most works of foreign origin which failed to comply with extant U.S. formalities such as notice or renewal. It is uncertain whether this legislation will survive constitutional challenge in the wake of remarks by some United States Supreme Court Justices and the Solicitor General during oral argument in the *Eldred* case.

V. THE WIPO TREATIES AND THE DMCA

In 1996, WIPO brought into being two new treaties for signature, the "Copyright Treaty" and the "Performers and Performances Treaties." Among other things, the treaties impose an obligation on signatories to enact laws governing: (1) circumvention of technological protection measures used by copyright owners to protect themselves from unauthorized uses, and (2) preservation of copyright management information inserted into copies of the work by the copyright owner. Such information may include licensing terms. These obligations were a classic "briar patch" strategy: copyright industries strongly wanted such measures, but going through the ordinary course of domestic legislation ran the risk of opposition. What was the solution? Create a treaty obligation. With a treaty obligation, any rational discourse, as well as any assessment of an untoward domestic impact, is eliminated. As a result of this strategy, the Digital Millennium Copyright Act (DMCA) was born. This bloated exercise of enacting into law an industry standards agreement has metamorphosed into the fourth axis of evil as it is increasingly applied well beyond intent and scope of the WIPO Treaty. Yet, the existence of the Treaty is cited as a reason why, even if the United States wished to abolish the DMCA, it could not.

VI. THE EUROPEAN UNION TERM DIRECTIVE AND *ELDRED*

In October of 1993, the E.U. issued its directive mandating harmonization of the term of protection within the E.U. at life of the author plus seventy years, twenty years beyond that of Berne and of then-U.S. law modeled on Berne. Almost immediately, a hue and cry went up on this side of the Atlantic because the Term Directive contained a reciprocity provision: the E.U. would extend the extra twenty years only to those countries which granted twenty extra years to E.U. authors. The estates of many well-known and beloved Tin Pan Alley songs quickly realized the possibility of extending their economic lives if they could get an extension here. The phrase "a pot of gold waiting in Europe with no costs to U.S. consumers" was used more than once. The phrase was predicated, though, on two-tiered legislation as the Berne Amendment to § 411(a) had been, namely, to grant the extension only to works of foreign authors, and not to U.S. works. If U.S. works also got an extension of twenty years, U.S. consumers most assuredly would be paying for term extension in the form of twenty more years of monopoly pricing, but if the term was not extended to U.S. works, a Hobson's choice was presented, because the Term Directive also provided that the term of copyright for nonmember states expires on the date copyright expires in that nonmember state. Thus, even if the United States extended the term for foreign works to life of the author plus seventy years, but kept the term at life of the author plus fifty years for U.S. works, U.S. works would not benefit from the reciprocal provision in the Term Directive. However, this does not mean that extending the term another twenty years was the correct policy, or even a constitutional approach.

In 1994, at the end of my tenure as copyright counsel to the U.S. House of Representatives's Judiciary Committee, the Chief Counsel and I were approached by a representative of the estates of Tin Pan Alley composers requesting that a term extension bill be included in the GATT fast-track legislation. We declined the request. The estates' representative then requested a one-year interim extension to allow the full term extension the opportunity to be debated in the next Congress. We refused, and indicated we thought any term extension was bad policy.

With the Republican takeover of the House after the 1994 elections, a new regime was installed in the House and the efforts to pass a term extension bill were met with a quite receptive audience. During those hearings, there was next to no analysis of the effects of term extension on U.S. consumers. Instead, witness after witness came forward extolling the

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fabulous international benefits, as well as the more abstract need to place our copyright law in harmony with the rest of the world, even though only the E.U. was involved.

Unfortunately or not, the term extension bill got bogged down with debates over amending § 110(5), which governed bar and restaurant performances via radio and TV. Legislation did not emerge from the quagmire until 1998, when the two initiatives were merged and passed.² A challenge to the constitutionality of the bill was devised and launched by noncopyright lawyers, a launch that ultimately reached the U.S. Supreme Court and exploded in a whimper, not a bang.

VII. THE *ELDRED* DECISION

On January 15, 2003, by a 7-2 vote, in *Eldred v. Ashcroft*, the U.S. Supreme Court upheld the Sonny Bono Copyright Term Extension Act (CTEA), which generously extended the term of copyright protection for another twenty years.³ Justices Stevens and Breyer dissented. As a result of the decision, for works created on or after January 1, 1978, the term of copyright for individual authors is life of the author plus seventy years, and for works first published before that date, the term is ninety-five years from the date of first publication.

