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The TRIPS Agreement: Imperialistic, Outdated, and Overprotective

Marci A. Hamilton*

ABSTRACT

According to Professor Hamilton, the TRIPS Agreement constructs international copyright law in the image of Western, Protestant-based capitalist copyright law. She suggests that the Agreement imposes presuppositions about human value, effort, and reward that contain political, sociological, and legal ramifications. In fact, the Agreement, with its focus upon valuing individual human creative achievement, could spur further developments in Western-based human rights in the rest of the world. By transplanting Western ideas to the rest of the world, TRIPS may actually encourage anti-authoritarian revolution.

She further suggests that the TRIPS Agreement seeks to establish a free market of intellectual property goods. By establishing such a system, the Agreement could serve to standardize the world's politics.

Professor Hamilton argues that the TRIPS Agreement is already outdated because it neglects to address that a great portion of the international intellectual property market will soon be on-line. She suggests that this critical omission could be used unfairly by publishers to restrict the free-flow of ideas as a means of profiting from their copyrights. The on-line era faces the difficult task of crafting an appropriate equivalent to the hard copy universe's free use zone. By restricting access to information and ideas through a global copyright law overly solicitous to publishers, the people's freedom from tyranny may be jeopardized. Although copyright should not be abandoned, it must be modified to fit an on-line universe.

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I. INTRODUCTION

The WTO/GATT Agreement involving Trade-Related Aspects of Intellectual Property Rights (Agreement or TRIPS) is a lot more than its moniker reveals.¹ Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPS attempts to remake international copyright law in the image of Western copyright law. If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history. Moreover, the Agreement will have achieved this goal under the heading "trade-related," which makes it appear as though it is simply business. To understand TRIPS, it is important to embrace an interdisciplinary approach, to widen the copyright lens to include culture, politics, and human rights.

Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at

1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex IC: Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 1-19, 365-403 (GATT Secretariat ed., 1994).

the same time that the on-line era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on-line. This silence could transform a troubling treaty into a weapon of extortion by the publishing industry, which has already succeeded in crafting TRIPS as a blunt instrument for copyright protection. While the corporeal universe has permitted Western societies to receive and copy large numbers of copyrighted works for free—through libraries, commercial browsing, personal lending, and copyright doctrines such as the first sale doctrine, fair use, and the idea/expression dichotomy, the on-line era raises the possibility that the publishing industry can track every minuscule use of a work and thereby turn the free use zone into a new opportunity for profit. TRIPS' silence threatens to make it both outdated and overprotective.

II. COPYRIGHT NORMS AND FREEDOM IMPERIALISM

The cultural underpinnings of existing copyright law require a reevaluation to assess their appropriateness and usefulness in building a universal copyright scheme. The subject of the AALS Symposium, the TRIPS Agreement, is the first giant step toward globalization of intellectual property rights.² Globalization introduces a new level of complexity into copyright law and creates a need for more creative ways of understanding and justifying rights protected by copyright. The United States is no longer negotiating primarily with European countries that share a similar moral and religious heritage and economic understandings. Now, the United States is also dealing with the Eastern countries as well as with the world's developing countries. Therefore, focus on copyright must extend beyond markets and trade issues to interdisciplinary understandings. Cultural views on human effort and reward are particularly important.

With 117 signatory countries from around the world, TRIPS is ambitious to say the least.³ It is also old-fashioned, Western-style imperialism. One commentator describes the TRIPS Agreement

2. "[TRIPS] is the highest expression to date of binding intellectual property in the international arena." David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385 (1995).

3. John Worthy, *Intellectual Property Protection After GATT*, 16 EUROPEAN INT. PROP. REV. 195, 195 (1994).

as "impolite."⁴ This description is too polite. Despite its innocuous name, TRIPS does not merely further trade relations between these many countries. Rather, TRIPS imposes a Western intellectual property system across-the-board⁵—which is to say that it imposes presuppositions about human value, effort, and reward. And it has appeared without serious public debate over its latent political mission.

It is not surprising that there might be uneven compliance across the world even after so many countries signed the TRIPS Agreement.⁶ Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective. To believe in the Western version

4. J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 813 (1989). Professor Reichman attributes this thought to Steven P. Ladas stating: "Imposition of foreign legal standards on unwilling states in the name of 'harmonization' remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism." *Id.* (citing 1 STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975)). Paul Geller's work has been important in shaping my view of TRIPS as a "legal transplant." See Paul Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199 (1994).

5. By the "West," the author means both Europe and the United States. See Whitmore Gray, *The Challenge of Asian Law*, 19 FORDHAM INT'L L.J. 1, 5-6 (1995).

During the Nineteenth and the first half of the Twentieth Centuries, the principal migration of legal ideas was from Europe to countries attempting to create or modernize their legal systems. . . . After the Second World War, however, a new era of global interaction of legal systems developed. U.S. economic dominance reinforced the idea that U.S. legal institutions and, particularly, recent U.S. substantive law, should be considered as normal models for modernization.

Id. See also J. H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 475 (1995); J. H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75, 113 (1993) (declaring that "the United States negotiators, blinded by a particular view of the cathedral, confined their efforts to securing copyright protection" to existing Western paradigms). As a historical matter, TRIPS' imperialistic character is not sewn out of whole cloth. TRIPS furthers, and incorporates by reference, the Berne Convention, which was the product of the Nineteenth Century's European empires. Berne's Western bias has been the subject of some discussion in the past. See LADAS, *supra* note 4; see also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1996* (1987).

