Although the final verdict is still out on this approach to copyright law revision, already there is ample reason to suspect that it threatens the very enterprise of such legislation, at least as that enterprise has conventionally been understood, by creating within Title 17 a series of highly specific "mini-statutes" whose content is not shaped by policy concerns but instead by the strength of the contending lobbies. Certainly, if this trend toward "Balkanization" in copyright legislation continues, it will only become more and more difficult for anyone — let alone a nonspecialist — to make coherent sense of the overall statutory scheme.[22]

The next two sections of this book will explore in greater detail two of the sources which are exerting pressure for further changes in U.S. copyright law: developments in international law, and developments in information technology (specifically, digital technology). How Congress responds to these pressures will be an indication of whether our copyright law can continue to grow by accretion, or whether, on the other hand, it will soon require another general revision, beginning from first principles.

§ 1.04 Copyright in a Changing World

As the foregoing history amply demonstrates, American copyright law today has been shaped by many forces. The most obvious among these influences, and historically the most important, have been the domestic ones, including the growing economic importance and political influence of the "copyright industries," on the one hand, and various powerful competing ideologies of intellectual property, on the other. In part because of these influences, the development of U.S. law has followed a path somewhat different from that taken by the laws of other nations. Today, however, our copyright law is increasingly subject to international pressures, and — partly as a result — its future path may converge with that of other nations. The present section of the casebook explores: (1) some of the discrepancies that appear when U.S. copyright is contrasted with the copyright law of other countries; (2) current U.S. treaty obligations regarding the law of copyright; and (3) the prospects for continued, and indeed increased, harmonization of U.S. copyright laws with those of the rest of the world, particularly our trading partners.

[A] A Comparative Law Overview

As we have noted already, the classically dominant view of American copyright law is instrumental in character: Copyright is seen as a means by which the general welfare is advanced through the provision of economic incentives to creators (and, we might add, disseminators) of new works of the intellect.

The analogue of copyright in the civil law world is known as "droit d'auteur" in France, "derecho de autor" in Spain, and "Urheberrecht" in Germany — all terms, which translated, mean "authors' (or author's) rights." The difference in terminology between the common law "copyright" and the civil law

[22] *See* Litman, *Revising Copyright Law in the Information Age*, 75 Or. L. Rev. 19 (1996).

"authors' rights" is more than linguistic happenstance. Rather, it suggests a fundamentally different emphasis between the two legal traditions in their attitudes about works of authorship.

There are, to be sure, important differences. Just as, in common law "copyright" jurisdictions like the United States, the provision of protection to authors (individual or corporate) and their successors conventionally is justified as a means to promote the general welfare, in "authors' rights" jurisdictions the protection of literary and artistic property is justified predominantly in terms of authors' inherent entitlements — indeed, as an extension of their personalities. And the laws of "authors' rights" countries embrace doctrines that clearly reflect such an emphasis. Thus, in the civil law world, an author is deemed to have a moral entitlement to control and exploit the products of the author's intellect, including the right of association of the work with the author's name and the right to prevent the mutilation of the author's artistic vision. Likewise, many civil law countries balk at the practice (familiar in common law jurisdictions) of extending legal protection to the works of corporate "authors" as such, insisting that, to be eligible for protection, a creation must be designated as the work of one or more individual authors.

Like all dichotomies, however, the distinction between the animating philosophies which undergird the laws of literary and artistic property in "copyright" and "authors' rights" jurisdictions has its utility — and its limitations. Historically, the distinction may never have been as clear-cut as it is sometimes made out to be.

For one thing, there is evidence that, even in the countries most strongly associated with the civil law "authors' rights" tradition, the true story of the origins and development of laws of literary and artistic property is far from mono-thematic. Although literary property rights in France had an interesting, albeit limited, pre-Revolutionary history, they took hold in earnest between 1791 and 1793, when the Revolution, having abolished the "privileges" of the Old Regime in 1789, proceeded to reinvent literary and artistic property. In a famous speech to the National Convention in 1793, Joseph Lakanal declared that "authors' rights" in the "productions of genius" were justified as being, "of all properties, the least disputable, the one whose growth can neither undermine republican equality nor offend freedom. . . ." Thus, the idea of "authorship" was invoked in justification of a "natural right" so obvious and important that it should survive even a revolutionary transformation of social life.

Still, the reestablishment of authors' rights in post-Revolutionary France was not justified on the basis of natural entitlement rhetoric alone. The author was not viewed solely as an atomistic individual responsible only to himself or herself and his or her art. In addition to the celebration of genius, the debates over the reestablishment of copyright in post-Revolutionary France also invoked a public purpose rationale: The artist deserves protection, in part, because he or she is a kind of *de facto* public servant, who has consecrated his or her career to serving the information needs of the masses.

Another prominent theme in the foregoing discourse was artistic responsibility. According to this argument, only if the creator of a work were regarded

as its proprietor could he or she be held to account for its content — reasoning which calls to mind the ways in which the state's interest in controlling the content of literary works became intertwined with the proprietary motive in the prehistory of copyright in Great Britain. In other words, the philosophical origins of French authors' rights laws are a mixed bag.

Closer to home, there is substantial evidence that the American law of literary and artistic property, which is often taken as the paradigm of the common law "copyright" approach, was itself shaped by the push-and-pull between competing visions of what such a body of doctrine could and should be designed to accomplish. One of those visions — stressing the instrumental basis of copyright — came to us as a highly specific element of our English legal heritage. The other — stressing the inherent entitlement of "authors" — is traceable to the general background of English and Continental social thought against which copyright laws everywhere in Europe developed, and specifically to the early modern vision of social life which has been described as "possessive individualism."

Before the emergence of 18th Century Romanticism, which was the specific literary and artistic correlate of "possessive individualism," most creative workers had been regarded — and had regarded themselves — as craftspersons laboring (along with others) toward the creation of a product.[1] As the 18th Century progressed, however, some creative workers were singled out for privileged treatment, a development illustrating the emerging "conception of the individual as essentially the proprietor of his own person or capacities."[2]

Throughout Western Europe, including Great Britain, writers and critics influenced by these trends developed a new, celebratory vision of "authorship" as a special calling, at once above and apart from ordinary human activity. The concept of "authorship," in turn, was the organizing concept around which new laws of intellectual property were articulated, and formed part of the heritage of United States copyright law. After literary Romanticism reached its zenith in England in the early 19th Century, its exponents (most notably, William Wordsworth) became deeply involved in the Parliamentary campaign for the extension and expansion of copyright. But even decades earlier, the currents of thought which fed the Romantic movement were already flowing.

One such current was the emphasis on "originality," which marks much Romantic writing about the nature of "authorship." The Romantic "author" was expected to break with the past, and to offer something new and literally unprecedented as proof of genius.[3] The effect of this development was to celebrate certain kinds of creative enterprise, but also to denigrate other efforts as less worthy.[4] This emphasis has left its highly visible traces in the

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[1] *See* Woodmansee, *The Genius and the Copyright*, 17 Eighteenth Century Studies 425 (1984), *reprinted in* M. Woodmansee, THE AUTHOR, THE ARTS, AND THE MARKET (1993).

[2] C.B. MacPherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 3 (1962).

[3] For a discussion of this development, see Woodmansee, *The Genius and the Copyright*, 17 Eighteenth Century Studies 425, 429 (1984); B. Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 23 (1967); and Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest*, 28 UCLA L. Rev. 715, 730 n. 33 (1981).

[4] Prof. Jane Ginsburg has pointed out the "Romantic literary commonplace [that characterizes] the work drawn from nature or experience as a 'copy,' and the imitation of the original as the 'copy of a copy.'" Ginsburg, *Creation and Commercial Value: Copyright Protection for Works of Information*, 90 Colum. L. Rev. 1865, 1882 n. 57 (1990).

jurisprudence of common law "copyright" laws, as well as that of civil law "authors' rights."

More importantly still, just as the two generic approaches to artistic and literary property share more in the way of intellectual history and basic philosophy than is commonly acknowledged, today the laws of common law and civil law countries are, as a doctrinal matter, converging to a significant degree. This trend is, in part, attributable to recent developments in the law of international copyright, summarized below, which are multiplying the minimum standards to which national laws must conform, thus promoting greater uniformity among such laws. In 1985, for example, France (an "authors' rights" country *par excellence*) introduced into its law a very "copyright"-like approach to the protection of computer software; and, in 1988, Great Britain (where "copyright" originated) revised its statute from top to bottom, going a long way toward achieving harmonization with the "authors' rights" laws of its Continental neighbors. As we will see, recent legislation in the United States, especially the enactment of "moral rights" for visual artists in 1990, also reflects this tendency toward convergence.

In addition, the tendencies just remarked upon also are observable if we look still further afield, to countries whose cultural and legal arrangements are profoundly different from those of the West. In feudal China, for example, Confucian literary and artistic culture focused on interaction with the past and discouraged bold innovation. Similarly, after 1949, the new socialist legal culture of the People's Republic of China proved hostile to the development of a system of private proprietary rights in works of the mind.

More recently, however, as a result of intersecting foreign diplomatic pressures and domestic economic developments, China has adopted a copyright law which is virtually indistinguishable, in many pertinent respects, from that of most Western nations, along with a set of administrative and judicial institutions to back up the law's mandates. Moreover, as of 1992, China became a party to the Berne Convention for the Protection of Literary and Artistic Property, the major international treaty in the field (described at greater length below). Although problems remain with respect to copyright law enforcement in China, especially where works of foreign origin are concerned, the transformation of Chinese copyright law (like that of other countries in Southeast Asia) over the last two decades is a noteworthy development — and testimony to the strong forces promoting the convergence of national laws governing literary and artistic property.

[B] Major International Treaties Involving Copyright

A little more than a century ago, the United States was the world's most notorious "pirate" nation. Today, no country is more active in the diplomatic effort to develop an orderly and responsive international regime of copyright protection. The change has everything to do with economics, and little or nothing to do with ideology. As things now stand, the United States is the world's largest producer and exporter of copyrighted works. As copyright, and other forms of intellectual property, have become a larger component of world trade, they have come to represent a bright spot in the otherwise unfavorable

U.S. balance of payments. This changed situation is reflected in U.S. adherence (effective March 1, 1989) to the Berne Convention, the oldest — and still the preeminent — multinational copyright treaty, and in its subsequent leadership in developing a series of important new international agreements in the field.

The present section provides an overview of the major international conventions involving copyright, with particular emphasis on the provisions of the Berne Convention and on various implementing provisions of U.S. law. To keep yourself current on these matters as they develop, a good place to begin is U.S. Copyright Office *Circular 38a: International Copyright Relations of the United States* (revised regularly).

[1] In General

There is not now, nor has there ever been, a "universal" copyright system. Instead, an author who wishes to protect his work abroad typically must look to the pertinent national laws of the countries where protection is sought. These national laws, in turn, are stitched together by a series of international agreements prescribing the conditions under which countries must give recognition under their domestic laws to works of foreign origin.

Like the most recent international copyright treaties, the earliest examples of such agreements were responses to the phenomenon of cross-border "piracy." Beginning in 1827, a series of agreements among the various German states guaranteed what is sometimes called "formal reciprocity" of protection: that works originating in a signatory state would be assimilated, for purposes of domestic law, to those created by nationals of another signatory. Subject to certain qualifications, this approach was the basis, over the next half century, of a series of bilateral agreements which eventually covered most of Europe and parts of Latin America. And it remains the fundamental principle of international copyright today, under the rubric of "national treatment."

The protection, which such a network of bilateral treaties could offer authors in countries *other than their own*, was far from comprehensive or systematic.[5] It fell far short of being a truly universal scheme — and it was for just such a scheme that European authors' organizations began to campaign in earnest in the 1850s. Their goal was nothing short of establishing world-wide recognition that copyright is a natural and indefeasible right which arises in the first instance — without the intermediation of the state — from the very act of "authorship" itself. Soon the drive for "universal copyright" was substantially co-opted by publishers, for whom a strong international legal regime represented an important precondition for the development of a world market in books.[6] The eventual result was the 1886 Act of the Berne Convention for the Protection of Literary and Artistic Works.