The outcome of the dispute was clear well before the oral argument, due to petitioners' jettisoning of their strongest arguments. Unfortunately, petitioners' strategic mistakes led to an opinion that is broader than it needed to be and which may well spill over into other areas—particularly patent legislation. Aside from the loss in *Eldred* itself, the consequences for the relationship between the courts and Congress in the copyright area may be the most profoundly affected, as the Court took a very hands-off approach to review of the constitutionality of copyright legislation.

A. *Dragon-Slayer or Puppy: How Much Deference Does Congress Deserve?*

One intriguing, critical question contemplated prior to the oral argument was whether the Court would don the mantle from its Congress-slaying federalist cases. In these cases, the Court scoured the record before Congress to determine whether, in the Court's judgment, Congress had sufficient evidence before it to

2. Ironically, the § 110(5) provision later resulted in a GATT panel violation.

3. 123 S. Ct. 769, 777–78 (2003).

abrogate states' sovereign immunity,⁴ or whether the Court would instead adopt some form of deference to what is merely commercial legislation. If the Court took on the role of a congressional dragon-slayer, the constitutionality of the CTEA was in serious jeopardy. The record before Congress on how an extra twenty-year grant of copyright would "promote the progress of science" was not at all credible. While the downside to American consumers through continued higher prices was fairly self-evident, although certainly not across-the-board for all types of copyrighted works, petitioners' entire case hung on convincing the Court to adopt a strict standard of review. Thus, the approach the Court took in reviewing Congress's actions was believed to be determinative of the outcome.

To those at the oral argument, who heard Chief Justice Rehnquist wax warmly about the expansive nature of Congress's Commerce Clause power, Founding Fathers notwithstanding, there was no doubt this was not a dragon-slaying case. Still, one might not have contemplated the type of deference found in the majority's opinion that "[t]he CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."⁵ I hasten to add that, as a former U.S. House of Representatives Judiciary Committee staffer, I am all for legislative deference, even for downright dumb legislation; dumb legislation is not inherently unconstitutional merely because it is dumb. Indeed, dumb legislation is perhaps the type of legislation in the most need of deference. At the same time, it must be acknowledged that Congress does occasionally pass unconstitutional legislation, and sometimes does so willfully. Unless the Court wishes to slough off the responsibility it took for itself in *Marbury v. Madison*, it is obligated to exercise constitutional oversight and not just say, "Oh, that's the kind of stuff Congress always does so we don't have to look at it."

B. *Where to Draw the Line*

The real issue is what test to apply when determining whether Congress falls on one side of the constitutional line or the other. As Justice Breyer pointed out in his dissent, "[a]lthough the Copyright Clause grants broad legislative power to Congress, that grant has limits."⁶ All line drawing is a matter

4. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–41 (1999).

5. *Eldred*, 123 S. Ct. at 781.

6. *Id.* at 801 (Breyer, J., dissenting).

of degree. In order to avoid “I know it when I see it” line drawing, Justice Breyer proposed a three-part test. A statute will lack rational support “(1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective.”⁷ Utilizing this test, Justice Breyer believed that, with respect to the term extension, “the failings of degree are so serious that they amount to failings of constitutional kind.”⁸ Reasonable people can, and often do, disagree on matters of degree—and *Eldred* is certainly a case involving degrees—but nevertheless Justice Stevens’s dissenting comment that “the Court has quitclaimed to Congress its principal responsibility Fairly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are . . . judicially unreviewable,”⁹ is closer to the mark than it should be.

Only time will tell whether the extraordinary deference accorded Congress in *Eldred* will be applied in future challenges, but in the meantime those who may be on the losing end of a legislative battle are well advised to think twice about a strategy which relies on a future court challenge rather than attempting to obtain concessions as the legislation makes its way through Congress.

There is a larger policy concern, though: the effect that a “free pass” on constitutionality may have on Congress. The only copyright act ever held unconstitutional was so held on establishment of religion grounds.¹⁰ Even before the bill was marked-up by the House subcommittee, the blatant unconstitutionality of the bill was pointed out.¹¹ While this fatal defect did not stop the legislation from being passed, one would hope that the obvious constitutional issue had some positive effect in avoiding even worse legislation. Without the check that the Court provides on Congress, there may be little incentive for

7. *Id.* at 802 (Breyer, J., dissenting).

8. *Id.* at 801 (Breyer, J., dissenting).

9. *Id.* (Stevens, J., dissenting).

10. *See* *United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 829 F.2d 1152, 1154 (D.C. Cir. 1987) (invalidating Priv. L. No. 92-60, 85 Stat. 857 (1971), which granted the appellant an extended copyright in the “central theological text of the Christian Science faith”).