6. Cf. Tara K. Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L & ECON. 327, 333 (1993) (arguing that one reason it has been so difficult to draft a multilateral intellectual property agreement is that a favorable agreement for one country could be unfavorable for another country).

of copyright rights, one must first accept some version of the following canon:

1. *Individualism*: Individual human creative effort is valuable.⁷
2. *Reward*: Society should single out original products of expression by granting their owners proprietary rights over them. Reward is determined according to the qualities of the product; mere effort is not sufficient to deserve such reward.
3. *Commodification*: Products should be capable of being disassociated from their producers and sent through the stream of commerce. In other words, product creators need not be the product's owners or distributors. Indeed, in the interest of achieving the greatest distribution of copyrighted goods worldwide, creators probably should not be the primary distributors.⁸

By strongly supporting the TRIPS Agreement, the United States—which is to say U.S. publishers—is exporting and imposing Protestant-based capitalism.⁹ The United States is also endorsing the imposition of a revolution-tending construct of the person. Individualism, as captured in the Western intellectual property system, is the *sine qua non* for a society to recognize and honor personal liberty. TRIPS is nothing less than freedom imperialism.

7. In the context of debate over international intellectual property protection, the German Branch of the International Law Association makes this point clearly: “[P]rotection of intellectual property . . . constitutes . . . a basic right of the individual.” REFLECTION GROUP INTELLECTUAL ECONOMIC LAW OF THE INTERNATIONAL LAW ASSOCIATION-GERMAN BRANCH, DRAFT PROPOSAL OF THE GERMAN ILA BRANCH—EXISTING AND EVOLVING PRINCIPLES AND RULES ON FREEDOM OF KNOWLEDGE, INTERNATIONAL PROTECTION OF INTELLECTUAL PROTECTION OF INTELLECTUAL PROPERTY AND TRANSFERS OF ACHIEVEMENTS OF SCIENCE AND TECHNOLOGY, § A.III.11 (1992) (Introduction by Meinard Hilf & Thomas Oppermann) [hereinafter MUNICH DRAFT].

8. This third criterion appears in its strongest form in the U.S. version of copyright law. As it may be the most important in the on-line era, global copyright law may not only look Western in the end, but decidedly American. See *supra* note 5.

9. This venue prevents me from fully explicating in detail the historical sources that support these claims. For the time being, it should be sufficient to indicate that my views have been influenced by the “Weberian hypothesis” that capitalism has its roots in Puritanism and the accompanying critical literature. See generally MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parson trans., 1958); PROTESTANTISM, CAPITALISM, AND SOCIAL SCIENCE: THE WEBER THESIS CONTROVERSY (Robert W. Green ed., 1973).

Whether such imperialism is a *good* idea involves difficult questions of political, sociological, and legal import that are better served by later contemplation. This Section is limited to describing the presumptuous sweep of the TRIPS Agreement and to suggesting that this is an important aspect of TRIPS that deserves open discussion and debate.

It is no accident that intellectual property norms are spreading worldwide at the same time that totalitarian regimes are falling. A people must value individual achievement and believe in the appropriateness of change and originality if it is going to concede to and adopt a Western-style intellectual property regime. Indeed, there is an intimate link between respect for individual human rights and respect for a copyright system that values and promotes individual human creative achievement.¹⁰

China—tellingly outside the TRIPS negotiations—is a vivid example of the hand-in-glove relationship between the suppression of individual rights and the complete disregard for copyright norms.¹¹ The institution of meaningful copyright reform in China is not likely to happen solely at the level of trade relations. Rather, it can be augmented and expedited by simultaneously penalizing violations of Western conceptions of human liberty. China has undergone one era after another in which new forms of liberty suppression have been practiced. The concepts that unite these political epochs *and* explain China's disregard for copyright norms is a vision of the family as the

10. Barbara Ringer, *Two Hundred Years of American Copyright Law*, in ABA, 200 YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK & COPYRIGHT LAW 117, 118 (1977) (asserting that “we know, empirically, that strong copyright systems are characteristic of relatively free societies”).

11. Although China is not a signatory to TRIPS, it is certainly a clear target for those industries that pushed TRIPS, and is probably one of the more difficult countries to bring into line with Western-based intellectual property values.

In a fascinating article on the history of intellectual property protection in China, Professor William Alford explores the “political culture” that has not led China to a Western-style intellectual property system. See William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 20 (1993); see also A.M. Rosenthal, *Washington Confronts China*, N.Y. TIMES, Feb. 6, 1996, at A23. In addition to being unreceptive to a Western intellectual property law system, the Chinese have believed in the goodness of literary and idea censorship. Alford, *supra*, at 27. Thus, in an era when more copyrighted works are becoming available worldwide, China is resisting that trend. Seth Faison, *Chinese Tiptoe into Internet, Wary of Watchdogs*, N.Y. TIMES, Feb. 5, 1996, at A3.

lowest social denominator, not the individual, and a marked disdain for change and originality.¹²

The Chinese culture does not elevate "the new" in the same way that the West does. Tradition is not a past to overcome but rather reversed. Indeed, copying is looked upon as a noble art. Copyright law appears impenetrable, artificial, and crass from such a perspective.

