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THE COPYRIGHT BATTLE: EMERGING INTERNATIONAL RULES AND ROADBLOCKS ON THE GLOBAL INFORMATION INFRASTRUCTURE

by STEPHEN FRASER†

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.¹

Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected.²

While it is undoubtedly true that copyright laws have developed in response to technological changes,³ it is just as evident that copyright law⁴ has constantly been a search to balance the interests of creators,

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1. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 430-31 (1984) (footnotes omitted).

2. NICHOLAS NEGROPONTE, BEING DIGITAL 58 (1995).

3. STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 185 (2d ed. 1989) ("The history of copyright reflects the development of technology.").

4. This article will use the term copyright to describe all the statutory rights the maker of a protectable work of expression may hold. This includes countries following the somewhat broader tradition of *droit d'auteur*, or authors' and neighboring rights generally found in civil law countries, or which base their protection on a natural right in the creator of a work. This is in contradistinction to those countries following the Anglo-copyright tradition of granting protection for the encouragement of learning or for the public's benefit. See *infra* notes 70, 84 and accompanying text.

owners, and distributors of copyrighted works with those of the general public who consume or make use of their protected expression.⁵ As in other areas in recent years, these problems have sometimes been taken up at the international stage first⁶ instead of in national or municipal legislatures.⁷ The Trade-Related Aspects of Intellectual Property Rights ("TRIPS") provisions included in the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT")⁸ further introduced the issue of international trade in copyrighted goods into the equation.⁹ If the GATT negotiations had seemingly exhausted the world where international copyright protection was involved, copyright attorneys and specialists have shown an apparently indefatigable ability to attack the problems left unresolved by the TRIPS agreement.

With the spread of faster computers and the arrival of the Global Information Infrastructure ("GII"), that balance is once again brought into question.¹⁰ This time, experience with the technology offers much less guidance because how that technology has developed and how it is used is frequently misunderstood. Additionally, the balance of interest between users and copyright holders is almost completely changed. Distinctions between authors, distributors, consumers, and users of copyrighted works, which traditional copyright industries developed and encouraged and which copyright laws reflect, have been altered and blurred by the evolution of one part of the GII - the Internet.

The balance can be too neatly described as a battle between copyright maximalists, those advocating for the highest levels of protection,

5. Put another way, the concern is to avoid both overprotection and underprotection of copyrightable works. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599 (1994) (Kennedy, J., concurring).

6. See Roger Cohen, *Global Forces Batter Politics*, N.Y. TIMES, Nov. 17, 1996, at E1, for a short review of the problems caused by globalization for national sovereignty.

7. See Jill Vardy, *Inside Ottawa; Canada Needs Ground Rules Suited to Our Own Reality: Treaty May Cause Internet Headaches*, FIN. POST, Dec. 5, 1996, at 1 (discussing Canada's involvement in negotiating multilateral copyright treaties).

8. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

9. Compare regional efforts by the European Union (E.U.), *infra* note 55. The strength of the U.S.' copyright industries has often been put forward as a reason for increasing the level of protection for works of expression. As a letter to the editor by the president and chief executive of Simon & Schuster, a large New York publishing house, demonstrates, this argument is usually allied to wanting to protect the interests of authors. Jonathan Newcomb, *Creators Have Most to Lose in Copyright Pact*, N.Y. TIMES, Dec. 23, 1996, at A14.

10. See, e.g., Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466 (1995); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993 (1994); Raymond T. Nimmer & Patricia Ann Krauthaus, *Copyright on the Information Superhighway: Requiem for a Middleweight*, 6 STAN. L. & POL'Y REV. 25 (1994).

and copyright minimalists, those arguing that copyright should offer only enough protection to give authors an incentive to create.¹¹ But a battle it surely is.¹² While there may have been, and still exist, some questions over whether copyright law would or should apply on the GII, developments that have taken place since the TRIPS negotiations show that there appears to be a consensus growing at the national and international levels that copyright protection will be applied to content disseminated on the GII. In fact, the battle has begun to look like a race between which country or international organization can most quickly come up with viable proposals for attacking the perceived problem of copyright on the GII. Not surprisingly, many of the proposals and their results look cribbed from one another, like school children copying each others' homework without serious thought of the consequences.

This article will examine these developments in order to address the issues that are at stake for creators, disseminators, and users of copyrighted materials. Obviously, not every aspect of the international and national interests of copyright protection involved in the circulation of copyrighted works on the GII can be addressed here. However, a look at the developments that have or are taking place at the World Intellectual Property Organization ("WIPO") and in the European Union ("E.U."), as well as closer to home in the United States and Canada, will serve as focal points for the study. For too long copyright has left other lawyers, government officials, legislatures, and the public in the dark regarding copyright's arcane but wide ranging provisions.

Further complicating the issues is the "technophobia" that sometimes surrounds the GII. Since much of the GII as currently conceived involves the use of computers, those not familiar with this technology and how it can be used are doubly disadvantaged. That includes not just lawyers and policy makers, but most individuals in and outside of developed nations. In other words, if it is bad enough that creators and users of copyrighted works do not initiate copyright law, the situation worsens

11. Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 135, 136. Professor Goldstein has varyingly used the terms high and low protectionists and copyright optimists and pessimists in his writings, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 15 (1994); Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 70, 82-83 (1992), but has argued that the distinction is peculiar to the Anglo-copyright countries. GOLDSTEIN, *supra* at 26. Although the U.S. copyright system places an emphasis on author incentives and the public interest, *see infra* note 143, it would be a mistake to imply therefrom that all authors' rights countries provide higher levels of copyright protection than nations following the Anglo-copyright tradition. Attempts to categorize positions according to the level of rights authors would hold too quickly descends into name calling and simplicity, all the while ignoring other important considerations copyright protection engenders.

12. See James Boyle, *Sold Out*, N.Y. TIMES, Mar. 15, 1996, at E15 (describing the struggle to expand intellectual property rights).

when they have no clue about how the GII works and why it is inextricably linked to copyright law. Although some of the basics of copyright law and the GII will be covered herein, this article cannot on its own overcome this deficiency. As Professor Pamela Samuelson has noted in her attempts to inform copyright users and creators of the changes being proposed to copyright law in the United States, almost in acknowledgment that the so-called copyright maximalists have taken a lead in the battle, it is the general public that needs to get involved in this area.¹³ Individually, they are the ones who make use of or will soon be benefiting from the GII.¹⁴ Leaving deliberations to copyright specialists and interested parties in the copyright industries alone risks irreversible mistake. This article examines the reasons why copyright on the GII will have an impact on us all and why emerging international rules could be raising dangerous roadblocks on the GII.

I. INTERNATIONAL COPYRIGHT

International law binds all nations. It is the general and concordant practices of states that arises to the level of *opinio juris sive necessitatis*. That is to say, nations follow the rules that have arisen through practice and adoption that have become accepted as binding on all nations.¹⁵ The Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")¹⁶ is the most widely adhered to international law treaty in the sphere of copyright. International copyright law has been called something of a misnomer because, by definition, it is argued, international law could not exist under the regime established by the Berne Convention.¹⁷ The reason for this is a distinction made between public international law and private international law,¹⁸ which are subsets of international law.¹⁹

13. Samuelson, *supra* note 11, at 191.

14. See Pamela Samuelson, *Intellectual Property and the Global Information Economy*, COMM. ACM, Jan. 1996, at 23 (declaring that the public should understand the amount of change that some groups seek in the copyright laws).

15. North Sea Continental Shelf, (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3 (Feb. 20).

16. Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris on May 4, 1886, revised at Berlin on Nov. 13, 1908, revised at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, revised at Stockholm on July 14, 1967, revised at Paris on July 24, 1971, and amended on Oct. 2, 1979, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention].

17. Compare Jon A. Baumgarten, *Primer on the Principles of International Copyright*, 15 PLI/PAT. 251 (1993), with *infra* note 25.

18. Such categorization is probably inadequate to explain the different types of laws that work at the international level. Nevertheless, as long as it is not taken too far, it has historically served as a helpful distinction.

19. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2 (2d ed. 1993).

International law can arise not only through tradition and practice but also through treaty.²⁰ Although widely adhered to, the Berne Convention is only binding upon members of the Berne Union, as membership to the convention is called,²¹ as opposed to all nations.²² Moreover, the convention is usually classified as a treaty of private international law. Private international law is often referred to as conflicts of law.²³ Such law is used in situations where the law of more than one jurisdiction could apply,²⁴ as where a plaintiff is from country A and defendant is from country B. The conflicts rules give guidance on which law to apply to private individuals or public entities in a controversy or case.²⁵ Conflicts rules will thus tell a court whether it should apply the law that is in place in its jurisdiction or the law of another jurisdiction (i.e., of another political division such as a municipality or nation).²⁶ The general conflicts rule applied in the Berne Convention is that of national treatment.²⁷

National treatment requires a court to treat a foreign party as if that party were a national and will generally result in the application of the *lex fori* (the law of the forum) to the case.²⁸ Thus, if plaintiff A is from Canada, and Defendant B is from the United States, assuming infringement of A's copyright occurred in the United States, a court in the United States would apply the copyright law of the United States, treating

20. *Id.* at 48.

21. Berne Convention, *supra* note 16, at art. 1.

22. As of July 1, 1996, of the 187 nation members of the United Nations, 119 were members of one version or another of the Berne Convention. WIPO DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS, BASIC PROPOSAL FOR THE ADMINISTRATIVE AND FINAL CLAUSES OF THE TREATY TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE, GENEVA, DECEMBER 2 TO 20, 1996, apps. I & II, *reprinted in* 43 J. COPYRIGHT Soc'y U.S.A. 372, 376, 380-82 (1996).

23. JANIS, *supra* note 19, at 234-35.

24. Cf. Joseph J. Ortego, *Contracts, Internet Contacts and Personal Jurisdiction*, N.Y. L.J., Sept. 17, 1996, at 1 (discussing cases where the parties to a dispute are in different jurisdictions and their only contact is through the GII).

25. JANIS, *supra* note 19, at 2. One commentator has described the Berne Convention as a hybrid: a public international law treaty binding between signatories but for the application of its rules of private international law. STEWART, *supra* note 3, at 30. This is probably closer to the fact than the mere categorization of the Berne Convention as a private international rule making treaty. Unless the minimum requirements imposed on Berne Union members, such as the reproduction, adaptation, and translation rights, are deemed mere conflicts rules, the treaty should be construed as a true hybrid of public (the minima) and private (national treatment) international law. This helps explain why the distinction can be more of a hindrance than an aid in international legal jurisprudence. See *supra* note 18.

26. Lionel S. Sobel, *The Framework of International Copyright*, 8 CARDOZO ARTS & ENT. L.J. 1 (1989).

27. Berne Convention, *supra* note 16, art. 5.

28. STEWART, *supra* note 3, at 38.

plaintiff A as if s/he were a national of the United States. The alternative would be to apply the *lex loci*, the law of where the copyrighted work originated.²⁹ In the above situation, the copyright law of Canada would have been applied if *lex loci* were the rule.

The advantage of national treatment is that courts do not need to learn another country's law whenever a foreign copyright owner is before its courts.³⁰ The disadvantage is that copyright protection in a given work will vary from country to country.³¹ As a consequence of national treatment, copyright laws tend to be territorial. Generally, whenever a copyright case is brought in a U.S. court, the law applied will be that of the United States. However, jurisdiction, or the right to hear a case, can be a more complicated matter.³² Just because the Berne Convention usually mandates application of the law of the forum does not mean that a court has the right to hear a case or to apply its law.³³ This problem becomes prevalent when copyrighted works cross borders as they often do on the GII.³⁴

The GII is often equated with the Internet. The Internet is the name given to an extensive network consisting of many networks of computers. A network can be as simple as two computers linked together by wire. The Internet uses certain protocols that allow the computers on the global network to communicate with one another and thereby transfer almost any information found in computer readable form, from text to music to movies.³⁵

In the scenario of A and B above, imagine that B obtained a copy of A's copyrighted work on a computer linked to the Internet in Canada and transferred this copy to his or her computer in the United States. B then does something with A's copyrighted work that infringes on A's copyright. A U.S. court would likely have jurisdiction over Defendant B be-

29. STEWART, *supra* note 3, at 37.

30. STEWART, *supra* note 3, at 38.

31. STEWART, *supra* note 3, at 38.

32. See David E. Rovella, *Internet Use Can Confer Jurisdiction*, NAT'L L.J., Aug. 12, 1996, at B1 (describing problems in determining if personal jurisdiction exists because of electronic transmissions into the forum).

33. Cf. Richard Raysman & Peter Brown, *Resolving Jurisdiction and Venue Issues on the Internet*, N.Y. L.J. Sept. 10, 1996, at 3. See Paul Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 20 COLUM.-VLA J.L. & ARTS 571 (1996), for different approaches and interpretations of the Berne Convention's national treatment provisions.

34. See generally Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318 (1995) (discussing how the GII challenges the traditional choice of law rules for international copyright violations).

35. See Richard Wiggins, *How the Internet Works*, INTERNET WORLD, Oct. 1996, at 54, for a discussion of how Internet protocols function.

cause s/he is a national of the United States and the infringement occurred in the United States.³⁶ What if plaintiff chooses instead to sue *B* in Canada? Maybe Canadian law gives more protection than U.S. copyright law would.³⁷ Could a Canadian court have jurisdiction over *B* and apply Canadian copyright law even though *B* had never set foot or done business in Canada? The answer is probably, though not assuredly, no. Now transpose the infringement to Australia and the nationality of *B* to Taiwan and the implications of the problems posed by the GII and the Internet become apparent. Surfing the Internet, the process of searching, perusing and collecting materials on the GII, might result in the unknowing infringement of the copyright laws of numerous nations.

A. BERNE MINIMUM PROTECTIONS AND THE PROBLEM OF ENFORCEMENT

In order to overcome the problems of having different levels of protection between members of the Berne Union, the Berne Convention includes certain minimal rules that all countries of the Union must follow. These include the obvious such as prohibitions against copying literary and artistic works,³⁸ as well as rules giving authors the exclusive right to authorize translations,³⁹ adaptations⁴⁰ and broadcasts⁴¹ of their works. Therefore, nationals of Berne Union countries can expect at least these minimal protections in every country of the Union. Along with national treatment, the minima alleviate the problems raised by the different levels of copyright protection between nations. Furthermore, it was hoped that creators in countries with less protection would put pressure on their governments to increase overall copyright protection, thereby bootstrapping up the level of protection afforded all authors in the Berne Union.⁴²

These objectives of the Berne Convention were not without success. Opened for signature in 1886, the Convention has gone through numerous revisions, the last substantive one having taken place in Paris in

36. If the infringement had occurred both in Canada and the United States, a party might still have to sue in Canada in order to recover its damages in Canada. See *The Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1100-01 (2d Cir. 1976).

37. See Lionel S. Sobel, *Pursuing the Home Court Advantage in International Copyright Litigation*, ENT. L. REP., Sept. 1995, at 3 (noting four advantages to bringing suit in the home country: "convenience, minimization of the plaintiff's expense, maximization of the defendant's expense, and the ability to use local counsel").

38. Berne Convention, *supra* note 16, art. 9.

39. Berne Convention, *supra* note 16, art. 8.

40. Berne Convention, *supra* note 16, art. 12.

41. Berne Convention, *supra* note 16, art. 11bis.

42. STEWART, *supra* note 3, at 38.

1971.⁴³ Each revision resulted in further protections being guaranteed to authors. However, there were major shortcomings as well. For most of the Union's history, the United States was visibly absent. The United States did not accede to or choose to comply with the Berne Convention until 1989.⁴⁴ Another problem was enforcement. Even though countries may have claimed compliance with the minimum level of protection required by the Convention, enforcement was viewed as impossible.⁴⁵

These problems were sought to be remedied during negotiations of GATT, since renamed the World Trade Organization ("WTO").⁴⁶ The TRIPS agreement provided that the enforcement procedures used by the WTO would apply to the substantive provisions of the Berne Convention.⁴⁷ TRIPS does this by incorporating Articles 1 to 21 and the Appendix of the Berne Convention into the GATT/WTO, with one important exception, Article 6bis, which will be reviewed later.⁴⁸

Now if a country, not only of the Berne Union, but also of the WTO, does not provide and enforce the minima set forth in the Berne Convention, that country can be brought before a WTO panel and be required to do so on pain of trade retaliation.⁴⁹ TRIPS thus marked a dramatic shift in the international protection of copyright law. It is one thing for country A to threaten to withdraw copyright protection for the nationals of country B because country B's copyright laws or enforcement thereof are insufficient. If country B has few or no developed copyright industries it will not care if its works receive no protection when imported into country A. It is a much bigger issue to be contended with when country A is able to exact retaliation through the WTO.⁵⁰ The WTO agreement covers trade in not just copyrighted works but also innumerable goods and

43. See SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* (1987), for a comprehensive history of the first hundred years of the Berne Convention.

44. The United States ratified the Convention on October 31, 1988. Since treaties are generally not self-executing in the United States, the Berne Convention, along with the Berne Convention Implementation Act, did not become effective in the United States until March 1, 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 205, 301, 401-11, 501, 504, 801 (1988)).

45. TERENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* 2253 (1993).

46. *Id.* at 2260.

47. TRIPS, *supra* note 8, art. 64.

48. TRIPS, *supra* note 8, art. 9(1); see *infra* Part II.7E. and III.B.

49. Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements*, 29 INT'L LAW. 99 (1995); see also TRIPS, *supra* note 8, art. 68.

50. This example is gleaned from a presentation given by Professor Jane C. Ginsburg, Jane C. Ginsburg, "Disputes & Resolutions: Harmonization of Copyright Laws and Global Licensing Systems" at the New York County Lawyer's Association (May 18, 1995).

services.⁵¹ Therefore, for its derogation, country *B* risks retaliation to an industry where it has strength. The deterrent effect of the WTO is potentially significant and the Berne Union begins to look pale in comparison.

