International copyright law consists of rules and standards developed across multiple regimes, including the WTO, WIPO, and bilateral free trade agreements (FTAs). Different political actors drive the development of copyright law in different forums, often choosing the regime most favorable to their desired policy outcomes. Not all international copyright law, however, is created equal. While hard, rule-based copyright law gets made through bilateral free trade agreements, broader limiting principles such as fair use are articulated in “softer” forums such as WIPO. The situation presents a paradox: usually it is far more difficult to establish international hard law than aspirational soft law, yet the web of hard law in the international copyright regime is developing at a faster rate than corresponding—and limiting—soft law standards.

It is no coincidence that softer limiting principles have been more difficult to establish in international copyright law than hard rules. This Article will outline how international copyright law gets written, and the relationship between the institutions that do the writing and the type of laws, hard or soft, that they establish. It will close by outlining consequences of allowing the current international copyright lawmaking system to persist unhindered.

Instead of focusing on the international relations theory of regimes as past scholars have, this Article will look to administrative law scholarship. In large part, the story of international copyright lawmaking is a story of regulatory capture. Thus this Article will add to the literature on private-public governance in international law by examining it through the lens of administrative law scholarship.

The Office of the United States Trade Representative (USTR), an agency within the executive branch, drives international copyright lawmaking. This June, Congress will reevaluate the “Fast Track” authorization that governs the relationship between Congress and USTR. Now is the time to evaluate whether Fast Track works for

copyright lawmaking, and appropriate levels of transparency and accountability. The Article will therefore examine both “Fast Track” authorization, and the Federal Advisory Committee Act (FACA)—two statutes rarely, if ever, examined by IP scholars.

Fundamentally, this Article examines how international law gets written. A number of scholars have focused on how international law is incorporated into domestic legal regimes, but surprisingly few have looked to how domestic legal regimes have been translated into international law. I explain that the USTR employs a captured form of “regulatory paraphrasing”—where an agency paraphrases U.S. legislation for external consumption—that has bad consequences for international copyright standards, including creating a rigid international copyright regime from which the U.S. itself has already departed.