In one sense, the Berne Convention fell short of meeting the expectations of those who had campaigned most earnestly to secure it. Neither the original Act of Berne, nor any of the five revisions of the Convention, created a

[5] *See* S. Ricketson, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 1886–1986, at 39 (1987).

[6] *See generally* N.N. Feltes, LITERARY CAPITAL AND THE LATE VICTORIAN NOVEL (1994).

universal law of copyright. Like the treaties that it supplanted, Berne is premised on the principle of "national treatment." At the same time, however, the Berne Convention, as it has evolved over more than a century, has greatly improved the level of protection for copyright worldwide. This has been accomplished in two ways: first, by establishing an international copyright regime which is truly multilateral (rather than bilateral or regional), and second, by introducing the concept of Convention "minima," which supplement the principle of national treatment by setting a "floor" below which signatory countries may not go in extending protection to qualifying foreign works. As we shall see, these minima deal with issues of subject matter, duration, formalities, and other crucial matters which help to determine the real substance of any regime of copyright protection.

[2] The United States and International Copyright

Until 1891, the United States had no international copyright relations. Indeed, the American publishing industry thrived during much of the 19th Century on the basis of unauthorized, "piratical" reprints of British "bestsellers." Not until the "elite" U.S. publishing establishment began to feel economic pressure from unregulated competition in the reprinting of British books would the laws undergo change.[7]

In 1891, the so-called "Chace Act," an amendment to U.S. copyright law, authorized the President to extend protection, by proclamation, to works originating in particular foreign countries, on the condition that those countries, in turn, provide adequate protection for the works of U.S. authors. Later, after a number of such proclamations had been issued, the United States began entering into a series of bilateral copyright agreements with other countries.[8] These piecemeal arrangements became increasingly less adequate, however, in an ever-shrinking world of new communication technologies and distribution mechanisms, and in the post-World War II era, when demand for U.S. works exploded. By the 1950s, when the United States emerged as a major exporter of copyrighted works, the need for American participation in a truly integrated system of international copyright had become apparent.

In response to these developments, a group of states convened by UNESCO between 1947 and 1952 developed a new treaty — the Universal Copyright Convention ("U.C.C.") — with the specific objective of drawing previously reluctant nations into the fold of international copyright. The United States joined in 1955 (and the Soviet Union in 1973). This "junior" version of the Berne Convention was distinguished primarily by the fact that U.C.C. minima were considerably less exacting. Nonetheless, it was (at least in part) the experience of the United States with the U.C.C. that eventually helped it muster the political will to take the larger step into the Berne Convention in 1988.

One important feature of the U.C.C. is the so-called "Berne Safeguard Clause," which prohibits a Berne Convention country from denouncing Berne

[7] *See* J. Barnes, AUTHORS, PUBLISHERS AND POLITICIANS: THE QUEST FOR AN ANGLO-AMERICAN COPYRIGHT AGREEMENT, 1815–1854 (1974).

[8] For a cumulative list of bilateral arrangements, along with other details on the position of the United States in the world copyright system, see *Copyright Office Circular 38a.*

and relying on the U.C.C. in its copyright relations with members of the Berne Convention. Art. XVII & App. Decl. This provision resulted from the efforts of Berne Union members who feared that the U.C.C. was a step backward and wanted to prevent Berne principles from being undermined by its members' adherence to the new treaty. Thus, the United States, now a member of Berne, cannot look to the U.C.C. for protection of any work originating from a Berne country, even though that country might have adhered also to the U.C.C. As a result, the U.C.C. is of relatively little practical importance in U.S. international copyright relations today, when almost all U.C.C. signatories are also parties to the Berne Convention and/or the Agreement on Trade-Related Aspects of Intellectual Property, or "TRIPS" (about which we have more to say below).[9]

[3] The Berne Convention

Administration of the Convention

The current text of the treaty, to which the United States has adhered, is the Paris Act of 1971. The Berne Convention is administered by the World Intellectual Property Organization ("WIPO"), an intergovernmental organization with headquarters in Geneva, Switzerland. WIPO is a specialized agency within the United Nations system. Its central role is to conduct studies and provide services designed to facilitate protection of intellectual property. Its Director General and staff oversee the "Berne Union," which was created by the Berne Convention.

Basic Provisions (Paris Text 1971)

The first article of the Paris Act recites (as has each Act of the Berne Convention since its inception): "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." This language clearly associates the Berne Union with the philosophy of "authors' rights," rather than the competing "copyright" approach to the conceptualization of literary and artistic property. In general, an aspiration toward improving and harmonizing the protection of literary and artistic property worldwide has driven the activities of the Berne Union since it began.

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[9] Thus, for example, *Copyright Office Circular 38a: International Copyright Relations of the United States (May 1999),* identifies only 9 countries (including Andorra!) as parties to the U.C.C. but not to Berne — and four of those, according to WIPO, have since adhered to Berne. *See www.wipo.org/treaties/documents/english/word/e-berne.doc.* Like the U.C.C., the Buenos Aires Convention, to which the United States and 17 Latin American nations adhere, is of little current practical importance. For an overview, see Rinaldo, *The Scope of Copyright Protection in the United States Under Existing Inter-American Relations: Abrogation of the Need for U.S. Protection Under the Buenos Aires Convention by Reliance Upon the U.C.C.*, 22 Bull. Copyright Soc'y 417 (1975). While many Latin American nations participated in a revision of the Buenos Aires Convention signed in Washington in 1948, the United States decided not to adhere to the new text and thus probably doomed the possibility of any effective inter-American copyright system. Publishers are cautious creatures, however, and old habits die hard: The casebook authors suspect that, if you turn to the back of this work's title page, you will find a Buenos Aires-inspired "All Rights Reserved" notice — just in case.

Berne's substantive provisions are found generally in the Convention's next 20 articles, which are followed by administrative provisions and an appendix incorporating special provisions for developing countries. The substantive provisions include both specific and general obligations imposed on its membership. Other rules are optional with the member country. Like the U.C.C., the Berne Convention is based on national treatment and compliance with Convention minima. As the following summary will reveal, however, Berne has established Convention minima more substantial than those found in the U.C.C.:

(a) *Subject matter.* The scope of subject matter that a member country must protect under Berne is stated broadly. It encompasses "literary and artistic works [which] shall include every production in the literary and artistic domain, whatever may be the mode or form of its expression," Berne Convention Art. 2(1) (Paris Text), including, in addition to *belles lettres,* scientific works, architecture, and works of applied art. The Convention expressly excludes from obligatory protection "news of the day or . . . miscellaneous facts having the character of mere items of press information." Art. 2(8).

(b) *Basis of protection.* The Berne Convention requires that protection be given to published or unpublished works of an author who is a national of a member state. Berne protection also is required for a work of a non-national of a member state if the work is first published in a member state or simultaneously published in a non-member and a member state. A work is published "simultaneously" if it is published in a member country within 30 days of its first publication in a non-member country. Art. 3(4).

Even before United States entry into Berne, American authors were able to enjoy Berne privileges by simultaneously publishing their works in a Berne country — the so-called "back door to Berne." Simultaneous publication did not, however, prove to be the panacea it may have appeared at first glance. First, it could be costly, thereby precluding less wealthy authors from availing themselves of the privilege. Second, seeking protection under the simultaneous publication privilege involved various definitional and practical uncertainties.

(c) *Preclusion of formalities.* Berne requires that the work be protected without formalities outside the country of origin. Thus, if a work originates in a member country, it must be protected in all Berne countries without any prerequisite formalities. Art. 5(2). On the other hand, Berne does *not* govern protection of works *in their country of origin.* This means that formalities *can* be imposed on a work if it "originates" (in the special Berne sense of that term) within the country requiring compliance.

(d) *Minimum term of protection.* The Berne Convention has established a minimum term of protection of life plus 50 years, or 50 years from publication for cinematographic works and for anonymous and pseudonymous works. Art. 7(1)-(3). As is generally the case for all Berne provisions, the member country can grant a term of protection in excess of the minimum term. Art. 7(6).

(e) *Exclusive rights.* Berne requires that certain exclusive rights be protected under national law. These rights are, on the whole, quite similar to the array of economic rights found in § 106 of the Copyright Act of 1976. *See, e.g.,* Arts.

8(1) (the translation right); 9(1) (reproduction); 11(1) and 11ter (public performance); and 12 (adaptation). But the exclusive rights stipulated by Berne are, in other ways, not as extensive as those granted by American law. For example, Berne is silent on the public distribution and display rights, both of which are provided for specifically in the 1976 Act. *See* § 106(3),(5).

In addition to exclusive economic rights, Berne requires that certain "moral rights" be recognized "independently of the author's economic rights and even after the transfer of the said rights." The two rights recognized are the right of attribution and the right of integrity:

> [T]he author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Art. 6bis(1). Article 6bis(2) provides that these rights shall last at least until the expiration of the economic rights. This concept of "moral rights" is rooted in the civil law tradition of literary and artistic property, and it is one which the United States has been slow to recognize.

(f) *Limitations and exceptions.* In addition to providing minima relating to exclusive rights, the Berne Convention also addresses the question of what conditions the laws of member nations may impose on the exercise of those rights. Article 10, for example, mandates exceptions for "fair quotation" from copyrighted works, and permits (although it does not require) broad national law exemptions in favor of illustrative uses of copyrighted works in education (including educational broadcasting). In addition to these provisions, which are specific as to the uses authorized but general in their application to the full range of authors' rights, the treaty articulates in Article 9(2) a general standard for exceptions to the reproduction right only: Under its so-called "three-part test," such exceptions are allowed "in *certain special cases*, provided that such reproduction does not conflict with a *normal exploitation* of the work and does not unreasonably prejudice the *legitimate interests* of the author." Quite a wide range of different national law practices, from the "fair use" doctrine in the United States to compulsory licensing in Europe and elsewhere, have been justified under the Article 9(2) formulation. Yet another Berne provision, Article 10bis, authorizes limitations on the musical works recording right of the sort found in § 115 of the U.S. Copyright Act.

(g) *Enforcement.* As noted above, the member countries of the Berne Convention constitute a "Union" for the protection of authors. This provision reflects a fundamental tenet of the Berne system: that the most important role of the treaty would be as the "constitution" of a "society" of states committed to the project of protecting copyright, rather than as a mechanism for mandating that particular states take particular domestic actions in their domestic laws. Accordingly, the treaty encompasses only one coercive provision, and it is largely (if not wholly) ineffectual. Article 33(1) provides for the submission of treaty compliance disputes among member states to the jurisdiction of the International Court of Justice in the Hague. Article 33(2), however, specifically permits an acceding country to declare that it is not bound by Article 33(1), and a number of states (including the United States) have so declared. The ICJ has never heard a case arising out of the interpretation of

the Berne Convention. As a practical matter, each country is its own final arbiter in interpreting the Convention, as applied to the field of domestic law.

Evaluating the Berne Convention

In 1986, the 100th anniversary of the first Act of the Berne Convention initiated a period of taking stock. On the one hand, the Convention and the Berne Union obviously had provoked world-wide upgrading and harmonization (if only partial) of laws relating to literary and artistic property. On the other hand, the Convention was — in the view of some — beginning to show its age. For one thing, it was silent on some of the most urgent current issues in copyright law: protection of computer programs, for example, and the treatment of sound recordings. For another, the very reliance on consensus-building and moral suasion which had contributed so much to the treaty's success began to look like a drawback in a world where some nations were ignoring Berne's precepts in their day-to-day practices. Of what use against copyright "piracy," some wondered, was a treaty which even signatory states could disregard with relative impunity? Finally, by no means were all of the countries with significant roles in the international intellectual property economy members of Berne: In particular, by 1986, the Convention had yet to attract the adherence of many developing countries, to say nothing of the United States, the Soviet Union, or the People's Republic of China. But this, at least, was soon to change.