Given the link between intellectual property rights and human rights, TRIPS could spur further developments in human rights. TRIPS does not merely transplant Western-style industries to the rest of the world, it also foments anti-authoritarian revolution.¹³ After the Berlin Wall fell, some said that East Germany fell because the East Germans were enthralled with the ethos and consumer goods viewed every Friday night on the U.S. television show "Dallas." Apparently, like so many U.S. viewers, they imbibed the "good life" ethos of the show. The theory goes that "Dallas" led them to be unsatisfied, and to ask why they were not driving expensive cars or wearing finely tailored couture clothing. By foregrounding the ethos of individual freedom and power, albeit in a vulgar form, "Dallas" questioned the East German authoritarian structure of power.¹⁴ It is doubtful that the United States fully understood that the signing of TRIPS would lead significant segments of the world to question political and social organizations of power. Yet, this is TRIPS' potential.

The TRIPS Agreement, in addition to transplanting an anti-authoritarian intellectual property ethos, has sought to establish a worldwide and lively free market in intellectual property goods. Publishers and the entertainment industry worked hard to protect global intellectual property rights in order to take advantage of this market. If and when a country adopts and enforces the Western-built fences and gates of capitalist intellectual property values, those international mega-oligopolies stand poised with ships full of products. Where the embrasure of Western-style

12. HOWARD GARDNER, *ART EDUCATION AND HUMAN DEVELOPMENT* 51 (1990) (discussing Chinese attitudes toward art and artistic production and education); see also Marci A. Hamilton, *Art Speech*, 48 VAND. L. REV. 73 (1996) (citing sources with relevant information). China's recent threats against Taiwan have arisen from its anti-democratic politics, which also create a hostile environment for Western copyright law. See Christopher J. Sigor, *Why Taiwan Scares China*, N.Y. TIMES, Mar. 19, 1996, at A23; William Safire, *New Mandate of Heaven*, N.Y. TIMES, Mar. 25, 1996, at A15.

13. Anti-authoritarianism lies at the heart of Calvin's response to Luther and the Catholic Church. See WEBER, *supra* note 9.

14. See Hamilton, *supra* note 12, for a description of art's capacity to challenge status quo power relations.

intellectual property rules is only halfhearted, the deluge of artistic and entertainment products will hasten the saturation of Western perspectives and their concomitant inclination to challenge authoritarian institutions and their minions.¹⁵

The U.S. Constitution recognizes correctly that the substance of copyright is somehow different and more momentous than ordinary trade or commerce. Copyright protection is a strong indication of foundational political values. To date, TRIPS discussions have been overly focused on trade.¹⁶ TRIPS is neither innocuous nor simple. It is a striking move to standardize the world's politics.

III. TRIPS IN THE ON-LINE ERA: OUTDATED AND OVERPROTECTIVE

The TRIPS Agreement appears in the midst of the on-line era, but it is oblivious of this era's fundamental change in intellectual product transmission and generation. The on-line era, with its worldwide communication bridge, massive access capacity, and private home receipt of mountains of information, questions the existing fences and gates of intellectual property ownership and invites a reassessment of their proper placement in virtual space. Determining the optimal balance between ensuring a steady and ample supply of information to recipients and remunerating the authors of original contributions to the cultural store is a vexing problem. Drawing lines is particularly daunting in the emerging global information infrastructure (GII). There is no easy, automatic answer. TRIPS treatment of copyright law does not introduce new law per se but rather refers to a limited number of issues, such as the copyrightability of computer programs, and incorporates by reference the outdated Berne Convention. By failing to adjust the Berne Convention to the GII, the TRIPS Agreement unwittingly bestows a windfall on copyright holders.¹⁷

15. See generally *id.* See also Safire, *supra* note 12 (referring to "telecommunications spread[ing] democracy's contagion").

16. The right to scientific information did enter into discussions held in Germany. See generally MUNICH DRAFT, *supra* note 7. This appears to be the exception rather than the rule. It is not clear whether the International Law Association (I.L.A.) will further address this topic. The author acknowledges a debt of gratitude to Professor Frederick Abbott for this information. See also Paul Geller, *Intellectual Property in the Global Marketplace Impact of TRIPS Dispute Settlement*, 29 INT'L LAW. 99, 115 (1995) (stating that TRIPS settlement dispute panels "may not be competent to resolve [privacy, free speech, and information access] issues").

17. Professor Pamela Samuelson has made the same argument regarding President Clinton's Information Infrastructure Task Force's recent proposals for

A. *Universal Access Norms vs. Copyright Norms on the GII*

The emerging ethos of the GII revolves around two issues: information and access. Compelling policy concerns line up on both sides of the debate over copyright protection on the GII. On the one side, there is the value of universal access to information. Information and access are important to free speech values recognized by the U.S. Constitution's First Amendment and the International Bill of Human Rights.¹⁸ In both spheres, more information is better than less information and access is better than exclusion. Indeed, a failure of information access, on both accounts, leads to ignorance and the consequent decay of the democratic propensities of the state.