Another important aspect of inclusion of copyright protection within the WTO is that the private international rules of the Berne Convention are now found within a treaty of public international law: a treaty governing relations between states⁵² as opposed to one governing which rule of law a nation will apply. The reason for emphasizing the distinction is that the results of public international treaties often form the basis of what eventually can become international law.⁵³ In essence, the enforcement procedures of the WTO and the decisions of its adjudicating panels could form the basis for *opinio juris sive necessitatis*,⁵⁴ which is copyright law that is binding on all nations. This argument grows stronger the more nations choose to become members of and abide by the WTO. The long term implications of TRIPS in the development of binding international copyright law could therefore prove as consequential to creators, disseminators and users of copyrighted works as the immediate results of that treaty.⁵⁵ If the minima included in the Berne Convention become increasingly enforceable between nations, the argument that international copyright law is a contradiction in terms, already weak for its emphasis on conflicts of law rules, loses much of its force.

B. EROSION OF NATIONAL TREATMENT AND THE NEW WIPO TREATIES

The World Intellectual Property Organization is responsible for the administration of the Berne Convention.⁵⁶ Yet, even if some of WIPO's thunder has been stolen by the WTO through its inclusion in TRIPS of the minima required by the Berne Convention, it has nevertheless at-

51. Instruments resulting from the negotiations included the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *reprinted in* 33 ILM 1125, 1143 (Apr. 15, 1994).

52. JANIS, *supra* note 19, at 2.

53. JANIS, *supra* note 19, at 48.

54. JANIS, *supra* note 19, at 44-54.

55. Professor Geller believes the TRIPS panels will, at best, give guidance in filling gaps in protection that will arise in between periodic revision of international intellectual property treaties. Geller, *supra* note 49, at 114. This assumes that TRIPS panels will choose not to interpret the minimum requirements included in the Berne Convention beyond their implementation in national copyright rules. It is still too soon to tell, but the interest in free trade that stands at the base of the WTO agreement could just as well encourage the development of international copyright law as that of new or revised intellectual property treaties. If anything, the E.U. experience would tend to argue that both may occur at the same time. Herman Cohen Jehoram, *The EC Copyright Directives, Economics and Authors' Rights*, 25 IIC 821 (1994).

56. RICKETSON, *supra* note 43, at 123.

tempted to address many of the issues raised or not addressed in the TRIPS agreement. The culmination of these negotiations, which was initiated by WIPO in 1991,⁵⁷ occurred at a Diplomatic Conference which took place in Geneva, December 2 to 20, 1996.⁵⁸ At this conference, the representatives of the nation, members of the Berne Union and WIPO reviewed and discussed the possibility of opening for signature three treaties meant to complement the Berne Convention. They were:

Draft Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works ("Protocol");⁵⁹

Draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms ("Neighboring Rights Instrument");⁶⁰ and

Draft Treaty on Intellectual Property in Respect of Databases ("Database Instrument").⁶¹

Going straight to the wire, the first two treaties, as amended during the Conference's deliberations, were approved shortly before midnight on December 20, 1996.⁶² The two new treaties, known as the WIPO Copy-

57. WIPO document AB/XX/2, Annex A, item PRG.02(2); Frank R. Rittman, *A Matter of Protocol: Is the Berne Convention Ready for the Twenty-First Century?*, DRAWING BOARD (newsletter of the New York Bar Association's Entertainment Arts & Sports Law Section), Spring 1993, at 25.

58. Peter H. Lewis, *160 Nations Meet to Weigh Revision of Copyright Law*, N.Y. TIMES, Dec. 2, 1996, at A1, D4.

59. WIPO DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS, BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY ON CERTAIN QUESTIONS CONCERNING THE PROTECTION OF LITERARY AND ARTISTIC WORKS TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE, GENEVA, DECEMBER 2 TO 20, 1996, *reprinted in* 43 J. COPYRIGHT Soc'y U.S.A. 399 (1996) [hereinafter *PROTOCOL*].

60. WIPO DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS, BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY FOR THE PROTECTION OF THE RIGHTS OF PERFORMERS AND PRODUCERS OF PHONOGRAMS TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE, GENEVA, DECEMBER 2 TO 20, 1996, *reprinted in* 43 J. COPYRIGHT Soc'y U.S.A. 443 (1996) [hereinafter *NEIGHBORING RIGHTS INSTRUMENT*].

61. WIPO DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS, BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY ON INTELLECTUAL PROPERTY IN RESPECT OF DATABASES TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE, GENEVA, DECEMBER 2 TO 20, 1996, *reprinted in* 43 J. COPYRIGHT Soc'y U.S.A. 516 (1996) [hereinafter *DATABASE INSTRUMENT*].

62. Seth Greenstein, *News from WIPO: The Final Day C Two Treaties for WIPO, and One More for the Road* (last modified Dec. 23, 1996) <http://www.hrrc.org/wr_12-20.html>. Greenstein attended the WIPO Conference in Geneva as an attorney-advisor to the Electronic Industries Association. His unofficial reports on the daily developments at the Conference, posted on the Internet, show one of the unprecedented uses that the GII makes possible to scholars: almost simultaneous comprehensive reportage of events taking place across the globe on subjects not typically recorded in traditional media. This article, for example, could not have been written so soon after the events without the availability of Mr. Greenstein's reports, as well as the postings of the Conference's materials and copies of the final text of the treaties, on the Internet.

right Treaty⁶³ and the WIPO Performances and Phonograms Treaty,⁶⁴ along with the Database Instrument, which was left open for further negotiations,⁶⁵ raise the level of protection given to works created by authors⁶⁶ and include numerous provisions on the application of copyright law on the GII. The GII has influenced the negotiations to the extent that the Notes on the Title and Preamble of the draft Protocol state that the treaties "could be characterized as 'Global Information Infrastructure Treaties' in the field of copyright and rights related to copyright."⁶⁷ The treaties are also, in effect, none too subtle attempts to attack related problems that have become prevalent in international copyright relations: the deterioration of national treatment, as well as the rise of neighboring rights and use of the doctrine of material reciprocity.

The best example of what constitutes neighboring rights is probably those rights given to producers of sound recordings. That is because such producers tend to be business entities, such as corporations, instead of individual authors.⁶⁸ Neighboring rights are rights that are similar to those protected by copyright laws (i.e. exclusive right to authorize reproductions, broadcasts and so forth) and which may be, but are not necessarily, protected under a nation's copyright law.⁶⁹ The distinction arose in part because authors' rights countries generally grant protection to natural authors for their creative endeavors.⁷⁰ Although corporations may hold certain rights, by definition, they cannot create; only its officers, directors, employees and contractees can create for them.

If protected by copyright law without reservation, as the United States does with sound recordings,⁷¹ the question of national treatment for neighboring rights does not arise because the United States treats foreign sound recording producers and performers as it would any U.S. national. However, the United States is not obligated under the Berne

63. WIPO Copyright Treaty, available at *WIPO Copyright Treaty* (last modified Jan. 16, 1997) <<http://www.wipo.org/eng/diplconf/distrib/treaty01.htm>>.

64. WIPO Performers and Phonograms Treaty, available at *WIPO Performers and Phonograms Treaty* (last modified Jan. 16, 1997) <<http://www.wipo.org/eng/diplconf/distrib/treaty02.htm>>.

65. WIPO Draft Recommendation, December 20, 1996, available at *CRNR/DC/88/eng* (last modified Jan. 16, 1997) <<http://www.wipo.org/eng/diplconf/distrib/88dc.htm>>. See also Paul Lewis, *No Accord Soon on Treaty for Data Base Copyrights*, N.Y. TIMES, Dec. 14, 1996, at 36 (mentioning the need for more time for discussion).

66. Seth Schiesel, *Global Agreement Reached to Widen Law on Copyright*, N.Y. TIMES, Dec. 21, 1996, at 1.

67. PROTOCOL, *supra* note 59, at Notes on the Title and Preamble ¶ 0.05.

68. STEWART, *supra* note 3, at 191.

69. STEWART, *supra* note 3, at 188-89.

70. See STEWART, *supra* note 3, at 189 (explaining that *Droit d'auteur* grew from the theory that an author has a natural right that is personal in his/her creation).

71. Copyright Act of 1976, as amended, 17 U.S.C.A. §§ 106, 114 (1996).

Convention to give national treatment for such works.⁷² Until recently, the United States did not provide protection for the public performance of sound recordings; only for musical compositions.⁷³ Many countries, on the other hand, have been providing copyright-like protection to producers and performers under the aegis of neighboring rights, including a public performance right in sound recordings.⁷⁴ However, many states have done so on the condition of material reciprocity.

Material reciprocity is an abrogation of the national treatment given to protectable works of expression. It requires something for something.⁷⁵ If the United States protects only digital public performances of sound recordings, as is currently the case (as opposed to including the more prevalent analog public performances),⁷⁶ then country *B*, which provides a general public performance right (i.e. does not distinguish analog from digital) as a neighboring right, may require that the United States provide country *B*'s nationals with protection that is materially similar to the protection it offers before it will grant protection to U.S. nationals. In effect, the United States, which has one of the strongest international copyright industries in sound recordings, was for years, and may continue to be, denied the ability to collect public performance royalties for sound recordings broadcast in other countries because of the material reciprocity requirement. The WIPO Performers and Phonograms Treaty attempts to address this issue in Article 4, which requires national treatment for "the exclusive rights granted in" the treaty.⁷⁷

The problem of neighboring rights is not simply resolved by a treaty. The neighboring rights problem exists not only because the listing of works included in the Berne Convention has historically been underinclusive, but because of the different traditions used in protecting works of expression such as literature and motion pictures among the countries in the Berne Union.⁷⁸ The Berne Convention applies to "authors"⁷⁹ as

72. Berne Convention, *supra* note 16, art. 2(1). Definition of "literary and artistic works" does not include sound recordings, but does extend to the musical compositions included on sound recordings. The distinction is important because composers of musical works are protected under the treaty. Composers may also, but will not necessarily, be producers and/or performers.

73. See THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995, H.R. REP. NO. 104-274, at 12 (1995); U.S. Copyright Act, 17 U.S.C. § 106(6).

74. Bill Holland, *Music Business Urges Congress to Adopt Performance Right*, BILLBOARD, Apr. 3, 1993, at 6. "The U.S. is one of a few developed countries without a public performance right in sound recordings." *Id.*

75. STEWART, *supra* note 3, at 41.

76. U.S. Copyright Act, 17 U.S.C. § 106(6); see *supra* note 73.

77. WIPO Performers and Phonograms Treaty, *supra* note 64, art. 4(1). The United States may still be out of luck because Article 15 allows partial or total reservation to the right of remuneration for broadcasting and communication to the public of sound recordings. *Id.* arts. 4(2), 15(1), 15(3).

78. See *supra* note 3 and accompanying text to note 70.

opposed to legal entities. For example, accepting motion pictures as protectable works within the treaty required a severe stretch of its provisions because there are several authors involved in any but the most rudimentary film.⁸⁰ Granting exclusive rights in producers, directors, writers, cinematographers, actors, editors, sound engineers, and so forth might seem extreme.⁸¹ The U.S. Copyright Act deals with this question through a legal fiction: the "work made for hire."⁸² Generally, the producer of a motion picture, a legal entity, is a commissioner of the work. As such, the producer is deemed to be the author of the film for the purposes of the Copyright Act.⁸³

This type of legal fiction does not always transfer well to countries which follow the "*droit d'auteur*" tradition. Part of the reason is that such authors' rights regimes often include protection for authors that are more personal in nature and which cannot be held by a legal entity such as a corporation.⁸⁴ Furthermore, the reasons and underlying theories given for the protection of copyrighted works will differ, with authors' countries generally choosing to protect the natural rights of creators in their work and countries following the Anglo-copyright tradition choosing to protect authors in order to encourage the release of their work to the public.⁸⁵ The melding of these traditions has not been easy,⁸⁶ leaving the United States outside of the Berne Union for much of its history.⁸⁷ The differences have thus contributed to the protection of new types of works outside of copyright and the Berne Convention into neigh-

79. Berne Convention, *supra* note 16, art. 3.

80. STEWART, *supra* note 3, 128.

81. Berne Convention, *supra* note 16, arts. 4, 14, 14bis. Art. 14bis (2)(a) leaves it to the legislation of the country where protection is asserted to determine who owns the copyright in a cinematographic work. *Id.* art 14bis (2)(a). The result is the possibility of multiple ownership structures for motion pictures depending on the country where the film is exhibited. Of course, contracts will often take care of these ownership issues, yet individual countries may have different provisions on what constitutes proper assignment of a copyright interest thereby frustrating oral agreements or all but the most comprehensive written contracts.

82. U.S. Copyright Act, 17 U.S.C.A. §§ 101, 201(b) (1996). See Gunnar Karnell, *Employment for Hire - A Non-Legislative Approach*, 33 J. COPYRIGHT SOC'Y U.S.A. 100 (1985) for examples of similar provisions in other countries.

83. 17 U.S.C.A. §§ 101, 201(b). Section 101's definition of a work made for hire, at least in regards to motion pictures, requires that "the parties expressly agree in a written instrument signed by them that the work will be considered a work made for hire." *Id.* at 17 U.S.C. § 101.

84. See *supra* note 3 and accompanying text to note 70.

85. Stephen Fraser, *Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law*, 18 HASTINGS COMM. & ENT. L.J. 287, 303-04 (1996). Canada, as will be seen in Part III.B., is an exception showing influences of both the *droit d'auteur* and Anglo-copyright traditions.

86. *Id.* at 318-19.

87. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995).

boring rights and other treaties such as the Rome Convention.⁸⁸ When protection is extended with neighboring rights and requirements of material reciprocity, as opposed to copyright and national treatment under Berne, accusations of protectionism have not been uncommon.⁸⁹ Thus, it should have come as no surprise to copyright specialists when copyright was taken under the wing of the WTO.⁹⁰

The WIPO Treaties are part of an attempt to overcome such perceived deficiencies in the Berne Convention. The reason the new treaties had been called protocol and instruments during their drafting was that their provisions would not have, and the new WIPO Treaties do not amend nor revise the Berne Convention⁹¹ or the Rome Convention.⁹² To amend the Berne Convention, under its terms, unanimity is required.⁹³ Getting such unanimity out of over one hundred Berne Union countries was not expected.⁹⁴ Instead, the treaties were designed to be considered as "special agreements," as that term is used in Article 20 of the Berne Convention.⁹⁵ Article 20 reads:

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.⁹⁶

The treaties are meant to provide increases in copyright and neighboring rights protection with the Berne Convention and the Rome Con-

88. One example is the protection of sound recordings or phonograms. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on Oct. 26, 1961, *reprinted in* STEWART, *supra* note 3, at 945 [hereinafter the Rome Convention].

89. GOLDSTEIN, *supra* note 11, at 190-95; *see also infra* note 344 and accompanying text.

90. Although this article sometimes groups together copyright attorneys and specialists into something resembling a separate class, it should be clear that as individuals and representatives of varying client interests, they do not share a common ideology or outlook on copyright and neighboring rights protection. *See* David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385 (1995) (arguing for an almost purist, if not isolationist, approach to copyright law; implicit in Nimmer's article is a belief that copyright should remain separate from international trade considerations).

91. WIPO Copyright Treaty, *supra* note 63, art. 1(1).

92. WIPO Performers and Phonograms Treaty, *supra* note 64, art. 1; *see also supra* note 87.

93. Berne Convention, *supra* note 16, art. 27(3).

94. The Rome Convention requires a two-thirds affirmative vote for revision. Rome Convention, art. 29(2). As of July 1996, there were 53 signatory countries to the Rome Convention. *See* WIPO Basic Proposal, *supra* note 22, at 380-82.

95. PROTOCOL, *supra* note 59, art. 1(1); NEIGHBORING RIGHTS INSTRUMENT, *supra* note 60, art. 1(2).

96. Berne Convention, *supra* note 16, art. 20.

vention acting as floors that can only be raised.⁹⁷ Moreover, the WIPO treaties are not limited to the Berne Union or signatories of the Rome Convention, but instead are open to accession to any member state of WIPO, which includes most nations in the United Nations.⁹⁸ Thus, like TRIPS, the treaties build upon the minima found in the Rome Convention and the 1971 Paris version of the Berne Convention.⁹⁹ In some ways, if the WIPO treaties prove popular, the Berne Convention may be left behind by TRIPS and the new treaties.¹⁰⁰

1. *WIPO Copyright Treaty*

Several areas covered by the treaties, such as the protection of and rental rights for computer software were dealt with in TRIPS.¹⁰¹ If this seems duplicative, it is useful to remember that not every member of the Berne Union is also a member of the WTO, China being the most prominent example, having not, as of this writing, yet been allowed membership in the WTO.¹⁰² The impact of the WIPO Copyright Treaty on international copyright law could prove as breathtaking as that of TRIPS. All that can be attempted here is a summary of the provisions that could have wide ranging implications on the GII and international copyright law.

The Preamble of the WIPO Copyright Treaty makes clear that its intent is to maintain and clarify the existing minima and to develop new international rules in order to address "new economic, social, cultural, and technological developments," in recognition of the "profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works."¹⁰³ The treaty does this by introducing to the international copyright sphere the exclusive right for an author to authorize "any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and a time individually chosen by them."¹⁰⁴ Essentially, this right gives authors the ability to con-

97. WIPO Copyright Treaty, *supra* note 63, art. 1(1); WIPO Performers and Phonograms Treaty, *supra* note 64, art. 1.

98. WIPO Copyright Treaty, *supra* note 63, art. 17; WIPO Performers and Phonograms Treaty, *supra* note 64, art. 26; *see supra* note 22.