[C] U.S. Entry Into Berne

[1] The Incentives for Entry

Before its entry into Berne on March 1, 1989, the United States was the only major Western country not a party to the Convention.[10] By the late 1980s, however, the prospective advantages of U.S. membership in Berne were more apparent than ever. As the world's largest exporter of copyrighted works, the United States had a keen interest in stemming the rising tide of international piracy which threatened to engulf American copyright holders. The U.S. had, however, withdrawn from UNESCO, the U.N. organization which administers the U.C.C. Most (although not all) of America's major trading partners, meanwhile, were members of Berne. Despite (or because of) Berne's identified shortcomings, it appeared critically important for the United States to assume a major role in guiding the direction of international copyright matters by joining the world's preeminent copyright convention.

One obvious and immediate benefit of U.S. entry into Berne was that American authors and copyright owners would no longer have to rely on the costly and risky "back door to Berne" procedure to protect their works in the two dozen Berne countries with which the United States had no other copyright relations. For the most part, however, the tangible benefits that

[10] U.S. adherence seems to have set off a kind of chain reaction: China eventually joined in 1992, and Russia in 1995. As of February 4, 2003, the total number of Berne members stood at 150, up by more than 50% since U.S. adherence. *www.wipo.org/treaties/documents/english/word/e-berne.doc.*

Berne membership offered American copyright owners were ones which would not be felt immediately. Rather, they would manifest themselves over the long term, as the results of increasing U.S. influence over the direction of international copyright policy.[11]

[2] The Berne Convention Implementation Act of 1988

By 1988, major changes had transpired in American copyright law and attitudes, making it far easier for the U.S. to enter Berne than had formerly been possible. In particular, the provisions of the 1976 Act, especially with respect to copyright duration, had eliminated many of the impediments to Berne adherence by bringing U.S. law into compliance with some of the important minima of the Convention. The 1976 Act, however, still fell short of the goal of Berne compatibility. When Congress finally did take the step of preparing the implementing legislation necessary to place the United States in compliance with Berne, it took what has been termed a "minimalist" approach, meaning that it made only those amendments to American law that were deemed essential for compatibility with Convention obligations.[12] Even employing a minimalist approach, however, some important changes to U.S. law were seen as unavoidable.

The United States officially entered the Berne Convention on March 1, 1989. Section 2(1) of the B.C.I.A. declares that the Berne Convention is not self-executing under U.S. law. This means that rights and responsibilities relating to copyright matters will be solely resolved under the domestic law — state and federal — of the United States, rather than pursuant to the terms of the treaty as incorporated into the body of federal law.

[3] The Unfinished Business of the B.C.I.A.

Among other things, the minimalist approach taken by Congress in 1988 assured that some significant issues pertaining to the compatibility of U.S. law with Berne minima went unaddressed, namely, the issues of moral rights, architectural works, and retroactivity. In each instance, it took Congress some time before it addressed this "unfinished business." An example is the treatment of moral rights, recognized specifically in Article 6^{bis} of the Berne Convention. Congress stated that the protection afforded by American copyright, unfair competition, defamation, privacy and contract law, taken together, were sufficient to meet the needs of Berne adherence. Nonetheless, only two years later, the Visual Artists Rights Act of 1990, amending the Copyright Act of 1976, gave limited recognition to moral rights under federal law.

Another example is the approach taken in 1988 and thereafter in the treatment of architectural works, which are specifically included within Berne's itemization of mandatory subject matter. Art. 2(1). In 1990, Congress

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[11] *See* Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 Cardozo Arts & Ent. L.J. 47 (1989), and *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in* 10 Colum.-VLA J.L. & Arts 513 (1986).

[12] *See* 134 Cong. Rec. S14552 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy).

Public Law 100-568
100th Congress

An Act

To amend title 17, United States Code, to implement the Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes.

Oct. 31, 1988
[H.R. 4262]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Berne Convention Implementation Act of 1988. Copyrights. 17 USC 101 note.

SECTION 1. SHORT TITLE AND REFERENCES TO TITLE 17, UNITED STATES CODE.

(a) SHORT TITLE.—This Act may be cited as the "Berne Convention Implementation Act of 1988".

(b) REFERENCES TO TITLE 17, UNITED STATES CODE.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or a repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

SEC. 2. DECLARATIONS. 17 USC 101 note.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

SEC. 3. CONSTRUCTION OF THE BERNE CONVENTION. 17 USC 101 note.

(a) RELATIONSHIP WITH DOMESTIC LAW.—The provisions of the Berne Convention—

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) CERTAIN RIGHTS NOT AFFECTED.—The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—

(1) to claim authorship of the work; or

This Act is effective March 1, 1989.

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

added architectural works as another category of subject matter to § 102 of the Act.[13]

A third delayed reaction to Berne concerned "retroactivity." Article 18 of Berne provides that, in general, "[t]his Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of protection." Despite Article 18, section 12 of the B.C.I.A. provided that no retroactive protection would be available for any work that already had entered the public domain in the United States. As noted in § 1.03 above, Congress eventually resolved the retroactivity issue in 1994 in the Uruguay Round Agreements Act.

[D] Neighboring and Related Rights Conventions

A number of countries specifically recognize the concept of "related" or "neighboring rights" as a species of intellectual property which is, so to speak, adjacent to copyright, but not part of it.

Take, for example, the question of protection for sound recordings (or "phonograms"). Many, perhaps most, countries balk at recognizing the producers and performers associated with such works as "authors." As a result, the rights of such persons (and of broadcasters) are protected abroad under various schemes of "neighboring rights." The United States has entered into two such neighboring rights conventions: the Geneva Phonograms Convention and the Brussels Satellite Convention.

The 1971 Geneva Convention ("Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms") provides international protection against the unauthorized manufacture, importation, and distribution of phonorecords. The United States adhered effective in 1974. As of January 17, 2003, the Geneva Convention had 70 adherents.[14] In contrast, the 1961 Rome Convention ("International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations") provides a significantly higher level of protection than the Geneva Convention, and also protects performances, including those embodied in sound recordings. The United States has not ratified the Rome Convention (although, through January 16, 2003, 71 other nations had).[15]

The 1974 Brussels Convention ("Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite") was ratified by the United States in 1984. Its purpose is to combat the misappropriation of satellite signals on an international level. The Convention itself creates no new rights for programs transmitted by satellite. Rather, member nations agree to provide adequate protection against satellite signal piracy in their domestic laws. The United States views its copyright and communication laws as adequate in this regard, and thus has seen no need for implementing legislation. The Convention focuses on the unauthorized distribution of

[13] *See* Pub. L. No. 101–650 (Title VII), 104 Stat. 5089 (1990); H.R. Rep. No. 101–735, 101st Cong., 2d Sess. (1990).

[14] *www.wipo.org/treaties/documents/english/pdf/o-phongr.pdf.*

[15] *www.wipo.org/treaties/documents/english/pdf/k-rome.pdf.*

signals, not their unauthorized reception. The private reception of signals for private use is not a regulated activity. Moreover, the object of protection is the signal itself, not the content of the material transmitted by the signal. Thus, the Convention is designed to protect the emitter or carrier, not the copyright owner of the program material. As of January 1, 2003, the United States was one of 26 adherents to the Brussels Satellite Convention.[16]

[E] Intellectual Property and International Trade

[1] NAFTA and TRIPS[17]

Beginning in the early 1980s, the United States launched an initiative to tie international protection for intellectual property (including copyright) more closely to the developing law of international trade. Spurred by the recognition that revenues from intangible information products represented an increasingly important dimension of U.S. participation in the world economy, and by a perception that U.S. firms were losing huge amounts to foreign "piracy" as a result (in part) of the failure of existing international intellectual property agreements to provide mechanisms for the enforcement of the norms they proclaimed, a succession of U.S. administrations has pursued policies based on the proposition that failure to adequately and effectively protect intellectual property — especially foreign intellectual property — is as much an unfair trade practice as are high tariffs, dumping, or governmental subsidies. The goal in the following pages is to describe briefly two important new international agreements rooted in this new way of conceptualizing intellectual property norms.

Along with many other aspects of the trilateral economic trade relationship among the United States, Canada and Mexico, intellectual property was addressed in the 1992 North America Free Trade Agreement ("NAFTA"). Where copyright and neighboring rights are concerned, NAFTA requires copyright protection for computer programs and data compilations as literary works, protection for sound recordings, recognition of a rental right for sound recordings, limitations on compulsory licensing, and recognition of rights against unauthorized importation of copies of protected works. In general, NAFTA puts a special emphasis on *effective* enforcement of intellectual property rights and, in particular, it requires signatories to make pretrial injunctive relief available in intellectual property cases — something Mexican courts had been reluctant to do in the past.

Subsequent to NAFTA, in April 1994, the "Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods" — the so-called "TRIPS Agreement" — was adopted by 107 countries which had participated in the Uruguay Round of the General Agreement on Tariffs and Trade (the "GATT").[18] As of February 5, 2003, their number had risen

[16] *www.wipo.int/clea/docs/en/wo/wo025en.htm.*

[17] Technically, the proper abbreviation for the Agreement on *T*rade-*R*elated Aspects of *I*ntellectual *P*roperty Rights would seem to be "TRIPs." But the WTO Agreement, and most commentators, use "TRIPS." The casebook authors surrender. Hereinafter, TRIPS!

[18] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, April 15, 1994, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS — THE LEGAL TEXTS 6–19 (GATT Secretariat ed. 1994).

to 145.[19] This agreement has enhanced international intellectual property protection both substantively and procedurally.

Under the GATT regime, an ever-growing number of countries negotiated agreed-upon norms for freer international trade. When it was first organized following World War II, the GATT was concerned primarily with promoting the reduction of tariff barriers to the international movement of goods. Since then, however, periodic multilateral negotiations convened to revise the agreement (called "Rounds" in GATT terminology) have extended the scope of its norms to cover a variety of "non-tariff barriers" — for example, the 1979 Code on Subsidies and Countervailing Duties limits the ability of governments to provide unfair economic advantages to local industries exporting in international commerce.

By analogy, advocates of the development of intellectual property provisions within the GATT framework argued that lax enforcement of the intellectual property rights of foreign proprietors also could be considered a means by which states shelter local companies from international competition. The costs of producing and disseminating a work of authorship are great — and, in an age of increasingly sophisticated media, growing — but the cost of copying is diminishing. The large disparity between the creator's costs and those of the pirate result, it was argued, in trade distortions which could appropriately be addressed by the GATT.

Inclusion of intellectual property on the agenda of the Uruguay Round was advocated by the intellectual property industries of the United States, Europe, and other regions. These talks produced a new international pact establishing the World Trade Organization ("WTO"), which superseded the GATT and to which TRIPS was annexed. The final TRIPS Agreement, in turn, incorporated many (although not all) of the provisions which the major intellectual property-producing nations sought to have included, with respect to a full range of intellectual property rights. Where copyright and neighboring rights are concerned, signatories of the TRIPS Agreement commit themselves to the traditional principle of "national treatment." The TRIPS text incorporates by reference the bulk of minimum standards contained in Articles 1–21 of the 1971 Act of the Berne Convention, although it specifically excludes Art. 6^{bis} (on moral rights) — a concession demanded by the United States.

On the other hand, the copyright norms of TRIPS go beyond the minima of Berne in a number of important respects. For example, the agreement mandates protection for computer programs under copyright, while obligating parties to prohibit unauthorized commercial rentals of computer programs and audiovisual works. And where enforcement (a topic on which both Berne and existing neighboring rights treaties are largely silent) is concerned, TRIPS signatories commit themselves, in Articles 41–64, to a range of specific measures to effectuate intellectual property rights of all kinds.