In the evolving GII universe, universal access is a goal. For example, the G-7 countries, in consultation with various interested industries, have sketched an ambitious plan to include the developing and Third World countries, as well as the developed countries, within the reach of the GII.¹⁹ A frequent analogy is drawn to the distribution of telephone service. The hope is to permit all sectors of the planet to provide, receive, and exchange information. Not coincidentally, as publishers have been lobbying for TRIPS' global protection of intellectual property, the G-7 has been working to expand the means of providing

amendment of domestic copyright law. BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE—THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter WHITE PAPER]. See Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 135; see also Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. (forthcoming 1996) (stating that the *White Paper's* proposals, for copyright law amendment in the information age is a boon to copyright owners).

18. See Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1158 (1993) ("One assumption that underlies the First Amendment is that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."); see also Lisa J. Damon, Note, *Freedom of Information Versus National Sovereignty: The Need for a New Global Forum for the Resolution of Tradeborder Data Flow Problems*, 10 FORDHAM INT'L L.J. 262 (1986); Giunta & Shang, *supra* note 6, at 330 ("Some developing countries maintain that knowledge and information are the common heritage of [humanity] and therefore should be made available at low costs.").

The G-7 industrialized countries are Britain, Canada, France, Germany, Italy, Japan, and the United States. Keiko Tatsuta, *G-10 Echoes Concern over Recent Forex Moves*, JAPAN ECONOMIC NEWSWIRE, Apr. 27, 1995, available in LEXIS, News Library, Curnws File.

19. Raf Casert, *Telecommunications Open Markets Urged*, PHILA. INQ., Feb. 25, 1995, at A02.

intellectual property to a worldwide market of potential consumers.

On the other side of the debate stands copyright law. In the U.S. system, copyright law protects original works of authorship while providing incentives to disseminate those works to the general public. Economic copyright permits authors to obtain monetary remedies or injunctive relief from those who substantially copy their works (in whole or in part). Under the European model of intellectual property, copyright is a moral right protecting personality, which justifies remuneration to authors and some control over the work even after it has been sold to the public.

The goal of information access challenges copyright norms. First, information is a vague and therefore potentially misleading term. Copyright does not protect the information content of expression. Rather, it only protects the particular "expression." If the works on the GII are characterized only as "information," it is deceptively easy to come to the erroneous conclusion that copyright is irrelevant in the "Information Era."

Copyright law also conflicts with the access norm in another way. Copyright law permits individuals through private rights of action to block access to works unless permission has been obtained and remuneration paid for access. At best, copyright seems ungenerous in the heady drive toward worldwide networking and information provision; at worst, it falsely appears downright antidemocratic. The GII surfaces a conflict between universal access norms and copyright values that has always been latent. This new era demands either a reconciliation of the two sides or the sacrifice of copyright to universal, free information access. Democracy suffers if either side is sacrificed.

Copyright should not be abandoned in the drive to realize a worldwide system of communication and cultural exchange. While often thought to be at odds, freedom of expression, provision of information, and copyright law serve similar goals. They operate together to increase the individual's capacity to challenge government's temptation to tyranny. They also maximize the capacity of the people to maintain their independence by constructing certain private power structures though religion, art, philosophy, politics, and family.²⁰ Copyright provides a reward to those who contribute original works of authorship to the cultural store. Such original works are worthy of reward because they generate and challenge discussion,

20. Hamilton, *supra* note 12.

perspectives, and world views.²¹ In a world of diminished original works, the people's freedom is dramatically restricted.

Although some believe that copyright is a relic of the print era, sacrificing copyright protection would be antithetical in an era where the possibilities of cultural exchange are being dramatically increased. Rather than abandon copyright, the GII should reflect the most effective balance between universal access norms and copyright protection. Copyright holders should not be permitted to exploit this formative phase solely in their favor.

The question remains how to balance information access norms with copyright norms within TRIPS' current lopsided balance. The key to crafting the appropriate rules for copyrighted works on the GII is to find a balance between these two extremes.²²

B. *The Free Use Zone and Its Construction in the On-Line Era*

The threshold question for those attempting to craft copyright law for the GII is how to adapt existing copyright treaties and statutes to the new on-line era. In the pre-on-line universe, copyright law permitted authors to exercise a measure of monopoly power over the use of their creations by others. However, this right to exercise control over the copyrighted work has been subject to significant restrictions. There has been a cushion of "free use" surrounding the author's capacity to prohibit unauthorized or unpaid uses. Examples of free use include: browsing among copyrighted books and magazines for sale in a bookstore, loaning a book to a friend, borrowing copyrighted works from public libraries, and visiting an art gallery or museum.²³ Copyright authors in the hard copy universe have not been in a position to extract remuneration for any of these uses, hence my term "free use." Under U.S. law, these activities have been permitted under the "first sale" doctrine,²⁴ which draws

21. See *id.*

22. See MUNICH DRAFT, *supra* note 7, at B.III.9 (urging "fair and balanced system of licensing of intellectual property rights").

23. Although the products involved are not free to consumers, copyright authors have also been constrained from exercising their copyright against "free uses," such as second hand bookstores that have been permitted to purchase works and resell them, and video rental stores that have been permitted to purchase videos and rent them for profit.