99. TRIPS, *supra* note 8, arts. 2, 9, 14.

100. Sam Ricketson, *The Future of the Traditional Intellectual Property Conventions in the Brave New World of Trade-Related Intellectual Property Rights*, 26 IIC 872 (1995).

101. TRIPS, *supra* note 8, arts. 9-11.

102. *See* David E. Sanger, *U.S. to Spur Beijing on Trade Group Entry*, N.Y. TIMES, Nov. 13, 1996, at D2 (stating that China is not a member of the WTO, and how the United States is trying to get China to join).

103. WIPO Copyright Treaty, *supra* note 63, at pmb1.

104. WIPO Copyright Treaty, *supra* note 63, art. 8.

trol whether and how they will make public access to their works possible, including access on the GII.

Probably the most controversial provision of the proposed Protocol, Article 7,¹⁰⁵ was left out of the WIPO Copyright Treaty during negotiations at the WIPO Diplomatic Conference.¹⁰⁶ Article 7 was removed, but not before the United States, one of its most ardent proponents, obtained a vote on an Agreed Statement as to how the WIPO Copyright Treaty should be interpreted.¹⁰⁷ The Protocol's Article 7 had dealt with what has become one of the most contentious issues in applying copyright law to the GII—"browsing."

a. The Internet and Browsing

At this point, it is necessary to review how materials are disseminated and received on the GII. To receive and send information over the vast network called the Internet, connection is required. Although there are many ways to connect to the Internet, for most individuals, this access will occur through an Internet/On-Line Service Provider ("ISP").¹⁰⁸

105. PROTOCOL, *supra* note 59, at 416-17.

Scope of the Right of Reproduction

(1) The exclusive right accorded to authors of literary and artistic works in article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

Id.

106. Greenstein, *supra* note 62; Schiesel, *supra* note 66.

107. Greenstein, *supra* note 62.

108. Some of the biggest ISPs in the United States include Netcom and AT&T Worldnet. Well known companies such as America Online and Compuserve also provide access to the Internet. These later companies are actually hybrids. Along with offering Internet access, they also furnish proprietary services. Loosely defined, a proprietary service provides a subscription service to databases made available only to their customers. Originally, proprietary service companies such as Prodigy and Compuserve, did not provide their users access to the Internet. With the growth and ease of use made possible by the World Wide Web "area" of the Internet, these proprietary services began offering connection to the Internet as well as access to their own copyrighted/licensed materials. Partly because of the lack of interconnection (inability of non-subscribers to access protected materials on these proprietary services), content providers and users began making wider use of the Internet, particularly the World Wide Web, thereby forcing many proprietary services to abandon much of the exclusivity of their services and to focus on the Internet side of their businesses, the most notable example being the Microsoft Network. See Peter H. Lewis, *Compuserve Changes Focus to Home Office and Businesses*, N.Y. TIMES, Nov. 22, 1996, at D1, D6 (illustrating an example of an ISP); see also *Microsoft Sees Big Internet Loss*, N.Y. TIMES, Nov. 18, 1996, at D8 (depicting another ISP).

Through a device called a modem, individuals usually connect to their ISP through their computer and a telephone line.¹⁰⁹ The ISP in turn connects its users to the Internet. Once this is done, the user, through her or his computer, can access information stored in other computers that are connected to the Internet, assuming these other computers are set up to make their information available. Common uses of the Internet are to send and receive electronic mail ("e-mail"), and to obtain information from computers all over the world.¹¹⁰ Once a user wishes to view information from another computer, called "browsing," the user's computer will automatically make a copy of the requested information onto the computer's Random Access Memory ("RAM").¹¹¹ This is where the problems of the GII and copyright law become contentious. If this information is not otherwise saved by the user,¹¹² it generally disappears after a set time or when the user's computer is turned off.

Those who have never used a computer might find the above description somewhat arbitrary. After all, if technology created the problem of the temporary copy, could not technology arrive at a solution that would avoid having a temporary copy being made on the user's computer? Suffice it to say, that would require a complete redesign of the Internet and how the Internet communicates. The advantage of the Internet is that it makes access to information fast and relatively easy. Removing the computer's temporary copy from the equation would make access to the information slower, if not impossible. It would be tantamount to imposing point to point broadcasting on the GII. Although the Internet creates an illusion that the user is constantly connected to the computer where the information is being obtained, the user actually is only connected long enough to "download" the information requested. Otherwise, the user would be monopolizing that other computer, barring access to other users who might wish to access the information therein.

The underlying concept of the Internet, if not of much of the GII, is a sharing of a resource, which is the channels of the network, so that all may benefit and access the information available. This is done through a form of packet switching which allows numerous users to access the same information in what appears to be a simultaneous manner but which is in reality done one at a time.¹¹³ Eliminate the user's ability to

109. See also Mark Landler, *Cablevision Sets Link to Internet for L.I. Viewers*, N.Y. TIMES, Dec. 17, 1996, at D1, D8 (discussing the purpose of modems).

110. See, e.g., Wiggins, *supra* note 35; *Shea v. Reno*, 930 F. Supp. 916, 925-30 (S.D.N.Y. 1996).

111. *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1378 n.25 (N.D. Cal. 1995).

112. The analogy here would be to making a photocopy, or taping a television or radio broadcast.

113. Wiggins, *supra* note 35, at 55.

browse the information saved onto his computer, and you quite literally risk eliminating what has become one of the most important means of communications devised.¹¹⁴

Article 7(1) of the Protocol explicitly risked doing just that. Because browsing would have unequivocally constituted an unauthorized reproduction,¹¹⁵ the Protocol could have required signatory countries to prohibit the practice unless those countries had specifically implemented an exception for the practice under Article 7(2).¹¹⁶ At first glance, Article 7(2) appeared to allow the signatories to limit the reproduction right of browsing.¹¹⁷ However, this limit was subject to similar requirements as those set forth in Article 9(2) of the Berne Convention, which authorizes limits in "special cases" and requires there be no "conflict with a normal exploitation of the work and . . . [that it] not unreasonably prejudice the legitimate interests of the author."¹¹⁸ The Protocol's notes to Article 7 attempted to give some guidance on this question. For example:

[I]t would be a matter for the legislation of Contracting Parties to limit the right of reproduction in the case of temporary reproduction of a work, in whole or in part, in certain *specific cases*, namely where the purpose of the temporary reproduction is solely to make the work perceptible or where the reproduction is transient or incidental in nature The purpose of [Article 7(2)] . . . is to make it possible to exclude from the scope of the right of reproduction acts of reproduction that are not relevant in economic terms.¹¹⁹

Arguably, under Article 7(2) of the proposed Protocol, signatories would have had to specifically list what it intended to save from the reproduction right. More general provisions, such as the "fair use" doctrine in place in the U.S. Copyright Act, which possibly would not be specific enough.¹²⁰

114. *ACLU v. Reno*, 929 F. Supp 824, 881 (E.D. Pa. 1996); see *infra* note 267 and accompanying text.

115. "The author's right of reproduction in literary and artistic works . . . clearly includes the storage of a work in any electronic medium; it likewise includes such acts as uploading and downloading a work to or from the memory of a computer . . ." PROTOCOL, *supra* note 59, at 414. Further, in section 7.08, there is similar language proposed by the European Community and its member States. *Id.* at 415.

116. PROTOCOL, *supra* note 59, at 416-17.

117. PROTOCOL, *supra* note 59, at 416-17.

118. Berne Convention, *supra* note 16, art. 9(2).

119. PROTOCOL, *supra* note 59, at 415 (emphasis added).

120. Section 107 of the U.S. Copyright Act reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

Opposition to Article 7 was great enough to have possibly caused complete failure of the WIPO Conference.¹²¹ Yet one of the reasons advanced for its exclusion was that Article 7 was unnecessary: the question of browsing already fell within the author's reproduction right in Article 9 of the Berne Convention.¹²² The United States' insistence for an Agreed Statement that the WIPO Copyright Treaty was to be interpreted consistently with this approach was supported by Mihaly Ficsor, Assistant Director General of WIPO.¹²³ In a statement to the assembled representatives in the final hours of the Conference, Mr. Ficsor urged that this had been WIPO's position since at least 1982: storage of a copyrighted work in a computer's memory, apparently even if only of a temporary nature, constituted a reproduction of that work.¹²⁴ This contrasts with what must be viewed as misleading early reports that "Internet access providers and free speech advocates [had] persuaded negotiators to delete wording that would have treated even temporary computer copies automatically created to view graphics and other information from the Internet as possible violations of international copyright law."¹²⁵ Deletion of even controversial language from draft treaty documents cannot change international copyright law if the Agreed Statement and WIPO Directorate's interpretations are accepted.

If Mr. Ficsor's interpretation is correct, the Agreed Statement is mere verbiage. Article 1 of the WIPO Copyright Treaty requires those acceding to the treaty to "comply with Articles 1 to 21 . . . of the Berne

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and;

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors.

U.S. Copyright Act, 17 U.S.C.A. § 107 (1996). *See also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

121. Greenstein, *supra* note 62.

122. Greenstein, *supra* note 62. Article 9(1) of the Berne Convention states: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, *in any manner or form*." Berne Convention, *supra* note 16, art. 9(1) (emphasis added).

123. Greenstein, *supra* note 62.

124. Greenstein, *supra* note 62. Mr. Ficsor's announcement was consistent with the prepared statement he gave before the U.S. House Judiciary Committee, Courts and Intellectual Property Subcommittee, and the Senate Judiciary Committee, on November 15, 1995 during Congress' deliberations over H.R. 2441 and S. 1284 to amend the U.S. Copyright Act. Prepared Statement of Mihaly Ficsor, FED. NEWS SERV., Nov. 15, 1995. *See infra* notes 155 and accompanying text.

125. Schiesel, *supra* note 66, at 1.

Convention,"¹²⁶ which includes Article 9 of that Convention. Either way, the United States was able to get enough votes for an Agreed Statement to the effect that browsing implicated the reproduction right,¹²⁷ which, while not binding under the Vienna Convention, is given regard as to the appropriate interpretation to be supplied a treaty.¹²⁸ If that were not confusing enough, it was argued that Article 7(2), on possible exceptions to the reproduction/browsing right, was already covered by Article 10 of the WIPO Copyright Treaty.¹²⁹ Article 10, in turn, was based on Article 9(2) of the Berne Convention.¹³⁰ Thus, unless an exception is included for browsing in a states' national legislation¹³¹ for "a normal exploitation of the [copyrighted] work" that does "not unreasonably prejudice the legitimate interests of the author,"¹³² browsing constitutes an infringing reproduction of that work. Assuming the requisite thirty nations ratify the WIPO Copyright Treaty for it to enter into force,¹³³ and further assuming the treaty proves popular, browsing on the GII, unless otherwise excepted, could become illegal even though there is no other way to view the materials or to know before hand if a work is copyrighted or in the public domain. In fact, under Mr. Fiscor's interpretation of the Berne Convention, browsing may already be forbidden.

If practically every instance of browsing risks constituting an infringement, the likelihood of being pursued for the infraction is currently small. The high cost involved in litigation, especially in North America, rarely involves situations of private uses of copyrighted materials. In fact, it is arguable that private uses of copyrighted materials are not infringements in the United States.¹³⁴ The problem, of course, is that the

126. WIPO Copyright Treaty, *supra* note 63, art. 1(4).

127. Greenstein, *supra* note 62.

128. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1969).

129. Greenstein, *supra* note 62.

130. Greenstein, *supra* note 62; WIPO Copyright Treaty, *supra* note 63, art. 10; Berne Convention, *supra* note 16, art. 9(2).

131. Query whether this includes the fair use provisions of the U.S. Copyright Act, 17 U.S.C. § 107.

132. WIPO Copyright Treaty, *supra* note 63, art. 10.

133. WIPO Copyright Treaty, *supra* note 63, art. 21.

134. One famous fair use case, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), had an individual defendant added to test this question. *Id.* at 423 n.3. Although the issue of private copying was not addressed, the Supreme Court of the United States decided that it was a fair use to copy entire television programs for later viewing. *Id.* The question of private copying is not directly answered by the U.S. Copyright Act or its legislative history either, although there is some indication that private taping of sound recordings was not deemed an infringement. Joel L. McKuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 319 (1994). This is arguably now codified at section 1008 of the U.S. Copyright Act. 17 U.S.C.A. § 1008 (1995). Either way, Sony appears to make it

GII blurs the distinction between what is a private use and what is a public use of copyrighted materials to the point that the distinction may become irrelevant.¹³⁵ This concern can be seen in the Right of Communication to the Public in Article 8 of the WIPO Copyright Treaty where public communication is broadly defined as "making available to the public . . . works in such a way that members of the public may access these works from a place and at a time individually chosen by them."¹³⁶ Many copyrighted works, such as books and magazines, can now be accessed on the GII at any time without ever needing to go to the local book seller. The private/public distinction is also of no aid in those countries that extend the copyright holder's exclusive rights to all uses made of their copyrighted materials.¹³⁷

b. Technological Requirements and Access Rights

Technology and the new WIPO Treaties could spell the end of the user's ability to access copyrighted works on the GII in private without permission or paying a fee. Technologically, this is achieved in a two-fold manner. Following the suggestion of the United States,¹³⁸ the new WIPO Treaties would make it unlawful to knowingly remove what is called "*Rights Management Information*" ("RMI") from a protected work or to knowingly distribute copies of works from which the RMI has been removed.¹³⁹ Another Article requires signatories to provide "adequate legal protection and effective legal remedies against the circumvention of

difficult to posit that browsing without more constitutes an infringement in the United States.

135. It is Professor Goldstein's contention that knocking down the wall that separates public and private uses would be beneficial to society. By tolerating authors to trace all uses of their works, the metering this allows would provide copyright holders with enough information on how to optimally allocate their creative resources. GOLDSTEIN, *supra* note 11, at 178-79, 200. The argument proves and assumes too much. It assumes the need to trace all works to make such a determination, that expression only arises with economic incentive, and that it is desirable to produce works only if there is sufficient demand. It does not properly consider the societal and individual values implicit in privacy. Society, individuals, and even copyright law amount to more than consumerism.

136. WIPO Copyright Treaty, *supra* note 63, art. 8.

137. See *British Columbia Jockey Club v. Standen*, 8 C.P.R. 3d 283, 288 (B.C. C.A.) (1985); *Bishop v. Stevens*, 72 D.L.R. 97 (1990) (Can.).

138. WIPO BCP/CE/VI/12, Jan. 10, 1996, *Committee of Experts on a Possible Protocol to the Berne Convention*, Sixth Sess., Geneva, Feb. 1 to 9, 1996, at 37-38, 41-42 [hereinafter WIPO BCP/CE/VI/12].

139. RMI is defined as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information . . ." WIPO Copyright Treaty, *supra* note 63, art. 12(2). See also WIPO Performers and Phonograms Treaty, *supra* note 64, art. 19(2) (discussing the variation on the definition for performances and phonograms).

effective technological measures used" to restrict unauthorized uses of protected works.¹⁴⁰

The result of these changes are not obvious if one is unfamiliar with the workings of the GII. Consequently, an analogy might be useful. Currently, in many countries, including the United States and Canada, the public can patronize a public library and borrow a protected book, audio-video tape of a motion picture, or even a sound recording, at no charge to the borrower. Imagine a situation where the owner of the rights in these works could include technology in these books, videotapes and CDs that would prevent a potential user from reading, viewing or listening to them without permission or a fee. That technology exists and under the WIPO Treaties, attempts or means to circumvent these mechanisms would be unlawful even though viewing the materials themselves might not constitute an infringement.¹⁴¹

In essence, if implemented, what these Articles could impose is an international regime that allows copyright and neighboring rights owners to control and possibly even trace their works long after they have left their hands—even after the works are no longer protected and have entered the public domain. Because of this and other concerns, during the WIPO Conference, the language of Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performers and Phonograms Treaty was limited—legal remedies for efforts to remove or alter RMI would only apply to acts that "induce, enable, facilitate or conceal an infringement of any right covered" by the WIPO Treaties and/or the Berne Convention.¹⁴² Note that the changes still do not address the possibility of

140. WIPO Copyright Treaty, *supra* note 63, art. 11; WIPO Performers and Phonograms Treaty, *supra* note 64, art. 18. This is a significant watering down from the language in the draft Protocol and Neighboring Rights Instruments which would have made "protection-defeating devices" unlawful. PROTOCOL, *supra* note 59, art. 13; NEIGHBORING RIGHTS INSTRUMENT, *supra* note 60, art. 22. A "protection-defeating device" was defined as "any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment or mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty." *Id.* art. 13(3); NEIGHBORING RIGHTS INSTRUMENT, *supra* note 60, art. 22(3).

141. WIPO Copyright Treaty, *supra* note 63, art. 11; WIPO Performers and Phonograms Treaty, *supra* note 64, art. 18.

142. WIPO Copyright Treaty, *supra* note 63, art. 12(1); WIPO Performers and Phonograms Treaty, *supra* note 64, at art. 19(1); Seth Greenstein *News from WIPO: Days Twelve and Thirteen C Climbing the Walls* (last modified Dec. 17, 1996) <http://www.hrrc.org/wr_12-15.html>. Canada's delegate noted that, as originally drafted, the technological measures might bar equipment that could have significant non-infringing uses. *Id.* The measures also ignored circumvention in situations where materials were in the public domain, for fair dealing or other specific exceptions allowing use of protected works. Seth Greenstein, *News from WIPO: Days Seven C The Audio Visual Debate, and What's Fair is Fair Use* (last modified Dec. 11, 1996) <http://www.hrrc.org/wr_12-10.html>.

tracing works long after they have left the rights holders' hands. Even lending a work to a friend or colleague could possibly be traced.