Among the major attractions of the WTO approach to improving international protection for copyright (and other forms of intellectual property) is the fact that the basic WTO agreement provides procedures to resolve disputes

[19] *www.wipo.org/treaties/documents/english/pdf/s-wct.pdf.*

over the application of its norms. As already noted, the possibility of sanctions arising out of particular disputes relating to intellectual property rights is one element that is missing from the traditional multilateral arrangements. Although these sanctioning mechanisms have not always worked well in the past, they do function. And many believe that the threat of their invocation has been effective in a number of instances in which the actual need to apply them never arose. Moreover, the negotiators who participated in the Uruguay Round devoted considerable attention to upgrading and refining the generic dispute-resolution procedures administered by WTO, adding provisions for more effective mediation and arbitration, tighter deadline structures, and greater use of non-governmental experts on dispute-resolution panels, as part of the Uruguay Round.

[2] TRIPS and the Berne Convention

One initial critique of the initiative to incorporate intellectual property standards into the GATT framework grew out of a fear that to do so would undermine the continuing effectiveness of existing multilateral intellectual property treaties, including the Berne Convention.[20] That concern is addressed in the TRIPS Agreement itself, which calls upon the newly-created Council for Trade-Related Aspects of Intellectual Property Rights to consult and cooperate with the World Intellectual Property Organization ("WIPO"), which functions as the Secretariat of the Berne Convention (and other international intellectual property agreements). How the norms of TRIPS will interact with those of the treaties administered by WIPO, and how WIPO itself will interact with the World Trade Organization and the TRIPS Council, will be worked out over the next decade.

[3] The WTO Implementing Legislation

Closer to home, the major follow-up to TRIPS was the enactment of the Uruguay Round Agreements Act ("URAA") in late 1994,[21] implementing the United States' obligations — and then some — under the TRIPS agreement. Two principles regarding the Uruguay Round Agreements in relation to U.S. law must be mentioned. First, with respect to the United States at least, the Agreements are not self-executing. They must be implemented in domestic legislation. Second, the Agreements are not a treaty. The U.S. Senate did not give its advice and consent. Instead, the only action by the U.S. Congress was passage of the implementing legislation.

The URAA included three components related to copyright. First, it made permanent the ban enacted by Congress in 1990 on the rental of computer programs for purposes of direct or indirect commercial advantage. Second, it added to Title 17, United States Code, a new Chapter 11 that provided a civil

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[20] *See generally* Leaffer, *Protecting American Intellectual Property Abroad: Toward a New Multilateralism*, 74 Iowa L. Rev. 723 (1991); Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 Cardozo L. & Ent. L.J. 47, 67–72 (1989); and *Gatt or WIPO? New Ways in the International Protection of Intellectual Property (Symposium at Ringberg Castle, July 13–16, 1989)* (F.K. Beier & G. Schricker eds., IIC Studies 1989).

[21] Pub. L. No. 103–465, 103d Cong., 2d Sess., 108 Stat. 4809 (Dec. 8, 1994).

cause of action for performers to prevent the "bootlegging" of live performances. Third, it provided retroactive protection for works whose source country is a member of the Berne Convention or the World Trade Organization or is the subject of a presidential proclamation, if the subject works are in the public domain in the United States through failure to comply with U.S. formalities, lack of national eligibility, or, in the case of pre-1972 sound recordings, lack of subject matter protection. These provisions will be discussed at greater length in succeeding chapters of the casebook.

[4] Updating the Berne Convention

Over its 100-year-plus life, the Berne Convention has undergone several major revisions, the most recent being the Paris Act of 1971. The revision process, requiring the development of consensus among the differing interests of Berne members, has become increasingly difficult, if not impossible, to carry out. Beginning in 1995, the United States and a number of European countries pressed for the expansion of the ongoing discussions of new treaties to include a new so-called "digital agenda."

In December 1996, two new treaties, "The WIPO Copyright Treaty" and "The WIPO Performances and Phonograms Treaty," were concluded pursuant to a WIPO Diplomatic Conference. The Copyright Treaty provides for the protection of computer programs as literary works, and for copyright in original (as distinct from non-original) compilations of data. It obligates ratifying states to recognize a general right of distribution and a rental right limited to computer programs, movies and "works embodied in phonograms," and is itself subject to a number of significant exceptions. It also bars ratifying states from taking advantage of Berne Convention provisions which otherwise would permit them to allow lesser terms of protection to phonograms than to other copyrighted works. The Performances and Phonograms Treaty breaks significant new ground. In particular, performers fare better under the new treaty than under TRIPS. Not only are they afforded more extensive economic rights, but the text provides explicitly for the basic moral rights of the performer "as regards . . . live aural performances fixed in phonograms."

With respect to digital issues, the relevant provisions of the two treaties approved in December 1996 are substantially identical. The relevant obligations in the final acts of the treaties include a duty to recognize a right of "communication to the public," along with a limited mandate for the protection of "copyright management information" against tampering, and another relating to "circumvention" of technological safeguards.[22]

The two new treaties now are being considered at the domestic level around the world. In the United States, the Senate gave its advice and consent to the treaties on October 21, 1998. Implementing legislation, including provisions on "anti-circumvention" and "copyright management information" (but not moral rights of performers), was signed into law as the Digital Millennium Copyright Act ("DMCA") on October 28, 1998. The WIPO Copyright Treaty entered into force on March 6, 2002. As of April 15, 2003, WIPO counted a

[22] For a detailed discussion of the Diplomatic Conference and its outcome, see Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369 (1997), and *Big Media Beaten Back*, WIRED 5.03, at 61 (1997).

total of 41 adherents. The WIPO Performances and Phonogram Treaty entered into force on May 20, 2002. The May 1, 2003 total of adherents for this agreement likewise was 41.[23]

Of course, the WIPO treaties leave other countries bound by them with substantial latitude as to how their general commands will be implemented in national law, especially where the issue of "anti-circumvention" legislation is concerned. Currently, the United States is attempting to "lock in" the formula adopted in its own DMCA through bilateral "Free Trade Agreements" (or FTAs) with various individual trading partners. In June 2003, such treaties had been concluded with Singapore and Chile, and were awaiting Senate ratification. FTA negotiations also are underway with Australia, Central America (CAFTA), Morocco, and the South African Customs Union. *See Capitol Hill*, Washington Internet Daily, June 11, 2003, at p. 1. Intellectual property provisions also are likely to figure significantly in the discussions of a major new hemispheric trade pact, the Free Trade Area of the Americas Agreement, which will be the subject of a November 2003 ministerial conference in Miami. (For the draft provisions and other information about the FTAA, see *www.ftaa-alca.org*.) The United States and other developed countries may also push for amendments to the TRIPS Agreement during the current Doha Round of World Trade Organization negotiations.

[5] U.S. Participation in the New Order

The developments described in this chapter, of which the new WIPO treaties are only the most recent, suggest that the character of international copyright regime continues to undergo significant change. A system which traditionally has emphasized national treatment, supplemented by a relatively few and easily satisfied treaty minima, is moving closer to one with an emphasis on true harmonization of national laws. Moreover, as a result of TRIPS and its dispute-resolution procedures, there now exists a procedure which will yield authoritative interpretations of international norms and conclusive adjudications of the compliance of particular countries with those norms.

The question is whether, by relinquishing the historical peculiarities of U.S. domestic copyright laws, the United States has gained the correspondingly greater benefits that international harmonization may offer U.S. works in the global marketplace.

§ 1.05 Copyright and the Digital Challenge

[A] Looking Back

Over its several centuries of existence, copyright law has negotiated successfully a series of "crises" precipitated by changes in information distribution by adapting itself to new technological circumstances. In the last century or so, for example, copyright has proved flexible enough to deal effectively with the new media of photography, motion pictures, and sound

[23] *www.wipo.org/treaties/documents/english/pdf/s-wct.pdf* and *www.wipo.org/treaties/documents/english/pdf/s-wppt.pdf* respectively.

recordings. The crisis of the moment, however, may pose a greater challenge by far to the adaptability of the copyright system.

As the term "copyright" itself suggests, the basic concepts of this body of law are rooted in the circumstances of print-on-paper information technology. At the beginning of this chapter, we suggested that the relationship between information technology and intellectual property law is a complex one. Advances in technology help to bring about changes in the life of society. These, in turn, generate demand for new legal regimes. As we also noted, the earliest copyright laws arose in response to the chaotic economic and cultural conditions caused in part by the spread of movable type throughout Europe. Since the crisis of that moment involved the multiplication and distribution of physical books, it was perhaps inevitable that these laws would be organized around the concept of publication: *first publication* was the act which caused copyright protection to attach, and the essential right of the copyright owner was the right to regulate *subsequent publications.* Even our ideas about limitations on and exceptions to the "copy" right — such as fair use and first sale — developed from the assumption that control over publication is central to copyright ownership.

Even today, despite the fact that the Copyright Act of 1976 has deprived publication of its function as the triggering mechanism for copyright protection, the jurisprudential superstructure of copyright doctrine remains based on the publication concept. Thus, at least until recently, unauthorized publication — the multiplication and distribution of physical copies — has been the most pressing practical concern of the U.S. copyright industries, against which most of their domestic and international enforcement campaigns were directed.

[B] Digitization and the Revolution in Information Processing

As copyright and the world move into the Third Millennium, a development in information technology, which may have as much potential for social transformation as did movable type, is leading some to question the continued relevance of traditional copyright law. That development is the digitization of information — *i.e.*, its description by means of strings of binary code — which was ushered in by the invention and popularization of digital computers. On paper, digital code is expressed symbolically as zeros and ones; electronically, it is embodied in series of "on" and "off" settings. A variety of different media may be used to fix information in electronic form: magnetic tape, floppy disks, silicon chips, CDs and CD-ROMs, and so forth. Whatever the medium, it is in this so-called "machine-readable" form that digital code can be recognized by electronic devices, such as computers, which in turn may be programmed to respond in various ways to digital signals.

Thus, one consequence of digitization was to introduce an entirely new category of information products — computer programs — into the marketplace, with disquieting consequences for schemes of legal protection developed in response to earlier technologies. Yet another consequence of the advent of digital code was to create a powerful new means by which to store large

amounts of information of all kinds. In fact, all the varieties of "works" previously known to human culture (and to the law of copyright) can be — and, increasingly, are being — expressed in digital form. Such records, of course, can be retransformed (with the help of a properly programmed machine) into recognizable text, image, or sound.

Digital information technology is to be contrasted with the analog technology which preceded it, and which of course persists. Take the example of a photographic image. Prints, negatives, screen projections, and cathode tube displays are all alternative potential analog embodiments of an image. What they have in common is that they represent that image — its shape, density, color, and so forth — directly to the human sense of sight. Now consider an image encoded on a digital medium — for example, a CD-ROM. No matter how hard one studies the surface of the disk, no matter at what magnification and no matter how bright the light, no representation of the image can be discerned there. What the CD-ROM contains is not a representation but an extraordinarily detailed description of the image, from which it can be rapidly reconstructed by electronic means.

It is precisely because they are descriptions rather than representations that images recorded in digital formats can be manipulated with such relative ease. To alter the texture of the background or the shape of a foreground object in an analog record of a photographic image might take a skilled retoucher hours or days, involving as it does the painstaking alteration of every affected portion of the picture. Beginning with a digitized image, the same result may be achieved with photo processing software in minutes, by changing the descriptive parameters of the digital record. That such digital records describe rather than represent information gives rise to some of the most important implications of the new technology for the law of intellectual property, to be discussed at greater length below.

[C] Digital Networks and Their Importance

First, however, we must note another aspect of digital technology with significant repercussions in the law: the development of digital networks. If all digital devices (such as computers) were free-standing rather than interconnected, the impact of digitization — though significant — would be limited. In fact, however, this is not the case. Today, more and more devices are linked by wired and wireless connections to form small and large networks over which digitized information can be exchanged without any need for the transfer of a physical object.