24. The European Community recognizes a similar principle. Once a hard copy of a copyrighted work is sold, the author's right to receive remuneration for that particular copy is extinguished. Herman C. Jehoran et al., *The Law of the E.E.C. and Copyright*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2 (Melville B. Nimmer & Paul E. Geller eds., 1993).

a distinction between the corporeal version of the work and the intangible copyrightable expression. Under the first sale doctrine, one can do whatever one wants with the book one purchases, from loaning it to burning it. One cannot, however, copy the book and distribute it for profit.²⁵

The first sale doctrine does not translate easily to the on-line environment, where most versions of the work are in an intangible format, whether stored, transmitted, or viewed on-screen. Until the work is printed onto paper (or perhaps saved to a floppy disk), there is no corporeal version of the work under traditional copyright notions. The on-line environment makes it tempting to view copyright law as a relic of the past or the first sale doctrine as a simple inconvenience that can be discarded in favor of copyright protection for every conceivable use of a work.

The free use zone has a second element. The U.S. copyright statute permits the copying of portions of copyrighted works under its fair use provisions, while most European countries recognize a personal use exemption. If one succeeds in proving that one's use of a copyrighted work is "fair" or for "personal use," then the work can be used for free, without fear of injunction.

Finally, the free use zone is also a product of the idea-expression dichotomy. In the hard copy world, copyright holders can claim monopoly privileges over the particular expression of a work, but they cannot prevent others from "stealing" the idea and crafting different expression around it. This has always been an abstract concept the application of which has caused consternation on the part of courts and commentators. In the virtual universe, however, the demarcation between idea and expression becomes even more abstract. Computerized creation and delivery of works makes it possible to transform any one work many times over, making this already elusive distinction even less certain.²⁶ With the distinction taking on such metaphysical proportions and TRIPS' clear directive to protect intellectual property products, there is likely to be a temptation to overprotect.

In the pre-on-line era, the browsing and borrowing privileges, fair use or personal use doctrines, and idea-expression dichotomy of the free use zone were quite considerable. In the virtual universe, however, it contracts considerably without some virtual tinkering. Fair use, personal exemptions, and the idea-expression dichotomy are grandfathered in by TRIPS' incorporation by reference of existing Western copyright law. Borrowing and

25. Copyright Act of 1976, § 109, 17 U.S.C. § 109 (1988).

26. I owe this idea to Neil Netanel.

browsing privileges have been the practical result of the first sale doctrine, which loses its force when works enter the on-line environment.

Because it only requires protection of intellectual property through simple incorporation of the pre-online era's Berne Convention, the TRIPS Agreement does not prohibit publishers in an on-line universe from extending their copyright monopolies well into the free use zone. TRIPS single-mindedly protects copyright owners' rights without providing the necessary limitations on copyright protection that make it an engine for change and originality rather than a one-sided anticompetitive mechanism. To the detriment of all, TRIPS transforms a copyright monopoly from one that serves the public interest into one that benefits only the copyright industries.²⁷

The task for national and international policymakers lies in constructing an appropriate free use zone in an on-line world. Before offering a proposal to ensure the protection of creative works and the existence of the free use zone, it is worthwhile to examine the two poles in the spectrum over copyright on the GII. These two extremes can be described as the "hackers' " view and the "publishers' " view.

1. The Hackers

The GII follows a period in computer history when on-line communication was limited to a small set of computer experts, who valued computer literacy, especially the capacity to access encoded or secretly held information.²⁸ These experts have labelled themselves "hackers."²⁹ The motto of the hacker world is: "Information wants to be free."³⁰ Some go so far as to argue

27. Cf. Samuelson, *supra* note 14.

28. See CLIFFORD STOLL, *SILICON SNAKE OIL* (1995).

29. See Stewart Brand & Matt Herron, "Keep Designing"; *How the Information Economy Is Being Created and Shaped by the Hacker Ethic*, *WHOLE EARTH REVIEW*, May 1985, at 4 (describing hackers as "dedicated, innovative, irreverent computer programmers [who] are the most interesting and effective body of intellectuals since the framers of the U.S. Constitution"). For an entertaining discussion of the "true" meaning of "hacker," see *id.*

30. Stewart Brand, described as a "1960s activist turned digital savant," is credited with coining the phrase, "Information wants to be free." Jim McClellan, *Cyberspace Angelic Startups*, *THE OBSERVER*, Jan. 21, 1996, at 68; David Stipp & Stewart Brand, *The Electric Kool-Aid Management Consultant*, *FORTUNE*, Oct. 16, 1995, at 160 (characterizing "[i]nformation wants to be free" as the "cyberhacker rallying cry" coined by Brand). The phrase is one of the cornerstones of the hacker movement, which is described in the book, STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984). See Brand & Herron, *supra* note 29. It is also one of the central themes of the editorial pages of *Wired* magazine. See

that barriers to information, including copyright, are outdated impediments to truth and exploration.³¹ They opine that copyright is an arcane phenomenon linked to the printing press that will be swept under the tide of the emerging on-line environment.