11. *See* *United Christian Scientists v. Christian Sci. Bd. of Dirs.*, 616 F. Supp. 476, 480 n.8 (D.D.C. 1985) (quoting a report of the Bar Association of the City of New York as published in 117 CONG. REC. S46,071–72 (1971)).

Congress to act cautiously. Without that check, we will all lose in the end.

C. The Copyright Clause Challenge

The narrowness of the petitioners' challenge in *Eldred* must be noted. While the CTEA extended an additional twenty years both to works created after enactment and to pre-existing works, under its Copyright Clause challenge, petitioners chose only to attack the grant to pre-existing works. This half-challenge was not moored to any conceptual anchor, though; there was no identifiable theory making a challenge to pre-existing works any more attractive or persuasive than a challenge to new works, a weakness quickly identified by the Court.

Petitioners' basic argument can be simply stated: Once legislation has been enacted granting a term of copyright, Congress is prohibited from thereafter extending the term for works covered by that legislation. To do so, according to petitioners, would violate Article I, Section 8, Clause 8 of the Constitution's "limited Times" clause. Of course, an extension of copyright for twenty years is for a limited time—twenty years. Given this obvious problem with their argument, petitioners were forced into a different argument entirely, namely, that the twenty-year extension was not unconstitutional by itself, but rather it was unconstitutional as one in a *potential* series of extensions which, if passed in the future, would amount effectively to a perpetual copyright. Such hypotheticals may be instructive in the law school classroom, but they are very poor vehicles by which to strike down legislation on constitutional grounds. Not surprisingly, the Court made short shrift of this argument.

D. The First Amendment Challenge

While petitioners' Copyright Clause challenge was limited to the extension of the term to pre-existing works, its First Amendment challenge extended to new works as well. The basis for that challenge was unclear before the complaint was filed. In truth, there never was a claimed First Amendment violation. Instead, petitioners' strategy was to try to get the Court to apply strict scrutiny, as applied to content-neutral speech, to a claimed Copyright Clause violation. In a particularly devastating exchange at oral argument, Justice Ginsburg, the author of the Court's opinion, quickly and deftly established through her examination of petitioners' counsel that petitioners had not articulated any independent First Amendment violation. The

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violation, if any, was entirely dependent on there being a Copyright Clause violation. In other words, there was *only* a Copyright Clause violation claim to which a First Amendment review standard was to be applied. With that dismissal, petitioners' case folded.

E. The Court Ventures Beyond Petitioners' Arguments

Had the Court stopped with its insightful and swift rejection of petitioners' arguments, its opinion would have been the stuff of judicial restraint and would have won over even those who strongly opposed the term extension on policy grounds. Unfortunately, the Court ventured farther out than it needed to in dispatching petitioners' arguments, and in so doing addressed issues that need not have been addressed.

F. What Happened to the "Pro" in the Quid Pro Quo?

One need not classify the DMCA as the fourth axis of evil to believe that the balances in the Copyright Act between proprietary and public interests are out of whack. Whether litigation, legislation, or the marketplace is the appropriate mechanism for restoring the balance is a much debated topic. Certainly the Court was dead-on correct in discerning that petitioners' real belief was that the CTEA was "very bad policy."¹² However, policy debates are a matter for Congress and not the courts, as many Justices pointed out at oral argument. That said, one may justifiably wonder why certiorari was granted in the first place.

The debate about the appropriate metes-and-bounds for copyright protection has always assumed there is some quid pro quo in the copyright bargain and that the bargain, like the power granted to Congress, is of constitutional import: Exclusive rights are granted in exchange for public access to works during the term of protection, with those works eventually going into the public domain at some reasonable point in time. Extending the term of copyright implicates this bargain because without some additional public benefit from the extension, an undeserved and unnecessary windfall is given to copyright holders. Of course, reasonable people may disagree about whether or how the CTEA fits into this bargain. In what is the most surprising and potentially troublesome part of the Court's opinion, the bargain itself was called into question. While "demur[ring]" to petitioners' description of the Copyright and Patent Clause as containing a

12. *Eldred*, 123 S. Ct. at 790.

quid pro quo,¹³ the Court stated that “patents and copyrights do not entail the same exchange, and . . . our references to a *quid pro quo* typically appear in the patent context. . . . [W]e reject the proposition that a *quid pro quo* requirement stops Congress from expanding copyright’s term in a manner that puts existing and future copyrights in parity.”¹⁴