In a network environment, "packets" of information are routed from the memory of the sender's computer to that of the receiver's, either directly or, more commonly, by way of a series of electronic way-stations ("servers" and "routers"). The existence of these networks depends on the wide acceptance of common standards governing how information is to be broken down, sent, and reassembled. Collectively, these linked networks form what is called the "Internet."[1] These developments have been accelerated dramatically by the

[1] The history of the Internet is a subject unto itself. As noted above, the Internet is made possible through the acceptance of common standards — such as the Transmission- Con-

creation of the multimedia branch of the Internet, the World Wide Web, by a researcher at the CERN physical laboratory in Geneva, Switzerland, in 1990 — and by the popularization of the Web which followed the development of "web browser" software.

Today, use of the Internet is growing exponentially. What was fifteen years ago an obscure (albeit powerful) communication system patronized by a small number of computer scientists and other devotees of digital technology has been transformed into the newest mass medium. Good estimates of the extent of current use are hard to come by, but recent studies indicate that, in 2002, there were between 580 and 655 million Internet users worldwide, over 168 million of them in the United States. Projections for 2004 suggest the worldwide total may then approach one billion.[2]

[D] Digitization and Intellectual Property: A Typology of Issues

The technology of digitization has produced a tide of economic and cultural trends which challenge many of copyright's most fundamental conceptions. Throughout this casebook, we will be highlighting digital technology and its implications for the law of intellectual property.[3] At the outset, however, it may be well to try to isolate the characteristics of digital information technology that require a response from the legal system. In 1990, Prof. Pamela Samuelson presciently summarized these qualities as follows:

I. ease of replication

II. ease of transmission and multiple use

III. plasticity of digital media

IV. equivalence of works in digital form

V. compactness of works in digital form

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trol Protocol (TCP) and the Internet Protocol (IP). A recent account of the early years of the Internet describes its development this way:

> Because [a] growing conglomeration of networks was able to communicate using the TCP/IP protocols [which were in place by 1978], the collection of networks gradually came to be called the "Internet," borrowing the first word of "Internet Protocol."
>
> By now, a distinction had emerged between "internet" with a small *i*, and "Internet" with a capital *I*. Officially, the distinction was simple: "internet" meant any network using TCP/IP while "Internet" meant the public, federally subsidized network that was made up of many linked networks all running the TCP/IP protocols. Roughly speaking, an "internet" is private and the "Internet" is public. The distinction didn't really matter until the mid-1980s when router vendors began to sell equipment to construct private internets. But the distinction quickly blurred as the private internets built gateways to the public Internet.

K. Hafner & M. Lyon, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET 244 (1996).

[2] Estimates of Internet usage are usefully collected at *cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_151151,00.html*.

[3] Outside the precincts of intellectual property law, a debate continues over the real social value of the "digital revolution." *Compare* M. Stefik, INTERNET DREAMS: ARCHETYPES, MYTHS AND METAPHORS *and* N. Negreponte, BEING DIGITAL (1995), which present a relatively optimistic picture of the social and cultural potential of the new technology, *with* C. Stoll, SILICON SNAKE OIL (1995); *and see* I. de Sola Pool, TECHNOLOGIES OF FREEDOM (1983), for a balanced discussion of the potential of networks to promote democratic values.

VI. new search and link capacities[4]

Increasingly today, copyright law must struggle to accommodate the consequences of a host of new realities that flow from the foregoing characteristics of digital information technology. These consequences include, for example, the ability to represent digitally, and to combine and recombine seamlessly, works of all kinds and categories, *i.e.*, the somewhat inaptly named "multimedia" phenomenon. Even more significantly, digital technology provides the means to communicate such information in new and unprecedented ways — through electronic networks in general, and through the Internet (the "network of networks") in particular — free from historic constraints of time and location.

[E] Digital Copyright at Home and Abroad

Corporate providers of copyrighted content — the so-called "copyright industries" which produce motion pictures, make sound recordings, publish books, and distribute software — have had a mixed response to the growth trend in Internet usage. In their view, the network environment is a place of both great opportunity and tremendous risk. On the one hand, they have

[4] The brief excerpts below provide at least the flavor of Samuelson's typology of "characteristics":

Ease of Replication. While all the improved reprography technologies [photocopying, sound and video recording, computers] pose threats . . . to copyright owners, what makes works in digital form so much more threatening is that the same technology one needs to use the digital work is the technology that can be used to make multiple copies of the work — and even more frighteningly, can be used to produce "perfect" copies.

Ease of Transmission and Multiple Use. When a single pirate copy can be put, not only in an isolated personal computer at a user's home, but loaded into a computer hooked up to a network of computers or a network of users of a larger computer system, each of whom can have ready and virtually simultaneous use of the same copy, copyright owners are understandably more concerned about controlling pirate copies.

Plasticity of Digital Media. [T]he copyright owner now has more reason to be concerned about what an individual user may do with his or her copy of the work. What if the user now customizes it and resells it to someone else? What if the user changes it in such a way that it misrepresents what the author meant to say?

Equivalence of Works in Digital Form. [O]nce in digital form, works protected by copyright are going to become less and less differentiated by type and more and more equivalent to one another because they will now all be in the same medium. This equivalence of works in digital form will make it easier and easier to combine what have been thought of as separate categories of works to create a work difficult to classify.

Compactness of Works in Digital Form. Works stored in digital form are essentially an invisible string of stored electrical voltages (the high-voltage corresponding to an encoded "A1," the low to "O," which are binary representations of the individual elements of the work, whether they be letters or numbers or a point on a bit map). By comparison with books and other traditional media, works in digital media do not take up much space. . . . The compactness of digital data will . . . allow new assemblages of materials that in a print world would be unthinkable.

New Search and Link Capacities. Parts of [a digital] text can be linked to other parts of the text, so that one can, with the "click" of a mouse, bring up on the screen a related entry or even text from a related but separate document. . . . There are a host of new intellectual property law questions raised by the new capacity for searches and linking of works in digital form.

Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 Rutgers Computer & Tech. L.J. 323 (1990).

identified the Internet as a potential future source of vast profits: a distribution medium with the potential of delivering content of all kinds, on demand, to consumers without the high overhead associated with conventional distribution systems. On the other hand, they perceive the Internet as a present danger to their valuable intangible assets. Their aim, then, is to make the network environment "safe" for digital commerce in information and entertainment products.

To some extent, this goal can be achieved through self-help by means of "technological safeguards" which create barriers to infringement: scrambling, encryption, watermarking, use of secure passwords, and so forth. But content providers are quick to argue that any technological security measures can eventually be "hacked," and that, therefore, new legal protections for copyrighted works in the network environment are also required.

In August 1995, a working group of a special Clinton Administration Task Force issued its report, the so-called "White Paper" on *Intellectual Property and the National Information Infrastructure*. The Report contained both (1) interpretations of how current copyright law could be applied in the network environment and (2) proposals for how the law could be updated to better serve the objective of securing intellectual property in cyberspace.[5]

As it turned out, both aspects of the White Paper proved highly controversial. Many of the Task Force's perceptions regarding current law — its comments about the inapplicability of the "first sale" doctrine (which permits the lending and resale, for example, of purchased books) to copies of works lawfully acquired by electronic transmission, its anticipation of the withering away of "fair use" in the digital environment, and its assertion that liability for unauthorized electronic transmissions might appropriately be imposed on the company or institution that provided the infringer with access to the Internet — provoked storms of criticism. Likewise, its proposals for statutory revision — imposing new limits, for example, on the importation, manufacture or sale of technologies capable of being used to "circumvent" technological protection systems — became the focus of heated debate.[6]

In 1996, the U.S. Administration took its campaign for copyright reform to an international forum: the Diplomatic Conference of the World Intellectual

[5] The group's overarching concerns are summarized in the following excerpt from the White Paper report:

> [T]he full potential of the NII [or National Information Infrastructure — a somewhat parochial term referring to the full range of digital information networks, including but not limited to the Internet] will not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII. Creators and other owners of intellectual property will not be willing to put their interests at risk if appropriate systems — in the U.S. and internationally — are not in place to permit them to set and enforce the terms and conditions under which their works are made available in the NII environment. . . . All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful NII, if there is no *content*. What will drive the NII is the content moving through it.

White Paper at 10–11.

[6] The flavor of this controversy is apparent from comments to Congress (in late 1995 and early 1996(from the Digital Future Coalition, a group organized to resist the White Paper's new "digital agenda." *See www.arl.org/copyright/nii/dfc/dfc* and *www.dfc.org/dfc1/Archives/n2/copyrigh.html.*

Property Organization, held that December in Geneva, Switzerland. *See* § 1.04 *supra.* There, the U.S. joined with countries of the European Union to push for new legal restrictions on information use in cyberspace. Although the draft treaties which the national delegates met to consider were based substantially on the U.S.-European "digital agenda," the final treaties and accompanying "agreed statements" took a distinctly more moderate line. Thus, for example, the work product of the Conference emphasized the importance of recognizing user privileges (such as the U.S. "fair use" doctrine) in the digital network environment, and, while calling on states to adopt legal measures to prevent "circumvention" of technological protection systems, did not mandate regulation of multi-purpose electronic technologies as such.

In 1997, the WIPO treaties were submitted to the U.S. Senate for ratification, and Administration-drafted legislation to "implement" the treaties (by bringing domestic law into conformity with their requirements) was introduced in both houses of Congress. This legislation contained provisions which would ban both the circumvention of technological safeguards and the making available of products or services which could be used to accomplish circumvention, along with other provisions to prohibit tampering with so-called "copyright management information." It also incorporated a schedule of civil and criminal penalties for the vindication of these new legal norms.

The centerpiece proposal on anti-circumvention drew fire from electronics and computer manufacturers, along with some commercial software developers, as well as from library, educational and consumer organizations. All of these interests insisted that the WIPO treaties required nothing more than the imposition of new penalties on those who circumvent technological safeguards in aid of copyright infringement, and that the U.S. should do no more than to provide for such penalties for circumvention. The same groups also faulted the proposals on copyright management information for their failure to provide unambiguous protections for the privacy of electronic information consumers. Other critics faulted the legislation for not going far enough to protect users in a digitally networked world through reinforcement of such traditional pro-user protections as fair use, the first sale doctrine, exemptions for schools and libraries, and limitations of the liability of on-line service providers.

Notwithstanding the controversy, however, the WIPO treaties implementing legislation, as amended, did ultimately pass Congress. On October 28, 1998, President Clinton signed into law the Digital Millennium Copyright Act ("DMCA"). The DMCA differed in a number of significant respects from the earlier Administration proposals. The final provisions of the DCA will be discussed at greater length in following chapters.

In concessions to critics, the final DMCA did incorporate a number of provisions designed to safeguard "fair use" and privacy, and it included detailed provisions limiting the liability of service providers in connection with infringing activities on the Internet. The legislation also left a number of issues to be resolved, mandating several follow-up studies on the effects of the new legislation on network-based culture and commerce, with a possible eye toward future legislation, and relegating other issues to administrative rulemaking. Debate over the meaning and significance of these provisions

Public Law 105–304
105th Congress

An Act

Oct. 28, 1998
[H.R. 2281]

To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Digital Millennium Copyright Act.
17 USC 101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Millennium Copyright Act".

SEC. 2. TABLE OF CONTENTS.

The Digital Millennium Copyright Act of 1998,
Pub. L. No. 105–304, 112 Stat. 2860 (1998)

continues. Indeed, as provisions of the DMCA begin to be interpreted and applied in the courts, that debate intensifies.

Today, the DMCA also is being reconsidered in Congress. On the first day of the 108th Congress, Representatives Rick Boucher and John Doolittle reintroduced the Digital Media Consumers Rights Act, a bill that would roll back some of the most controversial provisions of the DMCA, as H.R. 107. We will have more to say on this, and other such efforts, hereafter.

[F] The Issues in Context

Even the issues summarized above do not fully reflect the breadth of the emerging debate. For there is the further question of how copyright and other bodies of law should interact in the new world of digital information products. Anyone who has recently purchased a program on a CD-ROM, or by download from a software company's website, knows from personal experience about the "shrink-wrap" and "click-on" licenses which the purchaser is required to "accept" as a condition of installing and utilizing the program. Often, these licenses include terms which run contrary to copyright law, restricting the purchaser's use of the program in ways which copyright doctrine does not, waiving "fair use" privileges, and so forth.