Added to the controversial interpretation of the Berne Convention and the WIPO Treaties that would prohibit browsing, what these provisions do is completely alter the balance between the interests of authors/ neighboring rights owners and the interests of users and consumers of copyrighted materials. In the end, the effect of the new WIPO Treaties is to create a new right of access to protected and unprotected materials that extends beyond the time a work is first made available. At least where the United States is concerned, this goes against the very grain of copyright protection.¹⁴³ Hence, it is ironic that these interpretations and provisions were advanced and advocated by the United States. What the new WIPO Treaties ignore is that in many cases, the largest users of copyrighted materials tend to be authors and copyright holders themselves, thereby placing an impediment on their expression that could be tragic.

c. *Further Treaty Additions*

Other significant provisions included in the WIPO Treaties extend to authors and neighboring rights holders the exclusive right to authorize and control the distribution of their works,¹⁴⁴ a rental right,¹⁴⁵ and for performers and producers of phonograms, a remuneration right for the broadcast and communication to the public of their works.¹⁴⁶ Further, the WIPO Copyright Treaty, as noted in the draft Protocol, reaffirms "on a high international level the cornerstone principle for the protection of literary and artistic works: the principle of national treatment."¹⁴⁷ Article 3 does this by stating that Articles 2 to 6 of the Berne Convention will be applied to all of the new rights contemplated

143. As the U.S. Supreme Court has explained:

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work. This principle, known as the idea expression or fact/expression dichotomy, applies to all works of authorship *This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.*

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-50 (1991) (citations omitted and emphasis added).

144. WIPO Copyright Treaty, *supra* note 63, art. 6; *see also* WIPO Performers and Phonograms Treaty, *supra* note 64, arts. 8, 10, 12, 14 (mentioning the exclusive right to make publicly available fixed performances and phonograms).

145. WIPO Copyright Treaty, *supra* note 63, art. 7; WIPO Performers and Phonograms Treaty, *supra* note 64, arts. 9, 13.

146. WIPO Performers and Phonograms Treaty, *supra* note 64, art. 15.

147. PROTOCOL, *supra* note 59, n.2.06.

by the WIPO Copyright Treaty.¹⁴⁸

The Conference, however, left aside the question of a new type of, or *sui generis*, protection for databases for the "substantial investment in the collection, assembly, verification, organization or presentation of the contents,"¹⁴⁹ in a third WIPO treaty.¹⁵⁰ Instead, the Conference recommended that a convocation to further study the question of database protection take place in early 1997 "to decide on the schedule of further preparatory work on a Treaty on Intellectual Property in Respect of Databases."¹⁵¹ A resolution was also introduced for a similar convocation in early 1997 to discuss a protocol to the WIPO Performances and Phonograms Treaty to extend its protections to audiovisual performances in 1998.¹⁵² This resolution results from the inability of the United States and E.U. to agree to a compromise at the Conference on including the alternative audio-visual provisions in the draft Neighboring Rights Instrument.¹⁵³

Remarkably, the WIPO Copyright Treaty comes very close to requiring their signatories to comply with similar proposals found in TRIPS and in the INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS by the Information Infrastructure Task Force, better known as the United States White Paper.¹⁵⁴ Additionally, except for the technological and rights management provisions in the new WIPO Treaties, which the United States has so far been unable to implement in its own copyright law, accession to the treaties would require little if any changes to the U.S. Copyright Act.¹⁵⁵ Nevertheless, the fact that Congress had just failed to enact legislation proposed by the White Paper

148. WIPO Copyright Treaty, *supra* note 63, art. 3. Article 5 of the Berne Convention is where the national treatment requirements are found. Berne Convention, *supra* note 16, art. 5.

149. DATABASE INSTRUMENT, *supra* note 61, art. 1(1).

150. WIPO Press Release No. 106 (visited Mar. 29, 1997) <<http://www.wipo.org/eng/diplconf/distrib/press106.htm>>.

151. WIPO Draft Recommendation, *supra* note 65.

152. WIPO Draft Resolution, CRNR/DC/87 (visited Mar. 29, 1997), <<http://www.wipo.org/eng/diplconf/distrib/87dc.htm>>.

153. John Zarocostas, *Treaty Talks Drop Audio-Visual; Europe and US Fail to Resolve Dispute*, J. COMM., Dec. 19, 1996, at 3A.

154. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter U.S. WHITE PAPER].

155. Based in part on proposals included in the White Paper, bills were introduced in Congress to amend the Copyright Act. H.R. 2441/S. 1284, 104th Cong., 1st Sess. (1995). The legislation proved unpopular, particularly with Internet service providers and telephone companies, and was left in committee (and not enacted) when the 104th Congress adjourned for the 1996 elections. See Carey R. Ramos & Carl W. Hampe, 'Mere Conduit' Exemption Stirs Debate, 216 N.Y. L.J. 87 (1996).

should leave pause to wonder if the executive branch of the U.S. government has not attempted to change domestic copyright law through international treaty negotiations not entirely consistent with the interests of the owners, purveyors, and users of copyrighted materials.

As was the case with the negotiations that led to TRIPS, the United States was first out of the gate and has managed to get much of its agenda included into the negotiations for the WIPO Treaties.¹⁵⁶ This observation is not as compelling for the WIPO Performers and Phonograms Treaty, or with the problem of the protection of databases, where the United States appears to have been playing catch-up with Europe.¹⁵⁷ Although the E.U. seems to have been willing to follow the United States' lead where the reproduction right and technological measures proposed were concerned in the WIPO treaties,¹⁵⁸ the United States and the E.U. can not be said to always agree on how copyright law should be applied on the GII. The European Commission's GREEN PAPER ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY makes several such points.

II. THE EUROPEAN COMMISSION'S GREEN PAPER

The EC Green Paper¹⁵⁹ was released in July 1995, almost a year after the U.S.' own Green Paper.¹⁶⁰ The EC Green Paper's foremost purpose appears to be the solicitation of comments from interested parties over how copyright law should be extended to the GII in the E.U. This does not mean that the Green Paper does not provide any clues as to how the E.U. views some of the issues, as it certainly does.

Like most of the governmental studies reviewed herein, the EC Green Paper asserts that "[I]n order for the potential of the information society to be realised to the full, it will be necessary to maintain a balance between the interests of the parties concerned (rightholders, manufacturers, distributors and users of services as well as network operators)."¹⁶¹ Unlike the United States, however, other considerations

156. Commissioner Bruce Lehman of the Patent and Trademark Office, who headed the United States delegation to the WIPO Conference, was quoted as stating: "This treaty would for the first time create international recognition of rights already in U.S. law." Schiesel, *supra* note 66, at 37.

157. See Zarocostas, *supra* note 153, at 3A; WIPO BCP/CE/VI/11, Jan. 10, 1996, *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms*, Fifth Sess., Geneva, Feb. 1 to 9, 1996 [hereinafter WIPO BCP/CE/VI/11].

158. WIPO BCP/CE/VI/12, *supra* note 138, at 37, 40.

159. EUROPEAN COMMISSION GREEN PAPER ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY, reprinted in 43 J. COPYRIGHT Soc'y U.S.A. 50 (1995) [hereinafter EC GREEN PAPER].

160. See PRELIMINARY DRAFT, *infra* note 227.

161. EC GREEN PAPER, *supra* note 159, at 54.

are also thrown into the balance by the EC Green Paper. Probably the most notable among these are the concern for the proper functioning of the E.U.'s internal market, something to be expected considering the reasons for the creation of the European Community¹⁶² and the inclusion of the "cultural dimension." As the EC Green Paper reflects, protection of the interests of authors is an important "driving force" in the creation and dissemination of the "European cultural heritage," and that a proper balance must consider this if "the information society and the European culture [are to] develop in harmony."¹⁶³

A. COUNTRY OF ORIGIN

The EC Green Paper puts forward a proposal that suggests an utterly changing basic doctrine in international copyright law. The Paper proposes that E.U. nations apply the rule of the country of origin amongst themselves, instead of applying the principle of national treatment to disseminated materials, which generally translates to the rule of the forum.¹⁶⁴ "[T]he applicable law ought to be the law of the Member State from which the service originates."¹⁶⁵ This means that a work sent over the GII from the United Kingdom ("U.K.") to France would always apply the law of the U.K. In effect, what the EC Green Paper proposes is using, as the rule of law, a variation of one that would require judges and attorneys to apply the laws and regulations of countries with which they are not likely to be familiar: a proposal thought to have been rejected long ago in international copyright.¹⁶⁶

The EC Green Paper's proposal is not without precedent in the E.U. The 1993 Satellite and Cable Directive implemented the same rule in regards to broadcasting accomplished by means of satellite within the E.U.¹⁶⁷ Nor does use of the country of origin rule seem entirely misplaced within the context of the E.U. since the Satellite and Cable Directive, as well as a series of other Council Directives and European Court of Justice decisions, together have worked to harmonize the applicable copyright and neighboring rights laws within the E.U.¹⁶⁸ Practically

162. "[T]he need to ensure that goods and services can move freely." EC GREEN PAPER, *supra* note 159, at 56.

163. EC GREEN PAPER, *supra* note 159, at 57.

164. See *supra* notes 28, 29 and accompanying text.

165. EC GREEN PAPER, *supra* note 159, at 84.

166. STEWART, *supra* note 3, at 45 (discussing the failure of the Montevideo Convention of 1889 and the avoidance of this "mistake" by the Berne Convention).

167. See Council Directive of 27 September 1993 O.J. (L 248) 15 [hereinafter the Satellite and Cable Directive]; see also European Convention Relating to Questions on Copyright Law and Related Rights in the field of Transfrontier Broadcasting by Satellite, signed May 11, 1994, Council of Europe, European Treaty Series No. 153 [hereinafter European Convention 1994].

168. Jehoram, *supra* note 55.

speaking, applying the rule of an E.U. Member State would not be as unfamiliar as applying the rules of a more *foreign* non-Member State. Additionally, the EC Green Paper sees as a necessary condition to the use of the rule of the country of origin, the harmonization of the applicable laws.¹⁶⁹ This is in recognition of the problems that are inherent in the rule of the country of origin: different types and levels of protection in each country.¹⁷⁰ Through Council Directives and treaties binding on all the Member States of the E.U., such harmonization is possible in a way that may be unimaginable, if not impossible, internationally.¹⁷¹ Possibly recognizing its advantage, the EC Green Paper states:

Of course a worldwide solution would be desirable, but that will be possible only if there is an agreement on the substantive law of copyright and related rights which ensures a high level of protection and a sufficient measure of harmonization. *There is certainly no such agreement at present.*¹⁷²

Implied in this quotation are the limits felt to be found in the TRIPS agreement and in the Berne Convention. Since the new WIPO Treaties, or drafts of these, had not yet been circulated when the EC Green Paper was under consideration, one question appropriately raised is whether those treaties provide the sufficient level of protection and harmonization the European Commission would prefer. The answer is probably no. If anything, the WIPO Treaties stand as strong reaffirmation of the principle of national treatment.¹⁷³ The treaties also do not, as of yet,¹⁷⁴ protect databases in the *sui generis* manner mandated by the EC Database Directive.

At least for the moment, the E.U.'s approach is unique. Its influence may, nevertheless, prove to be difficult to resist because of the apparent simplicity of the country of origin rule.¹⁷⁵ However, determining the country from which an infringing work is first sent over the GII may prove a cumbersome problem in itself. With the Internet, it is not always easy or possible to make this determination. Use of anonymous remailers, where indicators of the source of a work are removed, are an

169. EC GREEN PAPER, *supra* note 159, at 84.

170. See Berne Convention, *supra* note 16, art. 9 and accompanying text.

171. EC GREEN PAPER, *supra* note 159, at 84.

172. EC GREEN PAPER, *supra* note 159, at 84 (emphasis added).

173. See PROTOCOL, *supra* note 59, n.206 and accompanying text. Country of origin rules are not entirely anathema in international copyright. See, e.g., Berne Convention, *supra* note 16, art. 5(4). But, as the Berne Convention and the WIPO Treaties show, such provisions tend to be the exceptions in international copyright treaties, rather than the rule.

174. See WIPO Draft Recommendation, *supra* note 65 and accompanying text.

175. It has certainly tantalized commentators. See Geller, *supra* note 33, at 595; Ginsburg, *supra* note 34, *seriatim*.

obvious example.¹⁷⁶ As is the case with requiring technology to be able to trace and identify infringing uses of protected materials, an unavoidable question in raising levels of protection as applied to the GII is the one of privacy.¹⁷⁷ Unfortunately, privacy is too often given little more than lip service in the race to set new copyright and related rights rules.¹⁷⁸ While the EC Green Paper is somewhat remarkable in leaving the issue of privacy open, the awareness of the opportunity to extend the rights of creators of expressive works is always present.

B. PRIVACY AND THE REPRODUCTION RIGHT

In the EC Green Paper's discussion of the reproduction right, and then later in the section on Technical Systems of Protection and Identification,¹⁷⁹ the extent to which right holders will receive protection of their reproduction right is raised and left somewhat unanswered. Thus, whether browsing should be considered a reproduction is not answered by the Commission. Interests of privacy are part of the reason.

[A] detailed examination will be necessary of the questions of protection of users' privacy which are raised by the fact that the network operators will be collecting and compiling precise details about the use of information and cultural services by each individual consumer.¹⁸⁰

The European Commission was well aware of the implications of the new technologies to the protection of works on the GII.

The development and spread of analogue systems of reproduction had made it impossible to control copying, and especially private copying, but digitization of works and other protected matter means that strict control of reproduction can now be envisaged once again. The right of reproduction, and the exceptions to it, particularly private copying, should be reviewed accordingly.¹⁸¹

[D]igitization allows private digital copying of a work or other protected matter to be detected, and limited if that is considered desirable.¹⁸²

If the EC Green Paper left these questions open to comment, indications of the direction the Commission preferred to take abound.

176. Daniel Akst, *Postcard from Cyberspace: The Helsinki Incident and the Right to Anonymity*, L.A. TIMES, Feb 22, 1995, available at <<http://swissnet.ai.mit.edu/6095/anonymity/short-pieces/finland-feb22-latimes.txt>>.

177. See also Fred H. Cate, *The EU Data Protection Directive, Information Privacy, and the Public Interest*, 80 IOWA L. REV. 431 (1995); European Parliament and Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (C 93) 1.

178. Samuelson, *supra* note 11, at 191.

179. EC GREEN PAPER, *supra* note 159, at 115-19.

180. EC GREEN PAPER, *supra* note 159, at 116.

181. EC GREEN PAPER, *supra* note 159, at 90.

182. EC GREEN PAPER, *supra* note 159, at 91.

Where the technology does not allow copying to be prevented, a valid response may continue to be that levies should be charged on the equipment and recording medium, and private copying be declared permissible. But where there is the technical means to limit or prevent copying, there is *no further justification* for what amounts to a system of statutory licensing and equitable remuneration.¹⁸³

In other words, if protected works can be tracked and a fee for their use charged by the rightholder, then according to the Commission, there is no longer any reason to continue to allow private copying unless there are other considerations that apply—privacy potentially the most important consideration. Compulsory licenses and levies on media and equipment used for copying, found in many European countries and elsewhere, are clearly disfavored.¹⁸⁴ Freedom of contract of copyright and related rights holders, although not paramount,¹⁸⁵ is the preferred method.¹⁸⁶ Not surprisingly, this type of balancing, if such a term can be used before the European Commission comes forward with its recommendations, appears to be less of a weighing than a declaration that the rights of users merit less consideration. After all, they are the ones doing the copying.

C. DIGITIZATION AND COPYING

What the European Commission would prefer is a harmonized system of protection that will address the problems raised by the GII and private copying.¹⁸⁷ These problems are not insubstantial. However, they may appear to be such because they have never been encountered in this manner before. As noted when reviewing how users can “browse” works available on the Internet, a necessary factor on the GII is the computer,¹⁸⁸ whether it be in the home, at school, in business or in government. What the computer allows is the dissemination of nearly, if not exact, copies of protectable works of expression. This is done through the process of digitization whereby the essence of a work is reduced to zeros and ones that can be read by a computer.¹⁸⁹ With the increase in the speed with which computers can make calculations and the reduction in price¹⁹⁰ and consequent increase in available storage on computers, an

183. EC GREEN PAPER, *supra* note 159, at 91 (emphasis added).

184. EC GREEN PAPER, *supra* note 159, at 91, 112.

185. EC GREEN PAPER, *supra* note 159, at 81-82.

186. EC GREEN PAPER, *supra* note 159, at 112, 113.

187. EC GREEN PAPER, *supra* note 159, at 93.

188. *Religious Technology Center*, 907 F. Supp. at 1378 n.25 (discussing browsing of digital information).

189. Barbara Hoffman, *From the Virtual Gallery to the Legal Web*, N.Y. L.J. Mar. 15, 1996, at 5.

190. See Richard W. Stevenson, *U.S. and Europe Agree on Freeing Technology Trade*, N.Y. TIMES, Dec. 12, 1996, at A1 (concerning the lowering tariffs for computer chips).

encyclopedic level of information can be transferred and copied by computers, often in a matter of seconds. This information, be it textual, audio or visual, can in turn be sent to others on the network in a similar amount of time without any loss in the quality of the work transferred.¹⁹¹ The potential for piracy is ubiquitous. Not surprisingly, the GII, and particularly the Internet, have sometimes been seen as a giant copyright infringement.¹⁹²

If the examination were to end there, authors and copyright holders would be understandably reticent to placing their works on the GII for fear of forever losing control over their creations.¹⁹³ A giant vacuum would arise, of insufficient content, and as a result, lack of interest and use. The reality, of course, is quite the opposite. Sometimes the GII runs into bottlenecks because of too many users, too much interest, and too much information flowing through its networks.¹⁹⁴ If never before has such an ability to infringe protected material been made available to the public, in an even greater sense, the public has never had the ability to enjoy the level of access to, and sharing of, information that it now has.¹⁹⁵ In fact, the Internet has been referred to as one of the greatest public forums for free speech ever created.¹⁹⁶ Due to the ability to interact and share information on a world wide scale, it is not exaggeration to state that the GII approaches what Marshall McLuhan called the Global Village. Therefore, when discussing the proper balance between international copyright protection, private copying, and access to information, the consequences of the choices to be made can seem overwhelming. No

191. Patricia A. Martone & Ashley J. Chadowicz, *Protecting Copyrights in Cyberspace*, NAT'L L.J., Oct. 31, 1994, at C33.