While copyright law appeared on the heels of publishing technology, its philosophical underpinnings are not intimately tied to the printing press. *Whatever* the means of copying, copyright law erects property boundaries around intangible expression so that it can be commodified, disseminated, and shared. Those statutorily-constructed barriers are more necessary than ever in an on-line universe with its copying facility. A properly functioning copyright system rewards original expression and provides sufficient protection against unauthorized use to encourage authors to release their works into the stream of commerce. Abandoning copyright protection in the face of the prevalent universal access norms ironically would remove incentives to disseminate works.³²

Even if copyright law is not outdated, the hackers do have a point, at least to some degree. Technology makes copying an evil that is difficult to police. The photocopying and tape industries have posed serious and persistent problems to the traditional copyright regime.³³ However, neither photocopying nor taping has ever produced a sufficiently high-quality product in sufficient volume completely to replace the market for most works. In contrast, high-quality copying and distribution of a work are very economical in the on-line environment.³⁴ One can download a work and send it simultaneously to millions of readers in the time it takes to photocopy a few pages of text. As the ease of copying increases so does the temptation to infringe.

Where is Wired @?, WIRED, Nov. 14, 1994, at 38. Indeed, the phrase has become so widely accepted that in 1994 it was referred to as an "ancient hacker war cry." Vic Sussman, *Pamphleteering in the Electronic Era*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 55.

31. The League for Programming Freedom urges this view in its baldest form. Those espousing this view have not limited their thesis regarding copyright to words but have also participated in the free distribution of their own copyrightable works. See Sussman, *supra* note 30.

32. See Litman, *supra* note 17 (discussing the importance of copyright law to dissemination of works of authorship).

33. See *CONTU'S Final Report and Recommendations*, in 5 COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD (Nicholas Henry ed., 1980).

34. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1005 (1994) (cyberspace turns "every individual into a mass publisher . . . in a way that photocopying never really did."

In a system where infringement is so easy, copyright protection will only be as strong as its enforcement mechanisms. The existing on-line universe has yet to land upon an enforcement scheme that will safeguard the value of authors' works distributed on the network. The fear that they will be copied *en masse* is so real in the current environment that some publishers and artists may not release their works on-line.³⁵ These artists are proving what standard copyright analysis has assumed for decades: adequate copyright protection encourages the distribution of creative works, while inadequate copyright protection lowers the birthrate of such works. The on-line environment will be a second-class medium lacking high-quality creative works, so long as copyright enforcement is not assured.³⁶ Without copyright enforcement and protection on-line, aesthetic holdings will be limited to those authored by part-time artists or artists with significant personal assets. In a virtual universe without copyright protection, the full-time artist loses twice: first, because only rich or part-time artists can afford to put their works on-line and still eat; and second, because consumers that would have supported them in the hard copy universe are now shopping in the on-line universe. Although there still may be a plethora of works on-line, they will not be the highest quality works possible.

The hackers have concluded that copyright law is likely to perish because of the GII's enforcement problems. This is a premature entombment. As discussed below, if the world community works together, the on-line community can be sufficiently policed to ensure fair remuneration to authors and artists.

2. The Publishers

For the publishing industry and authors, the international on-line environment raises the tantalizing possibility that all uses of a work can be tracked and subjected to a charge. With on-line bookstores, browsing can be monitored and a fee levied even if the work is not purchased. In addition, lending can be interpreted as

35. Doreen Carvajal, *Book Publishers Worry About Threat of Internet*, N.Y. TIMES, March 18, 1996, at A1, D2.

36. See John S. Rosenberg, *Copyright of Way on the Information Highway; Copyright Issues for Online Information Services*, SEARCHER, Mar. 1994, at 36 ("To the often heard refrain of many Netsurfers that 'information wants to be free,' current online vendors, publishers, and more than a few authors reply that if it is completely free, there may be no information for payment, the information superhighway will become a very expensive road to nowhere. Instead of the interactive multimedia future we've been promised, we'd have the database equivalent of home movies.").

copying. For example, once one has read a novel, one can easily send a new copy to one's mother via the network while retaining the original copy. In the pre-on-line era, one would have mailed one's mother the book, and, due to the first sale doctrine, no copyright rights would have been violated. To accomplish the same result in the on-line environment, one can simply punch a few buttons, sending a copy on its way. If the publishing industry can label this scenario an infringing activity, the free use zone will be eliminated.

Once the publishing industry enters the free use zone, it not only pushes the boundaries of copyright but also violates a significant sphere of privacy. Already, product marketers buy and sell address lists of individuals who have registered their preferences by purchasing particular products and services. By tracking and storing information about borrowing, lending, and browsing activity, the publisher obtains a profile of not only one's economic preferences but also one's predilections, whims, and desires. Building a free use zone in the virtual universe assists in the protection of that sphere of privacy.

Also worrisome is the possibility that the publishing industry may attempt to extract use royalties from works that are lodged with public lending libraries. The first sale doctrine, as well as pragmatic considerations, have historically prevented copyright authors from charging borrowers or libraries for lending activity. In an on-line environment, publishers are likely to view such lending as easily tracked and as a possible source of income.³⁷ Thus, the limited monopoly currently afforded copyright owners has the potential to become an "absolute monopoly over the

37. The American Association of Research Libraries anticipated the publishing industry's likely response to the on-line environment and responded with a public's bill of copyright rights, which delineates the browsing and borrowing privileges described here.