The state of the law on the enforceability of such terms is still unsettled, both as a matter of contract doctrine and with respect to the law of copyright preemption (discussed below in Chapter 11). The currently stalled drive to enact the so-called Uniform Computer Information Transactions Act (discussed at greater length in § 11.02) represented at attempt to address this issue through new state legislation. Ultimately, however, it may be for the courts to sort out.

One way or the other, the emergence of restrictive information licensing focuses new attention on the relationship between contract and copyright, and on the question of the extent to which our legal system should enable or abet the displacement of copyright rules by private arrangements.

[G] Looking Forward

This question, in turn, is part of a still larger set of issues that brings the discussion full circle. In the print-on-paper environment, today's information owners enjoy a more or less unfettered choice as to when they will choose to disclose their previously unpublished works to the public, whether for gain or glory. The manuscript in the desk drawer is protected against theft by criminal law, and its contents are protected against unauthorized use by copyright law — subject only to narrow exceptions. Once the manuscript has been commercialized or otherwise disclosed to the public, however, the situation is different. Would-be purchasers of additional copies, like would-be commercial adapters or performers of the work, still must deal with the copyright owner or its agent. But library patrons can read the work, libraries can lend it, critics or scholars can quote from it, teachers can photocopy it for classroom use or read it, students and actual or potential competitors can analyze it — all without obtaining permission or paying license fees, thanks to traditional limiting doctrines such as "first sale" and "fair use." Such a

published work is not in the "public domain," in the technical sense of that term, but it is available to the public as part of the general "informational commons" — the existence of which has been regarded as crucial to the "Progress of Science and useful Arts."

The emergent business model for the distribution of copyrighted works in the network environment seems to challenge the survival of an "informational commons."[7] Many copyright industry spokespersons argue that copyright owners should enjoy an absolute right to control "access" to their works, without any limitations or qualifications, and that the law of copyright and contract should operate to guarantee this entitlement. So long as "access" controls are equated with the lock-and-key on the desk drawer containing an author's unpublished manuscript, the point seems noncontroversial. Access controls may, however, comprise far more. If information is published in a newspaper, a teacher can copy a paragraph to initiate a class discussion; if the same information is provided only on the Internet, it can be made available exclusively on a pay-per-use basis, protected by contractual restrictions and technological safeguards. Indeed, technology makes it possible for information proprietors to treat every use — even every reading — of a digital work available via the Internet as a new instance of "access." In this way, some fear, such proprietors could maximize economic returns while continuing to withhold their works from general public scrutiny, including critical "fair use."

In response, information proprietors argue that because their motive in making material available by way of digital networks is *precisely* to maximize profits, consumers should have no concern about being frozen out of "access." To the contrary, they assert that, in a network environment characterized by ubiquitous electronic licensing, all kinds of uses will be possible upon the payment of fees which will be individually trivial (although cumulatively significant). Clearly, a pay-per-use information environment may represent a dystopia or a utopia, depending on one's perspective.

Difficult battles and hard choices lie ahead. Copyright policymakers today face issues beyond those that have arisen in the past in connection with new information technologies. Previously, it was enough to ask how traditional copyright principles applied to new media — or, at most, how those principles might be adapted to make such application more readily feasible. Digital technology in general, and digital networks in particular, invite us to undertake a more fundamental inquiry. Even if traditional copyright doctrines may not apply comfortably in cyberspace, we could, of course, work toward installing their functional equivalents, so as to assure the maintenance in this new environment of the "balance" of proprietary and user interests which traditionally has characterized this branch of our law of intellectual property. Doing so might be difficult, as a technical matter, but it would certainly not be impossible. The harder questions are whether we, collectively, should undertake this project — and, if not, to what other end the reform of copyright to meet the digital challenge should be directed.

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[7] For the geography of this concept, see Lessig, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

For a general, dispassionate review, see the World Intellectual's Property Organizations report on Intellectual Property on the Internet: A Survey of Issues (2002) at *ecommerce.wipo.int/survey/index.html.*

§ 1.06 Thinking and Talking About Copyright Law

[A] In General

The preceding sections of Chapter 1 trace the history of Anglo-American copyright law, seeking to place it in the context both of related bodies of U.S. law and of "authors' rights" laws elsewhere in the world, and to highlight the mechanisms and challenges that have made, and will continue to make, this ever-evolving field of study so fascinating and rewarding. Before proceeding, we take the liberty of raising one final topic: the practical and philosophical perspectives that inform and shape the "discourse" of copyright law.

Under the U.S. Constitution, Congress has the *power* to secure to authors for limited times exclusive rights in the creations of their minds. It has, on the other hand, no *obligation* to secure *any* such rights. Nor, for that matter, did the Parliament that enacted the Statute of Anne operate under any legal requirement to do so. Yet for nearly 300 years this body of law not only has continued to exist, but has continued to expand. Why?

Whether property rights should be recognized in products of the mind is a question which challenges fundamental assumptions about why society creates property rights in the first place. Few today would question the correctness of granting property rights in land or chattels, including manufactured products. But when the subject turns to intangible property, *i.e.*, to intellectual products, that consensus breaks down. There is, as we write, an on-going and lively disagreement about the very nature, and the proper scope, of the protections that are and should be made available under our law for the latter sorts of goods.[8]

Discomfort with recognizing property rights in products of the mind runs through the common law. Under common law doctrine, property rights arose from possession. But intellectual products were quite unlike land or chattels because, once disseminated publicly, ideas and other intangibles were not subject to exclusive possession. Justice Brandeis reflected this view in a famous dissent:

> The general rule of law is, that the noblest of human productions — knowledge, truths ascertained, conceptions, and ideas — become, after voluntary communication to others, free as the air to common use.

International News Service v. Associated Press, 248 U.S. 215, 250 (1918).

This discomfort notwithstanding, intellectual property rights in general, and copyright in particular, have grown apace over the past three centuries.

[8] *See, e.g.*, Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 Cal. L. Rev. 1413 (1992); Vaver, *Intellectual Property Today: Of Myths and Paradoxes*, 69 Can. Bar Rev. 98 (1990); Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 Hamline L. Rev. 261 (1989); Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989).

In the few pages that follow, we address the question of why this should be so. Further discussion will appear in succeeding chapters.

[B] Copyright and "Interest Analysis"

Like other kinds of property law, copyright serves several ends. It establishes the conditions for the existence of a market — in this case, a market in information — and, by defining specific rights, it performs the allocational function of helping to determine "who (in society) gets what" where information resources are concerned. The content of copyright law, like that of other bodies of legal doctrine, is the outcome of centuries of advocacy on behalf of various constituencies whose interests are affected by the laws governing artistic and literary property. One way of thinking about developments in copyright law — whether historical or contemporary, judicial or legislative — is to inquire who benefits from any particular development or set of developments.

Broadly speaking, the three groups in society who might stand to gain from any change in copyright law are:

- individual creators, who write, paint, photograph, compose or program copyrighted works into existence;
- distributors (*i.e.*, booksellers, publishers or disseminators), who facilitate the delivery of creative works to consumers; and
- consumers themselves.

This last "interest group," it should be noted, is a particularly diverse one, ranging as it does from end-consumers (readers, viewers, listeners) to those who re-use copyrightable content to create new works, and taking in along the way educators, researchers, journalists, *et al.* Or, to put the point differently, there is significant overlap among the various "interest groups" — and especially between creators and consumers.

Sometimes, the interests of some or all of these groups will be congruent. The decision to extend protection to some new, important and previously unrecognized form of creative production may be a net gain for all concerned. Sometimes, however, the interests of these groups may be divergent or even antithetical. For example, cutting back on "fair use" privileges may benefit distributors (and perhaps creators) at consumers' expense, while introducing "moral rights" principles into a copyright system is likely to benefit creators (and perhaps some consumers) at the cost of distributors.

Crude though this "interest analysis" approach may be, it gives us some basis for understanding the impact of trends in Anglo-American copyright law over the past 300 years. Generally speaking, the history of copyright since the Statute of Anne has been one of increase. Protection has been afforded to a progressively larger variety of works, for longer periods of time, against a wider range of unauthorized uses.

Likewise, the perspective of interest analysis may help us to appreciate the significance of the fact that copyright began in England with the efforts of the Stationers' Company (whose members were neither creators nor consumers of works) to secure legal protection for the interests of the book trade, and

that developments in U.S. copyright history often have resulted from the lobbying and litigation activities of latter-day distributors (publishing houses, movie studios, record companies and other such entities), not so different from those ancient booksellers.

This is not to say, of course, that only distributors have benefited from these developments. Although commercial distributors seeking to establish information markets may drive the development of copyright law, everyone in society stands to gain from the establishment of such markets — up to a certain point. Beyond that point, however, the allocational effects of changes in copyright law may yield disparate consequences for various interest groups. We suggest, therefore, that such developments should be continually examined, individually and collectively, to determine their impact on the distribution of information resources within society.

[C] "Rhetorics" of Copyright Jurisprudence

In the previous paragraphs, we suggested that it may sometimes be useful to consider the contours of copyright law as the outcome of interest group politics operating through the institutions of the law. Obviously, however, the claims of various groups generally are not expressed so straightforwardly in legal scholarship or legal argument.

Rather, "interested" claims tend to be asserted in language that is less direct, and which is designed to appeal to values shared by broader segments of the general society — in short, through the deployment of a number of characteristic and variously compelling "rhetorics." These rhetorics, in turn, can take on lives of their own and become independent factors in the development of intellectual property law. In order to understand the materials in succeeding chapters, and to develop skills in making intellectual property policy arguments, students should learn first to recognize these rhetorics, and then to put them to work.

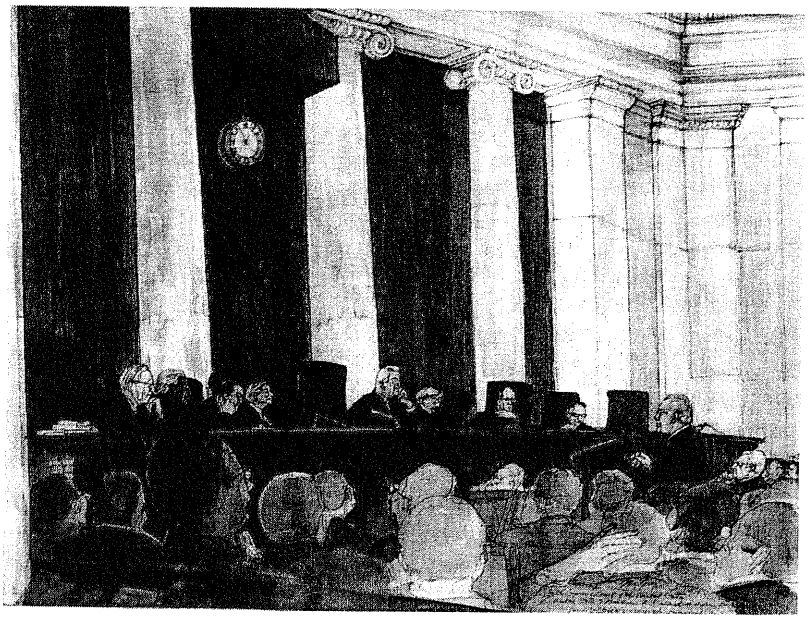
[1] The "Utilitarian" and "Natural Law" Conceptions of Copyright

The "Utilitarian" Conception

As has already been noted, early discussions of copyright law — including U.S. copyright — were dominated by two competing and, to a large extent, inconsistent rhetorics of justification. The first of these is the *rhetoric of incentives* — or, as it has been described in recent scholarship, the "utilitarian" position — which in the United States is strongly linked to the language of the Constitution's Copyright Clause.[9] This conception of copyright remains

[9] "Taking the free circulation of useful knowledge as its ultimate goal, the utilitarian position, underwritten by statutory laws, was preoccupied with the problems of political economy; that is, statutory conceptions of copyright were concerned with establishing and maintaining the free commerce in — and wide dissemination of — literary works." G. Rice, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 74 (1997).

dominant in American judicial opinions — especially Supreme Court opinions — today.[10]



Supreme Court Oral Argument
Franklin McMahon/CORBIS

The utilitarian position has always been premised, at least implicitly, on economic reasoning. In recent years, its economic foundations have become more and more explicit. Incentives in the form of legal protection are needed if works of the mind are to be brought to market, the argument runs, because of the special characteristics of such intangible commodities, which once created cannot be used up, and which can be used by large numbers of people at the same time. In other words, intellectual productions qualify as "public goods," because producers cannot appropriate their true value through sale. Accordingly, economic theory teaches, there is a risk that a suboptimal amount of information will be produced or disseminated.