192. See Marc S. Friedman & Kenneth R. Buys, 'Infojacking': *Crimes on the Information Superhighway*, 13 COMPUTER L., Oct. 1996, at 1 (discussing the effects of placing information on the Internet).

193. Ginsburg, *supra* note 10, at 1467.

194. Peter H. Lewis, *An 'All You Can Eat' Price Is Clogging Internet Access*, N.Y. TIMES, Dec. 17, 1996, at A1.

195. One court viewed the Internet as following:

The range of tools and forums available for users of interactive computer services is astounding: with access to the web of computer networks known as the Internet, a scholar can contact a distant computer and make use of its capabilities; a researcher can peruse the card catalogues of libraries across the globe; users around the world can debate politics, sports, music, and literature. However trivial some of their uses might seem, emerging media technologies quite simply offer an unprecedented number of individual citizens an opportunity to speak and to be heard – at very little cost – by audiences around the world. In that sense, we are encountering a communications medium unlike any we have ever known.

Shea v. Reno, 930 F. Supp. 916, 922 (S.D.N.Y. 1996) (emphasis added).

196. *Religious Technology Center*, 907 F. Supp. at 1378 (citing Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1624 (1995)).

longer are the results of even one country's decisions in this area limited to its borders because the GII transcends borders.

D. COMMUNICATION TO THE PUBLIC

The EC Green Paper was published in the summer of 1995 and in many respects, already appears dated.¹⁹⁷ When considering the extent to which a right holder should be able to control the right to have his work communicated to the public, the EC Green Paper states:

The public already uses the Internet, or has at least heard talk of it, and imagines that it is to be given access to all knowledge in the world free of charge, or at any rate for the cost of the call. Thus the definition of private use can be seen as defining the scope actually offered to the public. If it is too broad, rightholders will hesitate to allow their works to be used on the networks. If it is too narrow, the public may well stay away from the information superhighway in disappointment.¹⁹⁸

The GII is now probably beyond the point where the public will stay away in disappointment, unless, of course, an overly restrictive rights regime is enforced.

Dodging that bullet may be difficult, and has the potential of raising costs to the point where the GII will be too expensive to otherwise willing users. Similar problems are found in the possible creation, and/or extension of a digital dissemination right or a digital broadcasting right on the GII.¹⁹⁹ Both of these rights can be viewed as variations on the right of communication to the public, which the Commission had problems addressing because it was uncertain of what that right includes and what it should exclude as in the private realm.²⁰⁰ The Commission's discussion of these rights raises interesting international questions.

The Green Paper proposes applying the model of rental rights to the digital dissemination or transmission of materials on the GII, but specifi-

197. See EC GREEN PAPER, *supra* note 159, at 64-65, for the Green Paper's description of the "new services" being offered.

198. EC GREEN PAPER, *supra* note 159, at 95. At this point, Internet users seem to be voting with their feet, walking away from pay-per-use proprietary services and going to companies providing access and Internet services at a lower or fixed cost. See also Lewis, *supra* note 194, at A1 (discussing the fees on-line companies charge for Internet access).

199. One of the most significant aspects of the new WIPO Treaties are these new rights. WIPO Copyright Treaty, *supra* note 63, art. 8; WIPO Performers and phonograms Treaty, *supra* note 64, arts. 10, 14.

200. EC GREEN PAPER, *supra* note 159, at 95-96. The Commission's questions for public consultation in which it asks, in essence, whether personal e-mail and business e-mail should be deemed private or communications to the public and whether the means of disseminating such messages should make a difference in the equation. *Id.* See also WIPO Copyright Treaty, *supra* note 63, art. 8 and accompanying text (illustrating that it is written so broadly as to possibly eliminate the public/private difference).

cally excludes digital broadcasting from this part of its discussion.²⁰¹ In other words, accessing publicly available materials on the GII would be covered by this digital transmission right, but exclude situations where broadcasting to multiple users simultaneously takes place. At first glance, this may only be another example of the dated nature of the Commission's study. Currently, there is little reason to distinguish between broadcasts or transmissions of works over the GII because one of the GII's strengths lies in the ability for users to access materials at any time, thereby by-passing the time constraints of the broadcasting model. On the other hand, the distinction could be the Commission's way of silently proposing a new and separate *neighboring right* for the simultaneous digital dissemination of materials on the GII. Using the rental right as a model, sometimes considered outside of copyright,²⁰² would further strengthen their argument for the distinction from broadcasting and from the other rights currently assumed to apply to authors on the GII.

Such an approach would appear odd after the new WIPO Treaties which clearly encompass such dissemination.²⁰³ Second, a new neighboring right risks having different regimes of protection applying to works on the GII as such a right would not be covered by any existing treaty. Third, introduction of such a neighboring right could once again raise the problem of material reciprocity. The United States has been arguing for years that the inability of its rights holders to obtain a share of the levies placed on rentals collected in many E.U. countries was a violation of the national treatment principles underlying Berne even though Berne does not include a rental right.²⁰⁴ Also the new WIPO Treaties include a limited rental right similar to that found in Article 11 of TRIPS.²⁰⁵ Part of the reason why audio-visual works were not included in the WIPO Performers and Phonograms Treaty is due to the inability of the United States and the E.U. to agree on a compromise on this issue.²⁰⁶ The United States would likely see a move to implement a digital transmission neighboring right as further evidence of what it perceives as European protectionism. The European Commission's silence on the above issues is consequently one of the major revelations of its Green Paper.

201. EC GREEN PAPER, *supra* note 159, at 96-97.

202. STEWART, *supra* note 3, at 63-64.

203. WIPO Copyright Treaty, *supra* note 63, art. 8; WIPO Performers and Phonograms Treaty, *supra* note 64, at arts. 10, 14.

204. U.S. WHITE PAPER, *supra* note 154, at 148, 151-52; *see also* Fraser, *supra* note 85, at 316-18 (discussing the experience with France).

205. WIPO Copyright Treaty, *supra* note 63, art. 7; WIPO Performers and Phonograms Treaty, *supra* note 64, at arts. 9, 13.

206. Zarocostas, *supra* note 153, at 3A.

The question of a digital broadcasting right is a continuing issue for neighboring rights protection. The sound recording industry is wary of the digital broadcasting of its works, on and off the GII. In particular, the recording industry would like to see the limits imposed on phonograms removed and replaced with a full broadcasting right, something not currently granted in the most widely adhered to neighboring rights treaty, the Rome Convention.²⁰⁷ Generally, within the E.U., performers and producers are limited to a right of remuneration for the broadcasting of their sound recordings.²⁰⁸ Not surprisingly, motion picture and audio visual producers and performers would like creation of, or further extension of their copyright and neighboring rights if the broadcasting rights of the recording industry are extended.²⁰⁹ The Commission left the question open for further discussion and consultation.²¹⁰ Given that such a broad right was not included in the WIPO Performers and Phonograms Treaty,²¹¹ this is one area where the European Commission might choose to once again outpace other countries in international intellectual property rights as it appears to have done with the protection of databases.²¹²

One problem in viewing copyright and neighboring rights in terms of international trade is the tendency to accuse other countries of protectionism even where international conventions do not protect or prevent the actions of which countries are complaining. Taking the high moral ground that the United States now claims can appear hollow when considering that historically, U.S. protection of foreign works, at least prior to its joining the Berne Union in 1989, was pitiful at best. However, the exhortations can lead to negotiations to change and or join treaties, as seen in the recent GATT/TRIPS and WIPO rounds. Part of the process in international copyright law envisioned by the Berne Convention presumed that individual countries, if not regions like North America and the E.U., would push for increased protection of copyrighted materials when viewed in comparison to other countries' higher levels of protection. What the GII begins to show is that this process may have come too far in certain respects. The balance between creators, owners, distributors, and users is being changed by the GII in ways never anticipated by

207. EC GREEN PAPER, *supra* note 159, at 100-01; *see supra* note 88 and accompanying text (discussing the protection of new types of works outside of the Berne Convention).

208. EC GREEN PAPER, *supra* note 159, at 101.

209. EC GREEN PAPER, *supra* note 159, at 101. *See also Canadian Performers Join International Call for Protection of Rights*, CAN. NEWSWIRE, Nov. 15, 1996 (explaining performers' concerns with the impact that technological application would have on the performers' images).

210. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases; EC GREEN PAPER, *supra* note 159, at 102-103.

211. WIPO Performers and Phonograms Treaty, *supra* note 64, art. 15.

212. EC GREEN PAPER, *supra* note 159, at 75-76.

a system of laws created for the analog/hard copy mode of dissemination of protected works found in books, videos and CDs. This fact is most evident in the protection of an author's *droit moral*, or moral rights.

E. MORAL RIGHTS

Easily one of the most vexing problems in international copyright law is the issue of moral rights. The GII and advances in technology have made moral rights even more of a headache, one which on its own could bring national and international copyright developments to a halt. Since the most advanced approaches to moral rights have matured in the civil law countries of Europe that gave birth to moral rights,²¹³ it would be presumed that the EC Green Paper could give other countries guidance on how to approach these problems. Unfortunately, the European Commission does a good job at raising the problems in its Green Paper, but then attempts to side-step them by diminishing their importance.²¹⁴ The Commission states that during the hearings conducted before the drafting of the Green Paper it learned that "[m]oral rights were rarely invoked in order to prevent the exploitation of a work" because the parties involved would come to an "arrangement" ahead of time to avoid the problems.²¹⁵

The Berne Union has required signatories since the Rome 1928 version of the Berne Convention to extend moral rights to its nationals.²¹⁶ These rights, encompassed in Article 6bis, include the right of integrity and of attribution.²¹⁷ As the Convention states, the attribution right includes the right to claim authorship to and thereby be recognized as the

213. See Dan Rosen, *Artists' Moral Rights: A European Evolution, an American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983).

214. EC GREEN PAPER, *supra* note 159, at 103-05.

215. EC GREEN PAPER, *supra* note 159, at 105.

216. Berne Convention, *supra* note 16, art. 6bis; STEWART, *supra* note 3, at 106-07.

217. In full, Article 6bis reads as follows:

1. Independently of the author's economic rights, and even after the transfer of said rights, the 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 honour or reputation.

2. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

3. The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention, *supra* note 16, art. 6bis.

author of one's work.²¹⁸ The right of integrity gives authors the right "to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to" their work, "which would be prejudicial to [their] honour or reputation."²¹⁹ Both rights exist independently of the economic rights granted the author, such as the reproduction and adaptation rights, and are maintained after the economic rights have been transferred.²²⁰ Therein lies the root of the problem of moral rights. Even the licensee or assignee of the economic rights are subject to the moral rights provisions, unless s/he has managed to obtain a waiver from the author. Even then, waivers are not always enforceable or enforced, particularly where the right of attribution is concerned. Generally, France is perceived as the country giving authors the highest level of moral rights protection.²²¹

Moral rights then could place a significant roadblock on the GII. As the EC Green Paper notes, in a monumental understatement found not in the moral rights section of its discussion but in the section on a right of communication to the public: "The author's moral rights can be infringed even in private."²²² This means that materials obtained on the GII and changed by users, be it by failing to acknowledge the authorship of the original or altering the author's work, could amount to infringement of an author's moral rights. The problem is important because one of the advantages of digitization and computers is that works can not only be easily communicated and copied, but also manipulated.²²³ Such changes might include nothing more than editing out a paragraph of text from an essay which the author considered important, to changing or adding color to a photograph, to completely reediting an audio visual work in your spare time as a hobby or as a student in a cinema class.²²⁴

218. Berne Convention, *supra* note 16, art. 6bis.

219. Berne Convention, *supra* note 16, art. 6bis.

220. Berne Convention, *supra* note 16, art. 6bis(1).

221. *Bragance c. de Grèce*, Court d'appel de Paris (February 1, 1989), *reprinted in* J.D.I. 4; *see infra* note 285 and accompanying text (explaining that the Paris Court of Appeals granted an injunction to a ghost co-writer requiring the publisher to list the plaintiff as co-author with the first defendant, author Michel de Grèce, even though the plaintiff had signed a contract assigning all rights and waiving all moral rights in her contributions to the book).

222. EC GREEN PAPER, *supra* note 159, at 94.

223. EC GREEN PAPER, *supra* note 159, at 103-04.

224. The Commission gives further examples and evidence of the divisiveness of the issue:

The time is coming when anyone will be able to change the colours in a film, or replace the faces of the actors, and return the modified film to the network. This capacity to amend works in whatever way and to whatever extent one likes is regarded in some quarters as one of the greatest advantages of digitization. The creators of works, however, are greatly concerned that this technical capacity will be used to mutilate their works, and are asking for moral rights to be strengthened A hearing of parties with an interest in moral rights was held on 30 Novem-

The implications of moral rights can sometimes seem impossible to grasp and the European Commission's mixed signals are understandable considering the risks involved. The issue cannot, however, be wished away or diminished. The WIPO Performances and Phonograms Treaty, for example, has chosen to extend moral rights to performers.²²⁵ The tradition in the United States has been and was, until accession to the Berne Convention in 1988-89, generally not to recognize moral rights; and arguably, United States courts still are averse to such protection.²²⁶ Therefore, the differences between nations on how moral rights are protected is an issue that haunts and will continue to haunt the GII and international copyright law unless addressed at once. Not doing so risks creating havens where moral rights are ignored and limiting the full availability of creative works on the GII. Before such roadblocks arise, thereby possibly making the GII less efficient and reducing access to

ber and 1 December 1992. The hearing clearly showed the sensitive character of the question of moral rights. The opinions expressed diverged widely. The representatives of authors and performers generally wanted stronger moral rights, while the representatives of publishers and the press, producers, broadcasters and employers were hostile.

EC GREEN PAPER, *supra* note 159, at 104-05.

225. WIPO Performers and Phonograms Treaty, *supra* note 64, art. 5. The articles on the right of modification for performers and producers, included in the draft Neighboring Rights Instrument, arts. 8, 15, were taken out during the Diplomatic Conference because the modification right was deemed included within the reproduction right. Greenstein, *supra* note 62. Query whether this confuses the adaptation right with the reproduction right of copyright holders.

226. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995). As the *Carter* case explains, one of the major reasons the United States would not join the Berne Union was because of the moral rights issue. *Id.* at 82. When, almost two years after signing onto the Berne Convention, the U.S. Congress enacted the Visual Artists Rights Act ("VARA"), Pub. L. No. 101-650 (tit. VI), 104 Stat. 5089, 5128-33 (1990), the United States appeared to "close the door" on the moral rights issue. Goldstein, *supra* note 11, at 90 (reasoning that giving arts more rights of integrity and attribution is more of a political issue of federal power over the states, which have traditionally reputational interests as those prescribed by art. 6bis). As the *Carter* case exemplifies, the rights granted to authors under VARA are quite limited, and do not extend to "works made for hire," where the employer is deemed the author for copyright and moral rights purposes. U.S. Copyright Act, 17 U.S.C. §§ 101, 106A, 201(b) (1995).

The justifications given for enacting VARA by Congress, that "[M]oral rights . . . result in a climate of artistic worth and honor that encourages the author in the arduous act of creation," although consistent with the purposes of copyright protection in the United States, *see supra* note 143, ring hollow to anyone familiar with the justifications given for moral rights in civil law countries such as France. Moral rights, as conceived there, are personal to the author, and protective of the author's interests in his works as imbued with the author's personality. *See* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980) (comparing artists' rights in France with those in the United States, and advocating judicial and legislative evolution of artists' rights by means of existing American legal doctrines).

works, individual countries must also reconsider their approaches to copyright protection. Canada and the United States, having begun the process, can serve as examples of what may or may not be workable.

III. UNITED STATES AND CANADA

The first out of the gate to release a study on the GII was the United States with its Green Paper entitled *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE; A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS*,²²⁷ made public in July 1994. Canada's study, *COPYRIGHT AND THE INFORMATION HIGHWAY; FINAL REPORT OF THE SUBCOMMITTEE ON COPYRIGHT*,²²⁸ released in March 1995, had the benefit of some of the insights of the U.S. Green Paper and many of its concerns mirror those of the United States. However, it would be a mistake to equate Canada's and the United States' approaches to copyright on the GII. One of the most contentious issues, that of the liability for those providing Internet services to consumers and disseminating copyrighted materials, is one major difference.

A. INTERNET SERVICE PROVIDER ("ISP") LIABILITY

The United States' White Paper, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS*, released in September 1995²²⁹ after a year of public consultation, remarkably made few significant changes from the earlier Green Paper.²³⁰ One important addition was clarification of the Working Group on Intellectual Property's ("Working Group") position on how ISPs should be treated for copyright infringement. As the discussion in Part I.B.1.a above shows, countries adhering to the WIPO Copyright Treaty and the Berne Convention are to treat browsing of a work as the making of a copy on the browser's computer, thereby implicating the reproduction right of the copyright holder.²³¹ In the United States and Canada as well as numerous other

227. *WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE; A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* (July 1994) [hereinafter *PRELIMINARY DRAFT*].

228. *SUBCOMMITTEE ON COPYRIGHT OF THE ADVISORY COUNCIL ON THE INFORMATION HIGHWAY, COPYRIGHT AND THE INFORMATION HIGHWAY* (Mar. 1995) [hereinafter *CANADIAN SUBCOMM. REPORT*].