Without infringing copyright, the public has a right to expect:

- to read, to listen, or view publicly marketed copyrighted material privately, on site or remotely;
- to browse through publicly marketed copyrighted material;
- to experiment with variations of copyrighted material for fair use purposes, while preserving the integrity of the original;
- to make or have made for them a first generation copy for personal use of an article or other small part of a publicly marketed copyrighted work or a work in a library's collection for such purpose as study, scholarship, or research; and
- to make transitory copies if ephemeral or incidental to a lawful use and if retained only temporarily.

distribution of and access to copyrighted information."³⁸ Publishers might think that they are well served by such a system, but the public would not benefit.³⁹

By permitting the publishing industry to eliminate borrowing and browsing privileges on-line, a greater risk arises of increasing the disparity between the technology "haves" and "have-nots." Microsoft recently announced a plan to create a magazine that will appear on-line only. This is only the first of many on-line-exclusive works. If browsers and borrowers are liable to the publishers under copyright law, only the relatively wealthy will be able to gain access to these on-line-exclusive works. Unlike the current era in which anyone can be exposed to a vast panoply of works through free browsing and borrowing practices, the poor would be excluded.

There are those who predict the demise of copyright on the GII. They, however, have discounted the importance of copyright protection in order to ensure the widest possible dissemination of creative works. On the other side of the debate, there are those who believe that the GII offers an opportunity to tighten the monopoly over copyrighted works. Neither inclination should be indulged by the policymaker. Rather, policymakers should focus upon two goals: (1) ensuring that authors can obtain fair remuneration for their works through enforcement mechanisms that work and (2) protecting the public from an overreaching publishing industry by crafting a free use zone for borrowing and browsing.

3. Enforcement of Copyright on the GII

The GII poses, on a grand scale, the problem that the music industry has addressed through collective societies for years. Once a musical work has been recorded and distributed, it is easily copied and performed without permission. Use of such works in public places (*e.g.*, night clubs or hotels) or on the air (*e.g.*, radio or television broadcasts) have been monitored through collective efforts.

For any individual composer, monitoring every use of one's work is daunting. The same song might be heard simultaneously in a night club in Texas, as the background for a nationally televised show, and in a hotel lobby in New York. To solve the

38. ASS'N OF RESEARCH LIBRARIES, INTELLECTUAL PROPERTY: AN ASSOCIATION OF RESEARCH LIBRARIES STATEMENT OF PRINCIPLES I (May 1994).

39. See Litman, *supra* note 17 (emphasizing the importance of asking what the public's needs are when crafting copyright boundaries).

practical monitoring difficulties, BMI, ASCAP, and SESAC have formed collective licensing agencies that monitor and enforce the use of copyrighted music in public places.⁴⁰

The GII suggests the need for the same sort of monitoring and enforcement scheme for all copyrighted works. Policing works on-line with its vast number of data ports poses a difficulty similar to the monitoring of public performance of copyrighted songs. Authors might have to devote so much time to tracking their works and then enforcing their rights that creative productivity would lag, or many infringements would be unanswered. Private societies devoted to copyright enforcement on-line, and charging modest percentages, would allow authors and artists to concentrate on creative rather than legal endeavors. Moreover, enforcement could become less expensive and more effective through economies of scale. Collective societies might also create a copyright culture on-line more quickly and more efficiently than the independent litigation of a variety of individual claims of infringement. In sum, collective agencies with international jurisdiction are a tool worth investigating for ensuring authors' fair returns for their works.⁴¹

40. On the way to arguing against any intellectual property protection in the on-line era, John Perry Barlow has argued that ASCAP (American Society of Composers, Actors, and Publishers) and BMI (Broadcast Music, Inc.) are not acceptable models for the on-line era because their "monitoring methods are widely approximate. There is no parallel system of accounting in the revenue stream. It doesn't really work. Honest." John P. Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 85.

Barlow has missed the mark. While he is right about the monitoring difficulties in a hard copy universe, he underestimates the monitoring capacities of a universally linked on-line universe. Works may become marginally more difficult for individuals to monitor in the virtual universe. See generally Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC. 93 (1994). Monitoring technology, however, is just now beginning to flourish and already offers the opportunity—to those who can afford the technology—of tracking every use of a work, from browsing to downloading. With the publishing, entertainment, and high technology industries vitally interested in pursuing intellectual property protection on-line, the monitoring technology investment stream is highly likely to become a river, and a fast-running one at that. While monitoring may be expensive and inaccessible for the individual author, it will surely be affordable for collective societies (which will assist individual copyright owners who are willing to sacrifice a portion of their income stream if it can be accurately monitored and copyrights enforced) and for large media and technology companies.

41. The on-line tracking tools that would make a collective society effective already exist. See Robert L. Jacobson, *Interest Tools Designed to Block Unauthorized Uses of Copyrighted Works*, CHRON. OF HIGHER EDUC., Mar. 22, 1996, at A23. The question of who will employ such tools remains open. Candidates

The question remains how far such societies should be permitted to go in enforcing copyrights. A properly crafted free use zone should prevent publishers and authors from extending their existing monopolies into the spheres of borrowing and browsing.