Sometimes, of course, the problem vanishes because the producer's or distributor's natural "lead time" enables it to derive a sufficient profit to justify its investment and to encourage continued activity.[11] But where "lead time"

[10] Justice Stewart, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), put the matter this way:

> The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good.

As noted by Justice O'Connor in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985):

> By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas.

(Emphasis added.)

[11] This argument is elaborated in Breyer, *The Uneasy Case for Copyright: A Study in*

does not provide a sufficient return — as where investments in a work can only be recouped over time or through the exploitation of ancillary markets — the solution to the public goods problem is to provide special incentives for the desired activity — either in the form of direct government subsidies, or by granting limited monopoly rights to copyright owners.[12]

Economists recognize, however, that the incentive solution can also be the source of new difficulties — at least when the solution takes the form of the creation of new property rights. Free market economics disfavors the creation of monopolies unless there is an economic justification. Because of the exclusionary rights she possesses, the owner of the copyright in a work can charge a higher-than-competitive price for her product, resulting in a less-than-optimal diffusion of information.

Thus, the rhetoric of incentives in copyright law, as it has been developed, has sought to embrace considerations of public welfare. Copyright law attacks the "public goods" problem by recognizing a property right in the work, but the exercise of that monopoly is carefully circumscribed through regulation. On the one hand, copyright provides the incentive to create new products and an economic motivation to distribute them. On the other hand, the copyright owner's monopoly right is limited in time and scope by such doctrines as originality, the idea/expression dichotomy, and fair use (all discussed in detail hereinafter). Viewed in this way, copyright law should represent an economic trade-off between encouraging the optimal creation and distribution of works of authorship through monopoly incentives, and providing for their optimal use through limiting doctrines.

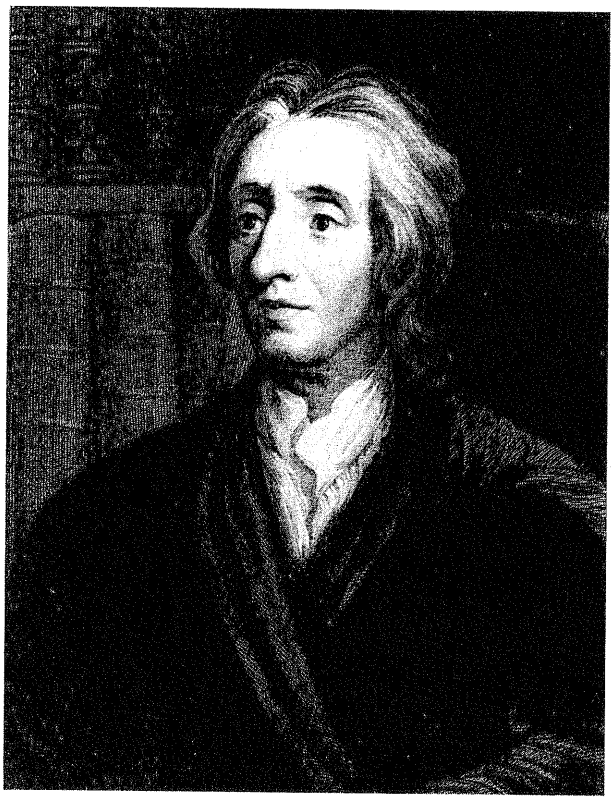
The "utilitarian" conception of copyright gives us one vocabulary for discussing the ways in which our collective life may be affected, for good or ill, by changes in the law. While there is room for doubt about whether the scope of copyright protection affects significantly the behavior of individual poets, painters or computer programmers, there is little question that changes in the legal exclusivity which distributors enjoy in the works they distribute can affect their investment decisions and business planning. This insight, of course, does not necessarily extend by very much our practical ability to determine the desirability of particular changes in copyright law by assessing their impact on public welfare. Presumably, there is an optimal level of protection beyond which providing additional incentives to distributors will yield little or no net gains in the quantity or quality of works effectively available to be consumed by the public. But any attempt actually to quantify that level of protection raises difficult and probably insoluble methodological questions.

Copyright of Books, Photocopies and Computer Programs, 84 Harv. L. Rev. 281 (1970); *cf.* Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. Rev. 1100 (1971); *and see* Breyer, *Copyright: A Rejoinder*, 20 UCLA L. Rev. 75 (1972). For a general consideration of the strengths and limitations of the economic theory of copyright, see Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989).

[12] *See* A. Alchian & W. Allen, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION & CONTROL 99–101 (3d ed. 1983). For thorough coverage of property rights in information and the public goods problem, see R. Cooter & T. Ulen, LAW AND ECONOMICS 135–168 (1988).

The "Natural Law" Conception

Competing with the "utilitarian" rhetoric in American copyright discourse, from the earliest era of the Republic down to the present day, is the alternative rhetoric of "natural rights" or "inherent entitlement." The natural law justification for recognizing property rights in works of authorship is based on the rights of authors to reap the fruits of their creations, to obtain rewards for their contributions to society, and to protect the integrity of their creations as extensions of their personalities.



John Locke (1632–1704)
Corbis-Bettmann

Locke and the Labor Model. The proposition that a person is entitled to the fruits of her labor is a compelling argument in favor of property rights of any kind, tangible or intangible. The most famous proponent of this natural rights theory was John Locke, the 17th Century English philosopher, who reasoned that persons have a natural right of property in their bodies. Owning their bodies, he believed, people also own the labor of their bodies and, by extension, the fruits of their labor. *See* J. Locke, SECOND TREATISE OF GOVERNMENT, Chapter 5 (1690).

In England itself, Lockean reasoning had little prominence in the campaign to establish the new law of copyright which culminated in the Statute of Anne

in 1710. Across the English Channel, however, the emphasis on "authorship" and "authors' rights" provided the primary ideological justification for the recognition of new legal interests in literary and artistic creations in 18th Century European intellectual property law, and a convenient basis on which those interests could be allocated. Both of these developments were urgently required if the new statutes were to serve the needs of the emerging commercial marketplace in works of the imagination. Ultimately, the belief in the paramount importance of "authorship" was to take on a significance of its own, marking the doctrinal landscapes of national law systems which emerged in countries such as France and Germany.[13]

The natural law justification for copyright continues to enjoy considerable currency throughout the world. Perhaps most importantly, it has animated successive revisions of the Berne Convention for the Protection of Literary and Artistic Property, up to and including the 1971 Paris Revision,[14] to which the United States adhered in 1989.

It would be wrong, however, to regard the "natural rights" conception of copyright as a mere recent European import in England and the U.S. The claims of "authorship" exerted a shaping influence in late 18th and 19th Century British copyright. Likewise, Lockean rhetoric has been part of the discourse of American copyright law since the 1790 Federal Copyright Act, and even before — in tension with the utilitarian conception discussed above.[15]

Lockean rhetoric remains a crucial part of the discourse in copyright jurisprudence today. In its present-day form and as applied to copyright, this view holds that an individual who has created a piece of music or a work of art should have the right to control its use and be compensated for its sale, no less than a farmer reaps the benefits of his crop. In addition, because the author has enriched society through his creation, the author has a fundamental right to obtain a reward commensurate with the value of his contribution.[16]

Like the rhetoric of incentives, the rhetoric of natural entitlement has struggled to incorporate considerations of what might be called the public interest in access. In particular, leading scholars have drawn on Locke's famous *proviso*, limiting property rights based on individual labor to situations "where there is enough and as good left in common for others," to suggest how a natural rights approach could be reconciled with the public's entitlement in the "informational commons."[17]

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[13] For general discussion of "authorship" as a legal concept, see Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 Duke L.J. 455 (1991); and see Chartier, *Figures of the Author*, in OF AUTHORS AND ORIGINS at 7 (B. Sherman & A. Strowel eds. 1994).

[14] *See* § 1.04. Nor should one overlook the 1948 Universal Declaration of Human Rights, which at Article 27(2) reads: "Everyone has the right to the protections of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author."

[15] "Bracketing the slavery issue, there was perhaps no debate more insistent for writers in antebellum American than the issue of literary property." G. Rice, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 77 (1997).

[16] For an overview of natural law theory, see Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L. Rev. 517 (1990).

[17] Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1572 ff. (1993).

Like the utilitarian conception, the Lockean justification for copyright law provides a useful vocabulary, but is finally indeterminate insofar as its specific implications are concerned. The theory maintains that the author should have control over his work, but indicates little about *how much* control the author should have, how long that control should last, who should benefit from the copyrighted work, or what on any given set of facts constitutes just compensation for the author's contribution to society.

Hegel and the Personality Model. The most influential alternative to the labor-based Lockean model of natural law is one based on a personality justification. Associated with the German philosopher Hegel, and embodied in "moral rights" legislation, the personality model advances the idea that property provides a means for self-actualization, for personal expression, and for the dignity of the individual. Putting to one side Hegel's difficult concepts of human will and freedom, the personality theory of intellectual property has an immediate intuitive appeal. After all, is an idea not a manifestation of the creator's personality or self? As such, should it not belong to its creator?

One celebrated formulation of personality rights can be found in Article 6^{bis} of the Berne Convention, which requires that member states protect an author's rights of "integrity" and "attribution." Despite the fact that Berne 6^{bis} makes no distinction between literary, artistic or musical works, the personality justification applies better to some categories of copyrighted works than others. The arts are a prime example. In a work of art, the personality traits of the author are materialized in an external object. Consistent with this ready applicability of personality-based natural rights theory to art, the rights of "attribution" and "integrity" for certain visual artists are now specifically recognized in § 106A of the Copyright Act of 1976, as amended following U.S. admission to Berne in 1989. In addition to § 106A, American law, at the state level, recognizes personality interests in various bodies of law that overlap with copyright, such as unfair competition law, defamation, privacy, and right of publicity.

In contrast to the arts, the personality justification is difficult to apply to intellectual products that appear to reflect little or no personality from individual creators. An intellectual property system based on personality interests will have trouble finding reliable indicia for an individual who has little or no real personality stake in a particular object. Unlike Lockean labor theory, which may be applied across the range of intellectual property, a personality justification works less well when applied to intellectual products that are not suffused with what society would call "personal expression". Thus, a labor justification may be applied equally well to patent protection for a new chemical compound, a database, or a poem. On the other hand, personality theory cannot be conveniently applied to works of utility, computer programs, maps, or highly collaborative works, where individual personality is subsumed in a collective effort. In short, personality theory would exclude categories of works now recognized as integral parts of copyright law.

In addition to the category problems, personality theory shares some of the same conceptual problems found in a labor theory of property. Personality (or labor, for that matter) is not an on/off proposition but is found in varying amounts, depending on the particular work under consideration. Suppose one

could say that a particular painting manifests the personality of the artist to a greater degree than another painting. If we accept this to be the case, should works be protected according to the amount of personality they manifest? If so, how should one make this measurement? In truth, Lockean labor theory also suffers from this conceptual dilemma, given that different works result from varying degrees of labor input.[18]

In summary, then, the utilitarian and natural law views (both of Locke and of Hegel) raise a good many questions to which they do not offer definitive answers. However, recognition of the ultimately indeterminate character of these contrasting rhetorics has not detracted from their popularity in the discourse of copyright law and policy. It is fair to say that, throughout the history of Anglo-American copyright, these rhetorics have been successfully deployed to explain or justify virtually every extension of the scope or intensity of copyright protection. They have also been invoked (usually with somewhat less success) in arguments against such expansionist developments.