Justice Ginsburg is an extremely cautious and careful jurist, and I cannot imagine that she intended to jettison entirely the concept that a benefit analysis is relevant in reviewing copyright legislation, as opposed to merely stating a belief that, given certain differences between the nature of copyright and patent protection, a patent’s *quid pro quo* is “more exacting.”¹⁵ Nevertheless, those less careful than Justice Ginsburg have seized upon the Court’s discussion for the broad proposition that there is no *quid pro quo* at all in copyright, but only in patents. The Solicitor General took this view in a recent brief to the Court in the *Dastar* Lanham Act case.¹⁶

Hopefully, the Court will have the opportunity to clarify this point, but in the meantime, it stands as a star exhibit for the wisdom of “less is more” in constitutional discourse, a point made eloquently by Second Circuit Judge Pierre Leval in a Horace Manges lecture at Columbia University.

G. *Selective Use of International Law in Eldred*

The absence of any domestic public benefit from term extension as well as the presence of a large disadvantage has caused some analytical problems if one were seeking to find a rational basis for the CTEA. The majority sought that basis in international considerations, first the pot-of-gold theory, and then the following amorphous one: Unless the United States granted term extension commensurate with the E.U., “the United States could not ‘play a leadership role’ in the give-and-take evolution of the international copyright system, indeed it would ‘lose all flexibility,’ ‘if the only way to promote the progress of science were to provide incentives to create new works.’”¹⁷ These quotations are from a short, polemical piece written by an

13. *Id.* at 786–87.

14. *Id.* at 787.

15. *Id.* at 787 n.22.

16. Brief for the United States as Amicus Curiae Supporting Petitioner at 8 n.4, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003) (No. 02-428).

17. *Eldred*, 123 S. Ct. at 781–82 (quoting Shira Perlmutter, *Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 332 (2002)).

industry representative whose company had filed an amicus brief with the Court. The statements are factually erroneous and cannot provide a basis on which to uphold a constitutionally challenged piece of legislation.

Acquiescing to the reciprocal strong-arm tactics, the E.U. can hardly be described as assuming a “leadership role”; instead, it is assuming a submissive “follower” role. Nor can the Term Directive be described part of “the give-and-take evolution of the international copyright system”; the Term Directive was a unilateral act by a regional party with zero give-and-take with other countries. Nor is there the slightest evidence to suggest that, had the United States failed to extend the term, the E.U. would have cared at all; to the contrary, the E.U. might have been delighted because U.S. authors benefit far more in the E.U. than E.U. authors do in the United States from copyright protection. It is also significant that there has been no worldwide swell of countries following the E.U.’s lead in extending the term of protection other than wannabe E.U. countries, which did so only because they were told to. Finally, there is no support for the proposition that when there was an international issue—rather than a regional issue like term extension—a decision not to extend term could conceivably affect the United States’s role in those discussions. How would that happen? Would the French delegate say: “Ah, my *Americaine* friends should not be heard on the question of protecting flugelhorns because they did not cave into the reciprocal provision of our 1993 Term Directive. Mice!” Unlikely, even in the current state of French-American relations. Proof of this is seen in the failure of the United States to accede to the reciprocal provisions of the Database Directive; there has been no fall-out from that act of “failed leadership.”

The additional assertion that the United States would “lose all flexibility” if U.S. legislation was restrained by that pesky constitutional clause similarly flounders. While it is undoubtedly true that the greatest flexibility comes with no restrictions, this does not mean that Congress loses “all” flexibility with an extremely modest restraint imposed by limiting term extensions to new works—after all, dead authors don’t need an incentive.

The most annoying part of the reliance on international law is the lack of reference to instances where the United States deliberately thwarted an international consensus. Here are some things not said: The United States single-handedly blocked an effort by the international community, not just Europe, to include a performance right for actors in audiovisual works. Indeed, the author of the polemic quoted by the Court played a significant role in killing, on behalf of the U.S. motion picture industry,

what is an international consensus. No lack of a leadership problem there, I guess. This is but one recent example of the United States's selective attitude toward international relations. Here are two others: (1) In the 1980s, even though the United States hosted an international treaty for semiconductor chip designs in Washington, D.C., after the United States passed the first such law, it refused to sign the treaty, finding it too favorable toward other countries; (2) The United States has never joined the 1961 Rome Convention for the Protection of Performers because of hostility toward performers' rights, a hostility that continues today.

VIII. CONCLUSION

While it is quite logical and expected for countries to act in their own interests, what is illogical and incorrect is to justify legislation that is against the interests of U.S. consumers by reference to the selective use of international considerations. If an issue is truly one of domestic import, say so, and debate the matter on those grounds. However, the term extension legislation could not have been justified on domestic grounds, hence the appeal to international law.