229. U.S. WHITE PAPER, *supra* note 154.

230. Barbara Hoffman, *Digital Innovations Now Challenge Legal System*, NAT'L L.J., Oct. 23, 1995, at C15, C16.

231. *See supra* Part I.B.1.a.

countries, copyright laws are strict liability statutes.²³² This means that a violation of a copyright occurs even though the user did not intend to infringe the copyright or even knew that the work copied was protected by copyright.

Given the design of the Internet, ISPs make numerous automatic and often temporary copies of the materials they disseminate on their networks. This includes making copies of e-mail a user sends and receives, to copies of materials included in computers a user frequently likes to visit on the Internet. This is done not only for the user's convenience and speed (in making the materials available on the user's computer screen), but also for the networks' convenience and speed. Strict copyright liability would make ISPs responsible for this type of copying even though the Internet could otherwise grind to a halt.²³³ Thus, the debate over browsing does not only include the issue of whether the user browsing materials is infringing a copyright owner's reproduction right, but also whether allowing copyrighted materials to be disseminated by ISPs for its customers is also infringing of that right.

At the time of the United States White Paper's writing, two cases in the United States had decided that bulletin board services ("BBS") were directly responsible for copyright infringement for the copying²³⁴ or displaying²³⁵ of copyrighted materials.²³⁶ Based on these cases and upon policy that would become extremely controversial, the Working Group decided that ISPs should not be exempt or be held to a different standard of copyright liability.²³⁷ Legislation introduced to implement some of the White Paper's proposals became bogged down in Congressional committees precisely because ISPs and telephone companies involved with Internet services wanted certain exemptions included in the legislation to amend the United States Copyright Act. With the end of the 104th Congress for the federal elections of November 1996, the United States had

232. See *Religious Technology Center*, 907 F. Supp. at 1367; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 (Can.).

233. See *Religious Technology Center*, 907 F. Supp. at 1367-69.

234. See *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994).

235. *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

236. For an in depth review and criticism of these cases, see Niva 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, 350-72 (1995) (addressing the case law approach to computerized bulletin boards and the conceptual difficulties in applying copyright liability to computerized systems). See also Christopher Wolf & Stephen B. Fabrizio, *Online Providers Can Be Liable for Users' Actions*, NAT'L L.J., Oct. 31, 1994, at C9 (questioning how the existing legal framework will be applied to the thousands of service providers); see also David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79 (1993) (discussing issues of liability).

237. U.S. WHITE PAPER, *supra* note 154, at 117.

not been able to implement the White Paper's suggestions.²³⁸ When the diplomatic conference in Geneva to consider what became the WIPO Copyright and WIPO Performers and Phonograms Treaties was still in the negotiation stages, critics of the United States position on browsing and ISP liability accused the United States government of attempting to circumvent Congress by imposing its position in the WIPO Treaties.²³⁹ The liability of ISPs was not directly addressed by those treaties, although their effect on ISP liability is significant if the position is accepted that browsing or making temporary copies of copyrighted works involves the reproduction right.²⁴⁰

The policy reasons given by the Working Group on ISP liability can be summarized by the following:

On-line service providers have a business relationship with their subscribers. They – and, perhaps, only they – are in the position to know the identity and activities of their subscribers and to stop unlawful activities. And, although indemnification from their subscribers may not reimburse them to the full extent of their liability and other measures may add to their cost of doing business, they are still in a better position to prevent or stop infringement than the copyright owner. Between these two relatively innocent parties, the best policy is to hold the service provider liable.²⁴¹

It should not have come as a surprise to the Clinton administration, which sponsored the White Paper, or Congress, attempting to enact some of the United States White Paper's recommendations, that telephone companies, through whose wires much of the Internet exists and who have entered into the business of providing Internet access, would disa-

238. H.R. 2441/S. 1284, 104th Cong., 1st Sess. (1995). During the process of "marking up" (making changes) to the bills in committee, several proposals for giving Internet service providers an exemption or limitation from strict liability were proposed. See Ramos & Hampe, *supra* note 155 (discussing the legal and political issues surrounding the debate on the "mere conduit" exemption from copyright liability).

239. Denise Caruso, *Global Debate Over Treaties on Copyright*, N.Y. TIMES, Dec. 16, 1996, at D1, D6; see also Schiesel, *supra* note 66, at 37; see also Samuelson, *supra* note 11, at 136-37 (discussing the competing theories of advocates for the highest level of copyright protection and those arguing for just enough copyright protection to give authors an incentive to create).

240. In an open letter sent to United States President Clinton during the WIPO Conference's deliberations, the heads of many of the United States' largest Internet service providers and communications companies criticized the fact that the issue of ISP liability was not being addressed in the proposed WIPO treaties and that the question of browsing and right of communication to the public "could result in making service providers liable without knowledge for every potential infringing communication on the Internet." December 10, 1996 Joint Letter to President Bill Clinton, WEST'S LEGAL NEWS, Dec. 16, 1996, available in WESTLAW at 1996 WL 715891; see also Caruso, *supra* note 239, at D6 (discussing the Joint Letter to the President and the fear of a resulting "reduced connectivity among 'information have-nots' in our society and throughout the world").

241. U.S. WHITE PAPER, *supra* note 154, at 117.

gree with this position.²⁴² As one commonly raised argument goes, making ISPs liable for copyright infringement because their computers copy and forward materials to Internet users would be like making telephone companies responsible for the illegal activities the telephone can facilitate.

The difference, of course, is that telephone companies, at least until recently, are often common carrier monopolies.²⁴³ As common carriers they must open their networks to all users on a non-discriminatory basis for which they have been given an exemption from strict application of certain laws including copyright law.²⁴⁴ Given the current climate in North America and in the E.U. to deregulate and to allow increased competition in telephone services, that argument becomes untenable in light of the similarities between ISPs and telephone service providers.²⁴⁵ A subscriber to America Online is not deprived from receiving electronic mail from individuals using other ISPs. In light of the international and multi-jurisdictional reality of the Internet, ISPs must be non-discriminatory in who they allow to use their services and networks if their own users are to be given access to all the Internet services they require and desire.²⁴⁶

The United States White Paper presumes that ISPs can perform their functions "without infringing or facilitating the infringement of the copyrighted expression of others,"²⁴⁷ but, as the Internet is currently constructed, it cannot.²⁴⁸ This is not to say that all of the GII is or will be structured the way the Internet is. That would be ignoring the possibility of other technological developments that might allow the swift and efficient dissemination of information in a manner similar to or better than the Internet. What it does mean is that the United States White Paper's policy reasons for imposing strict copyright liability on ISPs is misconceived and potentially dangerous. If the only ways ISPs can ensure protection against strict copyright liability are through redesigning the Internet or pre-screening of all information sent on its networks to protect themselves from unreasonable levels of liability, the Internet and the GII would be severely set back, if not come to an end as a viable

242. See *supra* note 238 and accompanying text; Giorgio Bovenzi, *The Liabilities of System Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 139-40 (1996).

243. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

244. U.S. Copyright Act, 17 U.S.C.A. § 111(a)(3)(1995).

245. Torsten Busse, *Networking: Europe to Benefit from Telephone Deregulation*, COMPUTERWORLD, Aug. 21, 1995, at 54.

246. See David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L. at art. 3.

247. U.S. WHITE PAPER *supra* note 154, at 117.

248. *Religious Technology Center*, 907 F. Supp. at 1367-69; see *supra* note 233 and accompanying text.

means of communication.²⁴⁹ The privacy implications of such pre-screening alone are cause for alarm.²⁵⁰ The impossibility of telling whether material is infringing or not in itself should be sufficient reason for not requiring such strict liability of Internet service providers.

Canada's position on the issue began to appear in the final report of the SubCommittee on Copyright of the Advisory Council on the Information Highway, *COPYRIGHT AND THE INFORMATION HIGHWAY: FINAL REPORT OF THE SUBCOMMITTEE ON COPYRIGHT* (Canadian SubComm. Report), which was released in March 1995.²⁵¹ The SubCommittee had no Canadian case law on how the issue of liability for ISPs would be handled. Instead, it looked at one of the cases the United States Green Paper had discussed in its limited examination of the issue.²⁵² Apparently assuming the same type of application of strict copyright liability would apply in Canada, the SubCommittee's official recommendation was that since ISPs are not common carriers, and thereby not exempt under Canada's Copyright Act, liability should be imposed: "However, a defense mechanism should be provided for those instances where it can be demonstrated that they did not have actual or constructive knowledge of the infringing or offensive material and where they have acted reasonably to limit potential abuses."²⁵³ When the Canadian Advisory Council on the Information Highway (known under the acronym IHAC in Canada) released its report, *CONNECTION, COMMUNITY, CONTENT: THE CHALLENGE OF THE INFORMATION HIGHWAY*,²⁵⁴ in September of 1995, its recommendation to the Canadian government was instead posed in the negative:

No owner or operator of bulletin board systems should be liable for copyright infringement if:

[a] they did not have actual or constructive knowledge that the material infringed copyright; and

[b] they acted reasonably to limit potential abuses.²⁵⁵

Otherwise, the Council believed, "copyright liability of BBS operators could be too rigidly interpreted."²⁵⁶

249. *Religious Technology Center*, 907 F. Supp at 1377-78.

250. *See supra* Part II.B.

251. *See supra* note 228.

252. *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

253. CANADIAN SUBCOMM. REPORT, *supra* note 228, ch. 4.

254. CANADIAN ADVISORY COUNCIL ON THE INFORMATION HIGHWAY, *CONNECTION, COMMUNITY, CONTENT: THE CHALLENGE OF THE INFORMATION HIGHWAY* (1995) [hereinafter IHAC REPORT].

255. IHAC REPORT, *supra* note 254, at rec. 6.16.

256. IHAC REPORT, *supra* note 254, at rec. 6.16. This is in part due to the SubCommittee's and IHAC's conclusions that browsing did constitute a reproduction. The final recommendation is interesting because it places some onus on copyright holders to identify what

Soon after the IHAC Report and the United States White Paper were made public, a Federal District Court in California independently agreed with this reasoning. In *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*,²⁵⁷ Judge Ronald A. Whyte decided that:

Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.²⁵⁸

Since the defendants, an ISP and a BBS,²⁵⁹ had not undertaken any "affirmative action that directly resulted in copying,"²⁶⁰ they were not held strictly liable for a third defendant's copyright infringement.²⁶¹ The case is notable for the concern it shows for the freedom of speech of Internet users if the rule were otherwise,²⁶² the "unreasonable liability"²⁶³ that could attach to all ISPs involved in the dissemination of any one message on the Internet, as well as for originating in the same district as one of the two cases the White Paper cited in support for its policy of strict copyright liability for ISPs.²⁶⁴ Thus, even if the *Netcom* case were proved to be an anomaly in United States copyright case law,²⁶⁵ its importance should not be underestimated. If anything, the case demonstrates that there are more than just "two relatively innocent parties"²⁶⁶ involved where copyright questions dealing with the GII are concerned. There is also the user's interests that must be considered. If that is forgotten, as the United States White Paper often implicitly does, then the balance of how copyright law is applied on the GII will be tilted away from

may be browsed freely: "It should be left to the copyright owner to determine whether and when browsing should be permitted on the Information Highway; the owners should identify what part of their work is appropriate for browsing." *Id.* at rec. 6.4.

257. *Religious Technology Center*, 907 F. Supp. at 1361.

258. *Id.* at 1370.

259. The distinction between an ISP and a BBS is sometimes merely a matter of degrees. A BBS is, like an ISP, a computer service. However, access to information on a BBS is usually limited to what is available on the BBS's computer(s). Examples of well known searchable BBSs are Lexis and Nexis. Because some BBSs have begun offering their users access to the Internet as well, the lines between different types of Internet providers becomes fluid. See *Shea v. Reno*, 930 F. Supp. at 925-30 for more details on the Internet's workings.

260. *Religious Technology Center*, 907 F. Supp. at 1368.

261. *Id.* at 1372-73.

262. See Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet*, Part IV (forthcoming 1997).

263. *Religious Technology Center*, 907 F. Supp. at 1369.

264. U.S. WHITE PAPER, *supra* note 154. See also *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994) (discussing copyright infringement); see *supra* notes 234-37 and accompanying text.

265. William J. Cook, *Be Wary of Internet Casting Shadows on Copyright Holders*, CHL. LAW., Apr. 1996, at 60.

266. U.S. WHITE PAPER, *supra* note 154, at 117; *supra* text accompanying note 241.

users, so much so that the promise of the GII could be quickly thwarted. As one United States court, considering freedom of speech on the Internet, stated:

It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the “democratizing” effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them [As such it] deserves the broadest possible protection²⁶⁷

Hence, as far as the United States is concerned, making the browsing of works on the GII an infringement and holding ISPs liable for this infringement by their users goes too far. Forgetting for a moment the roadblocks on the GII, such rules would impose the increased individual freedom of speech made possible by the Internet, as acknowledged by U.S. case law, is insufficiently considered in the United States White Paper is balance between copyright holders and copyright consumers. Other countries may not have the same protections for free speech that the United States prides itself upon. That being the case, what message is the United States sending the world when it proposes that its domestic copyright law, as well as international law, should be weighed so favorably towards copyright holders on the GII to the detriment of First Amendment freedoms?

B. THE CANADIAN EXAMPLE AND MORAL RIGHTS REVISITED

Copyright protection in Canada shows the influence of both the Anglo-copyright tradition and that of *droit d'auteur*²⁶⁸ more commonly found in the civil law countries of Europe. This is in no doubt due to the fact that Canada's Copyright Act,²⁶⁹ although since considerably amended and currently in the process of significant revisions,²⁷⁰ was based on the Copyright Act of the United Kingdom of 1911²⁷¹ while the Canadian province of Quebec has a civil law system in place dating back

267. *ACLU v. Reno*, 929 F. Supp 824, 881 (E.D. Pa. 1996) (Dalzell, Dist. J.). See also Linda Greenhouse, *Statute on Internet Indecency Draws High Court's Review*, N.Y. TIMES, Dec. 7, 1996, at 1.

268. Copyright law translates into *droit d'auteur* (i.e. authors' rights) in Canada.

269. Copyright Act, R.S.C., c. C-42; c. 10 (1st Supp.), cc. 1, 41 (3rd Supp.), c. 10 (4th Supp.); 1988, c. 65; 1990, c. 37; 1992, c. 1; 1993, cc. 15, 23, 44; 1994, c. 47; 1995, c. 1 (Can.) [hereinafter the Canadian Copyright Act].

270. An Act to Amend the Copyright Act, Bill C-42, 45 Eliz. II, 1996 (Can.) [hereinafter Canadian Copyright Revisions].

271. Copyright Act, 1911, 1-2 Geo. V, c. 46 (Eng.); *Durand & Cie. v. La Patrie Publishing Co.*, [1960] 24 D.L.R.2d 404 (Can.).

to its history as a former French colony.²⁷² By virtue of the civil law influence of Quebec on Canadian jurisprudence, Canadian courts have not been averse to referring to French or other civil law authorities when construing Canadian copyright provisions.²⁷³ This ability to navigate the apparently contradictory traditions of copyright for the encouragement of learning and/or public benefit and *droit d'auteur*, which emphasizes the personal and natural rights of authors in their works of expression, makes Canada an ideal country to look to when trying to resolve these inconsistencies, particularly where moral rights are concerned. As noted above in the discussion on moral rights in the EC Green Paper, the moral rights issue is one of paramount importance to users, disseminators, and creators of copyrighted materials.²⁷⁴

Canada has a long history where moral rights are concerned. In one of its first moral rights cases, dating back to 1911,²⁷⁵ Chief Judge Fitzpatrick of the Supreme Court of Canada stated:

I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, e.g., paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But it will not be contended that the publisher who bought the manuscript of "The Life of Gladstone," by Morley, or of Cromwell by the same author, might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuniary interest in the manuscript, he retains a species of personal or moral right in the product of his brain.²⁷⁶

As the above shows, Canada already recognized some of the basics of moral rights as embodied in Article 6bis of the Berne Convention before that Article existed: the rights of integrity and of attribution.²⁷⁷ This approach is in marked contrast to that historically favored in the United

272. *Videotron Ltée v. Industries Microlec Produits Electroniques Inc.*, [1992] 45 C.P.R. 3d 1.

273. *See John Maryon Int'l Ltd. v. New Brunswick Telephone Co., Ltd.* (1982), 141 D.L.R. 3d 193 (N.B. C.A.) (La Forest J.A.), leave to appeal to S.C.C. refused with costs [1982] 2 S.C.R. viii (Can.).

274. *See supra* Part II.E.

275. *Le Sueur v. Morang & Co.*, 45 S.C.R. 95 (1911) (Can.).

276. *Id.* at 97-98.

277. *See supra* notes 217-19 and accompanying text.

States, which, although rustic, is well expressed in the first sentence of Chief Justice Fitzpatrick's quotation: that copyrighted works are to be treated as any other goods.²⁷⁸

With its accession to the Berne Convention in 1989, the United States has been required to comply with Article 6bis, and, depending on whether approved by Congress, will have to do the same for the moral rights provision in Article 5 of the new WIPO Treaty for Performers and Phonograms. Furthermore, signatories to the WIPO Copyright Treaty would be obligated to comply with Articles 1 to 21 and the Appendix of the Berne Convention, without any exception for the moral rights provisions found in Article 6bis, which was left out of TRIPS.²⁷⁹ The United States has been criticized for not living up to its moral rights obligations.²⁸⁰ One way to counter this problem would be to adopt the Canadian approach to moral rights found in the Copyright Act of Canada.