The history of American copyright law has not reached an end, though — and there is more to the story.

[2] Other Rhetorics in Contemporary Copyright Discourse

In the scholarly literature and judicial decisions of recent years, a number of alternative ways of characterizing copyright and the purposes of the copyright system have begun to gain currency. Some of these rhetorics are new, while some have long and respectable, if not always extensive, histories. Some are offshoots, at least in part, in the traditional rhetorics described above, while others can claim a greater degree of autonomy. All of them add to the richness, if not necessarily the certainty, of copyright discourse.

The rhetoric of misappropriation. This characteristic rhetorical mode draws heavily on both utilitarian and natural law arguments, although invocations of it tend to appear in the guise of simple appeals to "fairness." How can it be right, the usual form of the argument begins, for one to profit (as a "free rider") from the outcome of the intellectual labor of another — to "reap where he or she has not sown"? Surely, the very fact that someone has cared enough to appropriate the products of another's mind must indicate that those products were worth something, and therefore deserving of legal protection.

The rhetoric of misappropriation has roots in the traditional doctrines of quasi-contract and restitution.[19] Moreover, the independent tort of misappropriation has a long, if somewhat checkered, history in both federal and state law, where it has sometimes been invoked in cases where copyright and patent law fail to provide remedies for the taking of mental creations. More recently,

[18] For those wishing to brush up on their Hegel, see G. Hegel, PHILOSOPHY OF RIGHT, trans. by T.M. Knox (Oxford: Clarendon Press, 1965) at pp. 40–57; and Netanel, *Copyright, Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 Rutgers L.J. 347 (1993). Hegelian property theory is examined in Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982). For application of the theory to intellectual property, see Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L. Rev. 287, 330-65 (1988).

[19] *See generally* J. Dawson, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951).

misappropriation rhetoric has provided an important part of the rationale for the development of new state causes of action for violation of the "right of publicity." The proliferation of state unfair competition law based on concepts of misappropriation has, in turn, created difficult preemption issues, which have yet to be satisfactorily resolved.[20]

Here, however, we want to note that the rhetoric of misappropriation has also found its way into the mainstream discourse of copyright itself. Courts invoke it in their decisions, and so do advocates for changes in copyright legislation. A good recent instance can be found in the (ultimately successful) arguments for the extension of the term of existing copyrights by an additional 20 years, to life-plus-70. Why, argue the children of deceased popular songwriters, should someone else benefit from the continued popularity of their parents' enduring hits, no matter how long ago they were composed?[21]

The difficulty with the rhetoric of misappropriation, at least where it is applied to copyright, may be apparent from the foregoing example. Powerful though it may be in its appeal to fundamental fairness, the tendency of misappropriation-based reasoning is infinitely expansive, insofar as the length, breadth and strength of rights are concerned. Put differently, the misappropriation justification, unlike those predicated on incentive-based or even natural entitlement principles, contains no internal checks. Without *external* checks, therefore, an intellectual property system based on ideas of misappropriation would protect every product of the mind, for an unlimited period, in the name of "fairness."

Obviously, copyright law is not likely to be remade along these lines any time soon. But the expansive pressure generated by the rhetoric of misappropriation is nonetheless a force to be reckoned with. Indeed, the next rhetoric to be discussed has gained currency (at least in part) because it seems to provide a basis for restraining the forces which misappropriation rhetoric has helped to release.

The rhetoric of the public domain. The core notion here has been stated as follows:

> [T]he existence of a robust, constantly enriched public domain of material not subject to copyright (or other intellectual property protection) is a good in its own right, which our laws should promote at the same time as they provide incentives or reward creativity.

Lange, *Recognizing the Public Domain*, 44 Law & Contemp. Probs. 147 (1981).[22]

Foregrounding the inescapable truth that all copyrightable works eventually become common property at the end of a period of protection, advocates of the public domain note further that durational limitations on copyright are part of the constitutional scheme itself, just as various other limitations on rights have been recognized in American copyright jurisprudence from its inception. They draw from this the conclusion that proposed modifications to

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[20] *See generally* Chapter 11 *infra*.

[21] *See* § 5.01 *infra*.

[22] *See also* Litman, *The Public Domain*, 39 Emory L.J. 965 (1990), and Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain* (Pts. 1 & 2), 18 Colum.-VLA J.L. & Arts 1, 191 (1994–95).

contemporary intellectual property law should be tested against the standard of how well and fully they preserve these traditional values.[23]

Notably, a counter-rhetoric has developed in response to advocacy of the public domain. Increasingly, advocates of longer, stronger and broader copyright protection take the position that the public domain is more an "information limbo" than an "informational commons," and that works in the public domain are likely to be lost to the public forever because no one has an economic incentive to exploit them.[24] In response, advocates of the public domain have begun to take up the challenge of explaining how, in concrete terms, the non-"propertyness" of some information actually promotes various good social and cultural ends.[25]

New economic rhetoric. The critique of the public domain advocacy just summarized represents an example of a relatively new strain in the discourse of copyright policy. By contrast, economic considerations have been part of the discussion from the beginning. With the rise of the "law and economics" movement in the United States, however, new claims are being made for the explanatory power of economic reasoning.

The traditional utilitarian rhetoric of copyright invokes economic concepts in its depiction of rewards to authors and distributors as incentives to make information goods available to the public. Incentive theory posits, as one observer has recently noted, "that copyright is necessary to prevent free riders from undermining the market in creative expression, notwithstanding a concern (usually) for 'copyright's social cost.' "[26]

Contemporary neoclassical economic theory, premised on faith in the allocational power of the free market, takes another, rather different approach, to the economic analysis of copyright. Under the neoclassicist approach, copyright is not so much a system of incentives to production and distribution of new works as it is a mechanism "for market facilitation, for moving existing creative works to their highest socially valued uses . . . by enabling copyright owners to realize the full profit potential for their works in the market."[27]

Unlike the economic analysis underlying traditional incentive rhetoric, neoclassical "property rights" theory is not vulnerable to the charge of

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[23] Kastenmeier & Remington, *The Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 Minn. L. Rev. 417, 422–23, 440–42 (1985).

[24] 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: Discussion and Comments 316–17 (Comm. Print 1963).

[25] As Litman puts it, "The public domain [is] a device that permits the rest of the system to work by leaving the raw materials of authorship available for authors to use." *The Public Domain*, 39 Emory L.J. 968 n. 999 (1990). *See also* Jaszi, *Goodbye to All That — A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law*, 29 Vand. J. of Transnat'l L. 595 (1996); Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines and New Arrangements of Public Domain Music*, 1996 Duke L.J. 241; and Hamilton, *An Evaluation of the Copyright Extension Act of 1995: Copyright Duration Extension and the Dark Heart of Copyright*, 14 Cardozo Arts & Ent. L.J. 655 (1996).

[26] Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 308–09 (1996).

[27] *Id.* at 309.

indeterminacy. Broadly speaking, its proponents conclude that the more broadly rights are defined, and the fewer exceptions to which they are subject, the more likely market mechanisms are to fulfill the function of promoting the valuation of resources through the pricing system. Viewed from this perspective, concepts like fair use (except in particular cases of "market failure")[28] and the existence of a public domain are inherently inefficient. Indeed, the critiques of public domain advocacy outlined above can be seen, in part, as anticipations or applications of neoclassical "property rights" theory. The true vulnerabilities of neoclassical economic rhetoric, when applied to copyright law, lie elsewhere: in theory, with its central assumption that market mechanisms do in fact promote efficient allocation, and in practice, with the many examples of ways in which real markets diverge from the ideal.[29]

Despite its vulnerabilities, however, neoclassical rhetoric has acquired considerable currency in copyright discourse, especially with respect to rights in the new digital information environment.[30]

The rhetoric of social dialogue and democratic discourse. Discussions of the future of copyright law in cyberspace also have given prominence to a powerful new competing rhetoric in copyright discourse, in which the copyright system is figured as a mechanism for promoting certain core values of the civil society — such as openness, freedom, and diversity of expression — which have long been prominent in discussions of First Amendment jurisprudence and policy, but which are a relatively new focus of attention in the domain of intellectual property.[31]

One important source of this new rhetoric is the literature of political science, which recognized early on the liberatory potential of new international communications networks.[32] More recently, a number of scholars have argued specifically that the promotion of discourse in the civil society should be considered an important end of copyright policy in itself. Some have emphasized a perceived nexus between "social dialogue" and the creative process, arguing that if copyright is to fulfill its core cultural mission, it must reinforce rather than frustrate the elaboration of new communications technologies.[33] Others have stressed the structural function of copyright in maintaining the "independent expressive sector that is critical to democratic governance" — and which derives its independence from the fact that those

[28] *See, e.g.*, Landes & Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325 (1989).

[29] Netanel provides a good introduction to some of the critiques to which neoclassical theory is subject. *Op. cit.*, at 332–36.

[30] *See generally* Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. Chi. Leg. F. 217.

[31] For a discussion of the marginalized position of the First Amendment in traditional copyright jurisprudence, see Chapter 9.

[32] *See especially* I. de Sola Pool, TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE (1983).

[33] *See, e.g.*, Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DePaul L. Rev. 97 (1993), and Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L.J. 345 (1995).

who participate in it are supported by the market rather than being dependent on patronage or government largess.[34]

Whereas some exponents of this new rhetoric envision an electronically mediated space for social discourse which stands outside the commercial marketplace in information products, others believe that, if appropriately regulated, this marketplace itself could support the free, open, and diverse exchange which copyright was devised to promote. What both groups appear to share is a conviction that copyright exists, at least in part, to promote the collective life of society, and that mere reliance on an unregulated market in commodified expression will not necessarily further this end.

The rhetoric of "deference." In the judicial opinions you will read during this course, you also will encounter another characteristic set of arguments (or justifications) for results, which sound in a somewhat different key from those we have consider up to this point. Taken altogether, however, these arguments do constitute a "rhetoric" in their own right: the rhetoric of judicial deference. Copyright law issues are fact-intensive, so we you will not be surprised to see appellate courts deferring broadly to trial courts — although it also will be interesting to note the instances in which such deference is *not* afforded to determinations at trial. And copyright is, after all, a subject dominated by a complicated and detailed statute, so it is to be expected that judges sometimes will decline to second-guess Congressional judgments — even when there may be good arguments for doing so! We will encounter this aspect of the rhetoric of deference when (for example) we consider the Supreme Court's recent ruling on the constitutionality of copyright term extension, *Eldred v. Ashcroft*, 123 S.Ct. 769 (2003), in Chapter 5. But this isn't the whole story of judicial deference. We also will have opportunity to observe, from time to time, how federal courts give way to interpretations of the statute from other sources, especially the U.S. Copyright Office, in recognition of their "expertise." *See Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991). So we will want to ask, as we go along, how profoundly the rhetoric of "deference" works to shape copyright doctrine and policy.

[D] Conclusion

Your study of the body of law called "copyright" is only beginning. As this book proceeds, we will revisit some of the ways of thinking and talking about copyright which have been summarized in the foregoing pages. You may already have strong opinions about which of those approaches you prefer. You may develop such preferences as you go along. All we ask is that, as you read through the chapters that follow, you bear in mind that mastering the ability to make (and answer) arguments using the various rhetorics just summarized will help make you a more effective advocate for copyright clients in the years to come.

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[34] *See* Netanel, *Copyright and a Democratic Civil Society* 106 Yale L.J. 283, 358–59 (1996), and Radin, *Regulation of Computer and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & Com. 509 (1996). For an historical argument that copyright law actually inhibited the development of civil discourse in the United States by "transforming printed texts from a practical means for assertive sociopolitical commentary into the more inert medium of property and commodity," see G. Rice, THE TRANSFORMATION OF AUTHORSHIP IN AMERICA 4 (1997).