4. The Free Use Zone on the GII

For works retaining a corporeal form, the first sale doctrine goes far to protect the free use zone. The question remains how to draw the lines that will create a free use zone on-line. The following are suggestions for achieving such a goal. They may either be used to amend existing national copyright laws or as a means of judicial translation of copyright coverage from the pre-on-line era to the on-line era. Constructing a free use zone in the on-line era will require some government intervention, largely by making explicit what is already accepted practice in a hard copy universe—that copyright owners do not have rights to prohibit individuals from browsing and borrowing their works.

a. Personal Lending

Individuals should be permitted to transmit copies of works on-line to friends or family for personal and private use. Personal lending should be an affirmative defense to charges of infringement.⁴² This defense is a crucial means of preserving a zone of privacy in the face of the on-line era.

b. Library Lending and Copying

Traditionally, public libraries have permitted individuals to obtain access to copyrighted works without purchasing them. Patrons can read books and magazines, listen to music, and view artwork for free so long as they return the item to the library. Authors (and their copyright assignees) are not remunerated for each of these uses. Patrons, however, cannot make copies of the books, disks, or videos or keep the library's holdings beyond a specified date. In other words, their use is limited in time and may not be augmented by making a permanent copy of the particular work. If a patron wants to keep a particular work, he

include the publishing industry, collection societies, individual authors, and the government.

42. See Litman, *supra* note 17 (advocating a distinction between commercial and noncommercial use in the assignment of copyright rights).

or she must purchase the work outside the library system or pay a fine to the library (which is generally equivalent to the purchase price).

Authors and publishers should be prohibited from interfering with this system. A library free use zone would need to be instituted via statute(s) and treaties by cutting back on copyright protection in these circumstances. Similar to the photocopying context, libraries would need to work in conjunction with publishers to ensure that they manage their holdings to prevent copyright infringement. Libraries would be responsible for ensuring that their borrowers do not download the work or do not retain the work beyond a limited time frame. Public free libraries play an important role in an egalitarian society, making this aspect of the free use zone worthy of serious attention on constitutional and political grounds.

c. Commercial Browsing

Publishers should not be permitted to charge customers for browsing through their various products. Browsing would include brief perusal of the work and excludes permanent downloading of the work. Devices currently exist that would permit publishers to make the distinction between the two uses.⁴³ Conceivably, the market may take care of this problem by encouraging the use of free "teaser" previews to entice purchasers. Thus, it would be most prudent to observe how this market develops over the next several years before taking domestic or international action regarding commercial browsing.

5. Summary

To ensure the widest possible dissemination of creative works and fair remuneration to authors, GII policymakers face two tasks: (1) to foster means of ensuring that copyright owners can enforce their copyrights, such as private collective agencies and technological means of tracing use, and (2) to protect a free use zone that prevents copyright owners from transforming their limited monopolies into absolute monopolies. The free market is the most desirable means of accomplishing the first objective.

The second objective will require domestic government and international action. The free use zone's borrowing and browsing phenomena are a direct result of the hard copy paradigm:

43. See WHITE PAPER, *supra* note 17, at 38 (describing "smartcards" among other devices).

browsers can be stopped from carrying books out of bookstores; the volume of private lending is limited because photocopying is tedious and the product is not as desirable as the original; and libraries can police lending practices, including photocopying. As a practical matter, there has been effective means of enforcing copyright against borrowers and browsers in a hard copy universe.

In an on-line environment, the fences and gates that permit borrowing and browsing will have to be engineered by statute and treaty. To construct a free use zone, the scope of copyright protection needs to be reduced to exclude liability for borrowing or browsing copyrighted works, even though that borrowing and browsing may involve downloading. In addition, policymakers would do well to reinforce their support for personal use exemptions and fair use principles in the on-line era.

A cursory glance might suggest that universal access norms and copyright law are in irreconcilable conflict, that universal access is superficially more important than copyright protection, and therefore copyright protection should be abandoned. A more careful analysis, however, reveals that copyright law is one of the tools to ensure that there is a steady supply of original works of authorship released into the on-line stream of commerce. Existing copyright law, transported to the on-line environment, raises the possibility that on-line authors and publishers will be able to expand upon their existing monopolies by charging for browsing and borrowing privileges. The United States must ensure that a free use zone becomes a part of the on-line environment and prevent the overreaching permitted by the TRIPS Agreement's silence.

IV. CONCLUSION

There were times before the TRIPS Agreement was ratified when some predicted it would never come to pass. Yet, it materialized out of the stratified discourse of 117 countries, largely as a result of the intense lobbying efforts of the huge, international publishing entities. As so often happens with large, collaborative projects, "soul-searching" was left for later. TRIPS, in its present incarnation, requires us to search the soul of the Western copyright system. Enforcement disputes between countries sharing incongruent presuppositions about human creative effort and reward will test TRIPS' imperialistic mettle.

Even if TRIPS withstands the inevitable public and private challenges to its Western-style imperialism, it will find itself in the unfamiliar territory of the on-line universe, an environment for

which it has not been well-crafted in the interests of a global society. The hard copy universe's free use zone must be constructed out of virtual fences and gates to prevent TRIPS from becoming the "copyright grab" for all history.

The encoded message within TRIPS is that change, creativity, and originality are positive goods. In short, revolution and freedom are central to the highest standards of human existence. As this message finds its way into unfamiliar hearts, the copyright industries hope to take more than they have ever been able to take in the past. This will be a clash worth watching. If only we were nothing more than spectators.