Canada was one of the first nations to incorporate moral rights in its copyright legislation.²⁸¹ As those provisions now read, an author may waive any or all of his or her moral rights.²⁸² This broad ability to waive

278. See Fraser *supra* note 85, at 319.

279. WIPO Copyright Treaty, *supra* note 63, art. 1(4); TRIPS, *supra* note 8, at art 9(1). In an interesting gloss on the reason for excluding Article 6bis from TRIPS, the Notes in the draft PROTOCOL to Article 1 stated "The reference in paragraph (4) covers Article 6bis because the proposed Treaty is not limited to trade-related aspects of copyright." PROTOCOL, *supra* note 59, n. 1.05. This is based on the assumption that the economic rights granted by copyright law can be so easily distinguished from the personal rights that are said to make up moral rights. It also ignores the history behind the exclusion of Article 6bis from TRIPS: that it was done at the insistence of the United States which has historically resisted the spread of moral rights protection. See Fraser, *supra* note 85, at 314-15.

280. Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 833 (1992); Edward J. Damich, *The Visual Artists Rights Act of 1990: Towards a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Fraser, *supra* note 85, at 296-97.

281. The Copyright Act Amendment, 1931, 21-22 Geo. V, c. 8, assented to 11 June 1931, at s. 5 (Can.).

282. The relevant provisions of Canada's Copyright Act are:

14.1(1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3 [regarding the author's exclusive rights], the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

14.1(2) Moral rights may not be assigned but may be waived in whole or in part.

14.1(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

14.1(4) Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

all moral rights has not gone without criticism²⁸³ and could be attacked as a simple method of entirely avoiding the moral rights issue. Closer review of Canadian moral rights case law shows that, because of the personal nature of moral rights, waivers are strictly construed.

It could be argued that the waiver provided for at s. 14.1(2) would be invalid in those cases where basic human rights and freedoms were called into question. The courts may, in certain cases, decide to interpret the waiver restrictively when the violation affects the author's human rights . . . This would be especially true in those cases where it was impossible to foresee the violation in question at the time the waiver was given. Blanket waivers of all moral rights in a work would be subject to close scrutiny, depending on the type of work and the type of violation.²⁸⁴

Some countries, in particular France, do not allow the waiver of some moral rights. In *Bragance c. de Grèce*,²⁸⁵ the Paris Court of Appeals granted an injunction to a ghost co-writer requiring the publisher to list the plaintiff as co-author with the first defendant, author Michel de Grèce, even though the plaintiff had signed a contract assigning all rights and waiving all moral rights in her contributions to the book. Showing the real life complexities moral rights can introduce, the choice of law provision included in the agreement between M. de Grèce and Ms. Bragance was that of the State of New York, and the contract specifically stated that Ms. Bragance's contributions were for a *work for hire* under the United States Copyright Act.²⁸⁶ This meant that M. de Grèce, for United States law purposes, would have been deemed the sole author of the work and would not have had to recognize Ms. Bragance as co-author. However, Ms. Bragance, being a French national, brought her suit in France, where the French *droit d'auteur* was applied. Even though the Court of Appeals found the U.S. agreement enforceable, part of the moral rights waiver was not because the right of attribution (apparently as opposed to the right of integrity) was not waiveable under French *droit d'auteur*. Considering the international reach of the GII, the *Bragance* case serves as a warning that not all provisions dealing with authors' rights in contracts will be construed under private international law rules for contracts. Instead, the conflicts rules applied in

28.2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.

Canadian Copyright Act, *supra* note 269, §§ 14.1(1)-(4), 28.1, 28.2(1).

283. See David Vaver, *Authors' Moral Rights - Reform Proposals in Canada: Charter or Barter of Rights for Creators?*, 25 OSGOODE HALL L.J. 749 (1987).

284. R. v. Ross, 1 S.C.R. 3 11-12, 14-15 (Can.) (Lamer J.) (1989).

285. Court d'appel de Paris (Feb. 1, 1989), *reprinted in* J.D.I. 4.

286. See U.S. Copyright Act, 17 U.S.C. §§ 101, 201(b).

those cases may be those of the Berne Convention or other international copyright or neighboring rights treaties.

Admittedly, adopting the Canadian approach to moral rights might not eliminate the risk of other such cases in those countries, such as France, where certain moral rights cannot be waived. Commentators have noted that moral rights are not uniform from country to country.²⁸⁷ This lack of uniformity, however, would make introduction of the Canadian method opportune, and could be considered by the European Commission should it decide in its White Paper, due in early 1997,²⁸⁸ that harmonization of moral rights in the E.U. is necessary.²⁸⁹ Given France's interests in preserving its culture and moral rights tradition,²⁹⁰ which was reflected during the negotiations of the Uruguay Round of GATT,²⁹¹ such a result may not be forthcoming. If France and other countries were to look at how the Canadian approach to copyright law also exhibits a concern over the protection of Canadian culture against foreign (i.e. United States) influences, they might reconsider their opposition.²⁹² Finally, the urgency of the issue is made stark by the reality of the Internet. The Internet raises the possibility of the evisceration of any rights artists may have in the integrity or proper attribution of their works as they are modified in their circulation on the GII.

Moral rights may reflect another example of the over-extension of copyright protection internationally. Just as likely is the proposition that moral rights have a long tradition in most countries outside of the United States and have historically, if not clearly, been found worthy of protection under international copyright law through the Berne Convention. This is one area where harmonization at the international level could prove helpful, if not necessary on the GII. The question becomes whether the moral rights regime of France, perhaps not correctly perceived as the most onerous, should be replaced with the rights that Canadian copyright holders enjoy, the protection found in the United States, or some other alternative. The Canadian model, however, offers a uniform method that is an irresistible compromise.

287. Adolph Dietz, *Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995); Gerald Dworkin, *Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995).

288. Brian Coleman, Julie Wolf & Hannelmore Sudermann, *EU Notebook*, WALL ST. J. EUR., Nov. 21, 1996, available in WESTLAW, 1996 WL-WJSE 14770926.

289. EC GREEN PAPER, *supra* note 159, at 106.

290. *Huston c. La Société Turner Entertainment*, Cour de Cassation, May 28, 1991, 149 RIDA 197 (1991).

291. Jeffrey Goodell, *Salut Suckers*, PREMIERE, Apr. 1994, at 131.

292. *Building the Information Society: Moving Canada into the 21st Century* § Growing Canadian Content (visited May 19, 1996) <http://info.ic.gc.ca/info-highway/society/toc_e.html>.

IV. WHAT MAKES THE INTERNET UNIQUE

Under traditional modes of dissemination of copyrighted materials dating back to the Gutenberg press, publishers and distributors of one kind or another have been responsible for making copyrighted and public domain²⁹³ works available in large quantities to the public.²⁹⁴ If the cost of publishing and distributing a work were deemed too high, based on economic, editorial, political or other judgments, a work might never come to the attention of the public. Since many works prove to be failures, become dated or replaced by other equivalents, even those works that have been lately published can soon be forgotten, and generally are. Without publication, access to an audience of more than a few acquaintances was thus limited to whether a relatively few publishers would agree to assist "authors" make and circulate their materials. These publishing houses generally employed editorial staffs to review and revise these works and make them ready for publication and eventual dissemination. Before the GII, this distribution was done through bookstores, libraries, cinema houses, television, video and record stores, radio stations, concert halls, etc. These were, and for the foreseeable future, likely will be, the traditional methods of making copies or performances available to the public. Authors were remunerated through royalties or other payments made by the publishers under some form of agreement. Except for those with direct access to these channels of dissemination or with sufficient funds, copyrighted materials meant for larger public consumption had to pass through this requisite bottleneck of "publishers."²⁹⁵

What makes the GII different, particularly the Internet, is that it promises to allow all those with access to it to be their own publisher, distributor, and editor. They can do this for their own copyrighted materials or for those of others who may or may not have access to the GII. In fact, confidential, private and/or personal materials are delivered, using the same channels as expression intended for mass audi-

293. One example of a work to have become popular after falling into the public domain is *It's A Wonderful Life* (Liberty 1946), directed by Frank Capra and starring James Stewart. The film became a Christmas time favorite through repeated U.S. television broadcasts beginning in the 1970s. Dan Barry, *For Bedford Falls at 50, Still a Happy Ending*, N.Y. TIMES, Dec. 5, 1996, at B1, B4.

294. Elkin-Koren, *supra* note 236, at 401-02; BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (2d ed. 1987). See also Caruso, *supra* note 239, at D1, D6; Elizabeth Atwood Gailey, *Who Owns Digital Rights? Examining the Scope of Copyright Protection for Electronically Distributed Works*, COMM. & L., Mar. 1996, at 3; Sarah Lyall, *Publishing; To Avoid Future Shocks, Publishers and Authors Are Fighting for the Electronic Rights to Books*, N.Y. TIMES, Mar. 24, 1994, at D6.

295. Elkin-Koren, *supra* note 236, at 401-02. Professor Pamela Samuelson has termed the approach taken by the U.S. White Paper as a "Copyright Grab" by these industries. Samuelson, *supra* note 11, at 191.

ences, on the GII. This is one of the important aspects of what the GII promises and what the Internet already delivers to many: a decentralized means of dissemination of almost all intangible creative (and not so creative) works. As skirted in earlier discussions, the Internet itself is organized in a decentralized manner.²⁹⁶ Users connect to other computers through wire and wireless means. Unlike other traditional media, use of the Internet is interactive. Communication is done from the user's computer to the computer(s) contacted. Although this a form of point to point communication resembling that which occurs during a telephone call, the content of the communication is sent through packets of bits of information which can take less than a second to be sent or received, thereby allowing other users to connect to that computer and not monopolize its telephone line like a person to person conversation would.²⁹⁷ The Internet's communication methods also re-route messages along the networks' lines in whatever way is necessary to reach their assigned destinations. If one line is busy or not working, another one is found to make that eventual *connection*.²⁹⁸ It can all appear seamless (unless many lines are busy or the computers themselves are slow) and simultaneous. As the technology continues to develop, there is no reason why all traditional media and copyrighted materials should not become available on the Internet and the GII.²⁹⁹

Most importantly, the decentralized nature of the GII is what allows it to promise to individualize and democratize communication. As the number of individuals with access to the GII increases, the amount of information that is made available to them can at first appear overwhelming. The number of people that can be reached on the GII is no less intimidating. Computers and the GII make possible the storage and access to all of human kind's knowledge. Some parties opposed to the dissemination of copyrighted materials on the GII without increased copyright protection have argued that it is unfair to have copyright owners subsidize the use of the GII by the middle class and wealthy.³⁰⁰ While users may currently be relatively limited when compared to other media, the demographics of those with access to the GII has constantly shifted—access to the GII is expanding to include more than just com-

296. See *supra* notes 111-13 and accompanying text.

297. See *supra* note 113 and accompanying text.

298. Charles McGrath, *The Internet's Arrested Development*, N.Y. TIMES MAG., Dec 8, 1996, at 85.

299. NEGROPONTE, *supra* note 2, at 71-74.

300. These are the people who tend to be able to afford the computers and telephone lines to access the information thereon the GII. See Paul Aiken, *Words Have a Price*, N.Y. TIMES, Dec. 20, 1996, at A39.

puter literate individuals in developed countries.³⁰¹ With the introduction of free access to the GII in schools and libraries, and the necessity of computer skills in the workforce, the argument loses much of its force and will likely soon disappear.³⁰²

This is not to say that all is perfect on the GII.³⁰³ Like all technology and media, the GII can be abused.³⁰⁴ Copyrights are infringed on the GII every day. Information not meant for public knowledge, such as personal letters, medical histories and other confidential information, as well as trade secrets and classified governmental documents, can be placed and easily accessed on the GII. The Internet has been used to harass and to conduct criminal activities.³⁰⁵ Yet, because of the lack of understanding of the Internet's decentralized structure, it is assumed that the GII can be regulated like any other area governed by law.³⁰⁶ Professor Elkin-Koren has argued that, "copyright law utilizes and reinforces the centralized structure of print technology. Imposing copyright principles on a digitized environment may unnecessarily reproduce this centralized structure."³⁰⁷ Stated differently, attempts to impose a centralized structure on the Internet, through copyright laws or otherwise, ignores the distinct advantages made possible by the decentralized structure of the Internet. The inability to grasp this difference, in the United States White Paper, in the E.C. Green Paper and in Canada's IHAC Report, is the primary reason why roadblocks on the GII are beginning to arise, be it through the new WIPO treaties or national legislation to amend copyright laws.

301. Andrew Kantor & Michael Neubarth, *Off the Charts: The Internet 1996*, INTERNET WORLD, Dec. 1996, at 45, 47-49; Brent Gregston, *The European Picture*, INTERNET WORLD, Dec. 1996, at 52; Gene Mesher, *The Internet in Asia*, INTERNET WORLD, Dec. 1996, at 56.

302. Steve Lohr, *A Nation Ponders its Growing Digital Divide; Weighing Costs of Information-Age Access for Every School and Library*, N.Y. TIMES, Oct. 21, 1996, at D5. If anything, the GII's decentralized structure introduces unique problems for libraries and other sectors of society. Because materials available on the GII are constantly changing, the instinct to library and save the data for future study raises additional privacy and copyright problems. The privacy issue arises because archiving of the GII would save not only its content but also who uses its materials. Copyrights are infringed because of the unauthorized copying that archiving implies. John Markoff, *When Big Brother Is a Librarian*, N.Y. TIMES, Mar. 9, 1997, § E3.

303. John Markoff, *On-Line Service Blocks Access to Topics Called Pornographic*, N.Y. TIMES, Dec. 29, 1995, at A1.

304. Mark Fearer, *Scientology's Secrets*, INTERNET WORLD, Dec. 1995, at 76; Warren Caragata, *Crime in Cyberspace*, MACLEAN'S, May 22, 1995, at 50.

305. Seth Schiesel, *On Parole and Out of Cyberspace*, N.Y. TIMES, Jan. 5, 1997, § 4, at 5; Monty D. Kaufman, *Warding Off the Dark Side of Cyberspace*, MASS. LAW. WKLY, Oct 14, 1996, at 29.

306. Elkin-Koren, *supra* note 236, at 348-50.

307. Elkin-Koren, *supra* note 236, at 350.

Analogies between the GII, broadcasting, and the telephone have been made. If broadcasters and the telephone industry can be regulated, why can't the GII? The development of the Internet proves that, as currently structured, this will be extremely difficult. Broadcast regulations, at least in the United States, exist because of the scarcity of the airwaves through which signals carrying content are sent, which limits the available amount of content and users. On the other hand, telephone companies generally act as common carriers and may not discriminate as to who has access to their facilities (as long as the telephone bill is paid). Otherwise, telephone subscribers are left to their own devices. Only by imposing a centralized structure on the dissemination of information on the GII, through the equivalent of broadcasters or telephone exchanges, can any entity, governmental or otherwise, possibly hope to control its impact. The United States White Paper implicitly argues for such an approach by attempting to make ISPs liable for the messages they carry from their subscribers.³⁰⁸ As demonstrated, if such a centralized approach were taken, the privacy of individual users³⁰⁹ and their rights to freedom of speech and association, would be at stake.³¹⁰ Therefore, if the GII's promise is to be fulfilled, centralized state control cannot easily be asserted,³¹¹ if it should be asserted at all beyond the immediately necessary for allowing the GII to continue to exist. That is what telephone regulation has allowed, but even that type of control may not be necessary on the GII because of the agreed upon protocols to the transfer of information. Furthermore, as a consequence of its decentralized structure, technological reality makes attempts to regulate the Internet even harder.³¹² Regulation of the GII requires authority over numerous individual access points, be they users, computers or, for that matter, jurisdictions like nations, that are not inherently concentrated and thus easy to control.

Given the international nature of the GII, not every country will agree that the easy and individualized means of disseminating and accessing information on the GII is acceptable or in its best interests. Not all countries have the same civil liberties traditions that many developed

308. U.S. WHITE PAPER, *supra* note 154, at 117.

309. Elkin-Koren, *supra* note 236, at 398-99.

310. Niva Elkin-Koren, *Cyberlaw and Social Changes: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215 (1996).

311. Robert Cassius de Linval, *L'Internet peut-il être contrôlé?*, NAT'L, June-July 1996, at 30, 32.

312. A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, available in BORDERS IN CYBERSPACE (Brian Kahin & Charles Nesson eds., available at A. Michael Froomkin *The Internet as a Source of Regulatory Arbitrage*, ver. 1.1b, draft May 7, 1996, (visited Apr. 1, 1997) <<http://www.law.miami.edu/~froomkin/articles/arbitr.htm>>; Post, *supra* note 246, pars. 33, 36, 38; Elkin-Koren, *supra* note 310, at 217.

western nations enjoy;³¹³ and even democracies have not shown themselves averse to controlling their citizens' access to information.³¹⁴ Copyright laws can be and are such a limitation. Whether copyrighted works are protected by national laws on the basis of the public interest, as in the United States, or on the basis of a natural/personal right in the author, as done in many countries following the civil law tradition of continental Europe, they nevertheless allow copyright holders to limit access to their expressive works. Authors are given certain rights to prohibit the copying, adaptation, and public dissemination of their works.³¹⁵

How, then, can these rights be maintained on the GII without also crushing it? Some commentators believe that copyright laws based on a traditional system of centralized dissemination of hard copies of works cannot possibly address the problems raised by the Internet. John Perry Barlow, among others, has argued that "information wants to be free" and the Internet, making an abundance of information available, is proof of this.³¹⁶ Nicholas Negroponte believes that because copyright law has historically been shaped by changes in technology, be it the printing press, photography or broadcasting, that the changes brought about by computers and the Internet makes copyright law hopelessly dated.³¹⁷ Esther Dyson, a respected leader in the computer and on-line world, has suggested that copyrighted materials will see a severe reduction in value because of the overabundance of works to which the Internet gives users access.³¹⁸ Because supply will outpace demand, she suggests that authors will receive most of their remuneration not by making their works available for a fee, but by using their materials to advertise their other services: "performances, readings . . . and interacting with their audiences."³¹⁹ Copyright laws themselves would be used to ensure authors' moral rights of attribution and integrity.³²⁰

313. Philip Taubman, *Cyberspace in Singapore; The Internet Threat to Official Censorship*, N.Y. TIMES, Nov. 8, 1995, at A24.

314. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

315. U.S. Copyright Act, 17 U.S.C. §§ 106, 106A; Canadian Copyright Act, *supra* note 269, §§ 3, 14.1.

316. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84; *see also* Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, 137 (discussing the value of a copyright).

317. *See* NEGROPONTE, *supra* note 2, and accompanying quotation.

318. Claudia Dreifus, *The Cyber-Maxims of Esther Dyson*, N.Y. TIMES MAG., July 7, 1996, at 16, 18.

319. *Id.* at 18.

320. *Id.*

These arguments, from what intellectual property Professor Robert P. Merges calls "cyber-purists," are said to ignore the distinction between information, such as facts and ideas, which are free, and the expression that makes use of these ideas, which are not free and are protected by copyright.³²¹ Professor Merges likens ideas to ore in a mine which authors extract and to which they add value. "Information is to the cyber-economy what physical matter is to the economy of tangible assets. Just as matter must be reworked into useable forms—steel, plastic, glass—so must information. In its raw state it is almost useless."³²² Although a correct statement of current copyright law, the analogy is somewhat misleading. Not every author has access to ore in its pure form. Facts and ideas are as often obtained from copyrighted newspapers and books as they are firsthand or from thinking. Copyright law allows the taking of facts and ideas so that they may be built upon by others.

How does one obtain these facts and ideas in a world where traditional hard copies, such as books and tangible records, may no longer exist? Where is the "copy" in the copy-right going? The GII and the Internet have made a world without tangible copies possible. Prohibiting browsing or all copying of these materials therefore takes away from the facts and ideas copyright places in the public domain. In a world without copies, copyright law's current balance risks placing too much control in the hands of the creator to exclude even cursory glances of protected expression. This may be acceptable for personal communications, but what of works that the author wishes to mine through payment for its consumption? As a consequence of this change, ideas, style, procedures, and other elements not normally protected but left to the public to use freely come entirely under the copyright holder's control. He can insist on being paid for viewing what is currently free. In a world without copies, copyright as we now know it disappears. Its reemergence on the GII gives copyright holders rights never imagined in the pre-digital world. When individual authors control these rights, copyright may act as a means of decentralization on the GII, at least to the extent that authors allow access to their works. When expression is concentrated in copyright conglomerates, however, copyright acts as a force for re-centralization. The price for access then risks being much higher.

Like other commentators,³²³ and explicitly encouraged in the Cana-

321. Robert P. Merges, *In My Opinion: Intellectual Property and Digital Content: Notes on a Scorecard*, 1 CYBERSPACE LAW, June, 1996, at 21 n.1; Berne Convention, *supra* note 16, at art. 2(8); WIPO Copyright Treaty, *supra* note 63, art. 2; TRIPS, *supra* note 8, art. 9(2).

322. Merges, *supra* note 321, at 15.

323. Ginsburg, *supra* note 10, at 1489.

dian IHAC Report³²⁴ and, to a lesser extent, the EC Green Paper,³²⁵ Professor Merges argues that history has shown that centralized collective rights organizations usually arise in situations where numerous users wish to obtain permission to make use of copyrighted materials.³²⁶ Private public performance rights organizations such as ASCAP and BMI in the United States are cited as models for the licensing by broadcasters and music halls of the right to publicly perform the copyrighted music of the organization's member composers.³²⁷ It is obvious that the ability to go to one organization to obtain permission to use copyrighted materials is desirable, if only because it is efficient and less costly. Search costs of finding the copyright holder are reduced, if not eliminated, and license fees tend to be lower.³²⁸ Other than the obvious antitrust problems these organizations have raised (copyright owners agreeing on what to charge users),³²⁹ there are additional major problems with the collective rights model as applied to the Internet.

One is from whom will license fees be collected.³³⁰ In music, ASCAP and BMI can collect from radio and television stations, concert halls, restaurants, most any place where public performances of music are likely to occur.³³¹ Although such places and licensees are numerous, they still tend to be somewhat limited in number, if only because economically it does not make sense to pursue all possible public uses of music. Furthermore, trying to collect for every possible use of copyrighted materials may not be desirable. Witness the recent fiasco over ASCAP collecting fees from the Girl Scouts of America for singing songs around the campfire,³³² and restaurant organizations petitioning Congress to amend the

324. IHAC REPORT, *supra* note 254, rec. 6.12. "The federal government should encourage the industry and creator and user communities in the creation of administrative systems to streamline the clearance of rights for use of works in a digital medium." *Id.*

325. EC GREEN PAPER, *supra* note 159, at 109-11. The Commission seemed torn between encouraging the development of a "more finely tuned and individualized form of rights management," and the risks of copyright and related rights becoming "an obstacle to the creation of multimedia products," if centralized collective rights organizations did not arise. *Id.* at 109, 111.

326. Merges, *supra* note 321, at 20-22.

327. Merges, *supra* note 321, at 21.

328. See, e.g., DAVID SINACORE-GUINN, COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS (1993) (discussing the advantages of a centralized collective rights organization).

329. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (illustrating the antitrust fee issue).

330. Ginsburg, *supra* note 10, at 1492-93.

331. See SIDNEY SHELMEY & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 196-216 (6th ed. 1990) (explaining methods that copyright holders of music enforce their rights).

332. Elisabeth Bumiller, *Battle Hymns Around Campfires*, N.Y. TIMES, Dec. 17, 1996, at B1, B5; Lisa Bannon, *The Birds May Sing, But Campers Can't Unless They Pay Up*, WALL ST. J., Aug. 21, 1996, at A1.

United States Copyright Act because of perceived strong-arm tactics by ASCAP and BMI.³³³

Users of the GII, on the other hand, are everywhere: at home (and therefore in private), at work, on the beach, in public auditoriums, etc. If you charge their ISPs, the most likely candidates,³³⁴ how do you charge? By number of subscribers or by amount of information sent to each user? How much do you charge? How do you determine which copyright holders are entitled to remuneration and for how much? More basically, should providers of Internet services be charged for the individual activities conducted by their users over whom they have limited control simply because they are the ones most able to monitor their users?³³⁵ Will we need laws to protect the privacy of users from having this information released or sold by ISPs or copyright holders? These are not easy questions.

Another problem is the fact that collective rights societies generally require that all copyright holders be included in the collective. Not everyone writes music, so it is easier to assemble all composers in a given country than it is to assemble the millions of possible copyright holders with works on the GII. Almost any literate person can write, and many users of the Internet do write, if only electronic mail to other users. Will all users of the GII be required to join a collective rights society? Will we all one day obtain regular checks for royalties for use of our copyrighted materials on the GII?

Historically, collective rights societies have been organized according to the exclusive right involved. Looking at the United States, outside of possibly the Copyright Clearance Center for the copying of certain published materials, rare is the organization that will license more than one exclusive right which an author may hold under copyright.³³⁶ If anything, multi-media works (i.e. works that include more than one type of copyrighted material such as photographs, text, music, spoken word, audio-visual works, etc.) have shown that the transaction costs of obtaining rights from all the different possible rightholders included in the multi-media work, many of which are not available from collective rights societies, can be extremely high, if not economically prohibitive.³³⁷

Finally, collective rights organizations tend to be based on the rights available to authors in individual countries. Organizations may agree to

333. Bill Holland, *Rights Groups to Renew Bar Bill Fight*, BILLBOARD, Sept 2, 1995, at 5; Music Licensing Reform Act of 1996, S. 1619, S. 1628, 104th Cong., 2d Sess. (1996).

334. Ginsburg, *supra* note 10, at 1492-93.

335. See *supra* Part III.A.

336. U.S. Copyright Act, 17 U.S.C. § 106 (providing copyright holders the exclusive right to reproduce, prepare derivative works based upon, distribute, display, and publicly perform, a copyrighted work).

337. See EC GREEN PAPER, *supra* note 159, at 109 (demonstrating this very concern).

transfer fees for works of their members in use in each other's countries, but they are certainly not currently required to do so.³³⁸ These and other questions raised by formation of new centralized collective rights organizations show that backward thinking to what has worked in the past will not always work for copyrights on the GII. The only type of collective rights organization that could possibly work on the GII is one that includes all GII users. The practicality of such an undertaking, which is merely another attempt to centralize the decentralized, should be obvious.

Compulsory licensing and levies are other means currently used to give copyright holders remuneration for the use of their works. Compulsory licenses have come under severe criticism by governments and commentators in recent years.³³⁹ They argue that such licenses tend to be a disincentive to marketplace forces, making all works equivalent or nearly equivalent in value even though some works are obviously more popular than others and could command higher license fees. It was with some surprise that the draft proposal to eliminate compulsory licenses for broadcast rights were not included in the new WIPO Copyright Treaty.³⁴⁰ Even the United States chose to vote to leave the provision out in spite of its position opposing compulsory licenses in the U.S. White Paper.³⁴¹ However, this may only have been an example of the flexibility shown at the WIPO conference to obtain some heightened level of copyright protection for works on the GII than to leave Geneva with no treaties at all.

Levies have been similarly criticized. As with collective rights organizations, the issues focus on who should receive recompense, how much, and under what type of formula. In 1992, the United States introduced levies on digital audio tape recorders and recording media,³⁴² and the current proposed revision to Canada's Copyright Act includes similar levies on all, not only digital, audio recorders and media.³⁴³ The United States has placed Canada on its trade "watch list" to review possible trade action because it believes that the material reciprocity requirement included in this part of the Canadian legislation would violate TRIPS and the North American Free Trade Agreement even though Canada's proposal, by including analog media, is currently much broader

338. SHEMEL & KRASILOVSKY, *supra* note 331, at 212, 218-21.

339. U.S. WHITE PAPER, *supra* note 154, at 52; EC GREEN PAPER, *supra* note 159, at 112; Merges, *supra* note 321, at 20.

340. PROTOCOL, *supra* note 59, at art. 6.

341. Greenstein, *supra* note 62.

342. Audio Home Recording Act of 1992, 17 U.S.C.A., §§ 1001-10 (West Supp. 1996).

343. Canadian Copyright Revisions, *supra* note 270, at §§ 79-88.

than that in the United States³⁴⁴ This position taken by the United States, now a net exporter of copyrighted material, can only be expected to harden against countries who take measures that provide increased protection for their copyrighted industries at the perceived expense of United States copyright holders. Yet copyrighted works are not like everyday manufactured goods. In their most protected form, copyrighted works embody original and highly creative expression—expression that can amount to personal triumphs and cultural treasures. This is what copyright law was meant to encourage and protect. The fact that limitations inherent in physical copying mandated centralized dissemination of copyrighted materials, to the point where *publishers* became favored under copyright, should not negate the imperative reason for copyright protection—to protect authors' expression.

Even if collective and compulsory licenses, as well as levies, could address the question of what is proper remuneration sufficient to give authors an incentive to create, especially where copyright holders cannot efficiently negotiate licenses with all the individual users of their works on the GII, such imposed licenses and levies do not touch the moral rights problems that the GII raises. If widespread blanket waivers of moral rights were included in collective licenses, or made part of legislation requiring compulsory licenses, the effectiveness of the waivers would not necessarily guarantee escape from liability.³⁴⁵ Blanket waivers cannot possibly foresee all uses to which a work is made that might harm an author's moral rights as currently understood in France, Canada, the United States, or elsewhere. If anything, blanket waivers could prove the beginning of the end of moral rights on the GII. Ironically, it may be the fact that moral rights lie in individual authors, and are not always waived, that will prove copyright's or the GII's downfall. Because moral rights and the assertion of authors' rights on the GII decrease the necessity for the intermediary of publishers, and thus run counter to the otherwise centralizing aspects of copyright law, the GII will either develop into an author friendly media or disappear in the attempt to remake the "copy" on the GII in the image of current publishing/copyright industries.

V. CONCLUSION

If theorists such as Esther Dyson are correct and the abundance of copyrighted materials on the GII drives down the price of all expression, then they may also be correct that the protection authors will need are

344. See *Washington Monitor*, 17 ENT. L. REP. 1, 3 (May 1996) (discussing Canadian legislation to revise copyright law); Larry LeBlanc, *Canadian Performance Right Bill Draws Fire From U.S. Broadcasters*, BILLBOARD, Jan. 7, 1995, at 6.

345. See *supra* notes 279-80 and accompanying text.

the right to be recognized as the creators of their expression and to have control over how that expression is manipulated.³⁴⁶ For Ms. Dyson, this is the moral aspect that is included in copyright law beyond the mere labeling of the rights involved as moral rights. Yet, even this may prove to be too much. If the incentive to create loses its economic allure, what is to say that the romantic notion of the author alone in his garret will not disappear to be replaced by the author as employee or even the re-emergence of the author-institution-patron relationship that brought us Bach, Haydn, and many other authors before copyright laws were developed? Alternatively, it is quite possible that the GII will allow numerous authors to disseminate their works but at no prospect of an immediate economic reward. This may not be that sad a result. Art and fiction, on the other hand, may no longer be for museums and bookstores. Computers and the GII promote access to copyrighted expression in many ways. Do we need to reward authors and publishers for every tangible copy and the costs involved in the manufacture of the copy? All the more reason why copyright law's centralizing structure must be rethought, and moral rights with it.

In the end, the "cyber-purists" and other commentators may prove to be correct.³⁴⁷ It is apparent that application of current copyright laws and treaties on the GII can go too far. As long as international copyright law is compelled to keep raising protection³⁴⁸ when some lowering, if not complete change, in the type of protection may be necessary, the risk of collapse of the GII and/or copyright law exists.³⁴⁹ Despite the numerous studies, until a better understanding by governments, regulators and all other interested parties of the decentralized working of the GII occurs, proposals to address these problems, at both a national and international level, are doomed to result in eventual failure. Creators, users, and disseminators of copyrighted materials need to be similarly educated. Unfortunately, resolution of the intractable problems of copyright on the GII become harder and harder to find as international law and conventions grow to limit possible considerations.³⁵⁰

Although the new WIPO Treaties, the EC Green Paper and similar developments in countries like the United States and Canada appear to focus on finding a *proper balance* between the interests of users and creators, that section of users that has become accustomed to using and

346. See *supra* notes 318-20 and accompanying text.

347. See *supra* notes 316-21 and accompanying text.

348. Berne Convention, *supra* note 16, arts. 19, 20; TRIPS, *supra* note 8, art. 9; see *supra* note 97 and accompanying text.

349. NEGROPONTE, *supra* note 2, at 58. See generally Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996) (discussing the shortcomings of the TRIPS agreement).

350. See *supra* note 55 and accompanying text.

transferring materials on the Internet may have already left those questions behind. If anything, the issue for many users in that community appears to have become combating the charge that information wants to be anything but free.³⁵¹ The assumptions, and continuation, of centralized structures found in the treaties, legislation and governmental studies examined in this article thereby ignore the new reality made possible by the GII.

Maybe copyright and authors' rights rules are mere remnants of a different era when it was possible to control the copying of materials. Maybe it is not in the public's interest to extend or raise the level of protection for works on the GII where information can be so easily disseminated and obtained,³⁵² especially as the cost of entry continues to decline and access is extended to more than just an elite group able to afford computers and connection to the GII.³⁵³ As long as certain uses can remain private (not for distribution to all on the GII), adequately recognized, respected and/or remunerated,³⁵⁴ it is possible that the current level of protections given to creators and users (versus centralized copyright industries) will be sufficient and eventually lose some of their relevance as the importance of an uninhibited public forum becomes apparent in many countries.³⁵⁵ International law, however, could make this extremely difficult.³⁵⁶ Instead of waiting to see how the GII develops, governments have chosen to attempt to shape it in the image of the current centralized model of copyright dissemination. If recent history is an indication, copyright lawyers and specialists (and their industry interests) can probably expect some exciting years ahead as they battle over how to best fence off the GII.³⁵⁷ Unless users and creators together, who are the real interested parties here, start taking control of their own destiny beyond the traditional "balance" of bi-polar opposites of consumer-infringer/creator-copyright industry, that is exactly what is going

351. See *supra* notes 316-21 and accompanying text.

352. Seth Schiesel, *Copyright Pacts Are Still Facing Foes in Congress*, N.Y. TIMES, Jan 1, 1997, at 61, 63.

353. See *supra* notes 300-02 and accompanying text.

354. Marci A. Hamilton, *Artists May Have to Settle for Remuneration Alone*, NAT'L L.J., Oct. 31, 1994, at C29.

355. See *supra* note 270 and accompanying text.

356. See *supra* Part I.B.

357. In the January 1997 ABA Journal, the monthly magazine of the American Bar Association, an article posits that based on a survey by the Anderson-Boyer Group and the Law Office Management and Administrative Report, "intellectual property partners command the highest fees" of attorneys in the United States. Mark Hansen, *IP Means Impressive Pay*, ABA J., Jan., 1997, at 27. See also Marlene Edmunds, *Internet's Complex Copyright Woes*, VARIETY, Jan. 22, 1996, at 83 (discussing the unsettled issues of copyright law as applied to the Internet).

to happen.³⁵⁸ The risk is that in the process, as Nicholas Negroponte has noted in a quotation that bears repeating, "[c]opyright. . . will probably have to break down completely before it . . . [can be] corrected."³⁵⁹

358. Entrenched interest will naturally find this sort of inquiry anathema.

But, after over a century of increased copyright protectionism nationally and internationally, it is surely time for the public affected by copyright law to regain control of the process, to influence developments from the bottom up rather than passively accepting them from the top down.

David Vaver, *Rejuvenating Copyright*, 75 CAN. BAR. REV. 69, 79 (1996).

359. NEGROPONTE, *supra* note 2 and accompanying quotation.