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ESSAY

The End of Copyright*

David Nimmer**

α. CHIMES FROM TRADE WINDS

One December 8, 1994, Congress ended the experiment that it commenced on May 31, 1790, in the first Judiciary Act:¹ legislating an autonomous body of United States copyright law governed by the Copyright Clause of the Constitution.² We witnessed, on December 8, a major change of constitutional proportions; even more significantly, we experienced the first tremors of certain tectonic shifts in United States sovereignty; and, perhaps most significantly, we undertook a sea change in defining the end that copyright serves, the identity of the master in the copyright sphere.

I refer to enactment of the Uruguay Round Agreements Act (the "Act").³ That enactment, one must hasten to add, represents a major overhaul of federal law in many spheres, not simply in copyright.⁴ I cannot hope to cover the alpha and omega of this massive

* This Essay was delivered as the keynote address at UCLA's entertainment symposium, *Where Worlds Collide* (February 10, 1995). © 1995 by David Nimmer.

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1. 1 Stat. 124 (1790).

2. U.S. Const., Art. 1, § 8, cl. 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

3. Pub. L. No. 103-465, 108 Stat. 4809 (1994).

4. Matters addressed range from textile trans-shipment to cheese and chocolate crumb importation to excess pension assets used for retiree health benefits. Uruguay Round Agreements Act, S. Rep. No. 103-412, 103d Cong., 2d Sess. 123, 127, 148 (1994) ("Senate Report").

law. But its copyright significance more than amply warrants monopolization of this Essay's attention.

Copyright has now entered the world of international trade.⁵ The popular press mirrors this phenomenon⁶—never before has copyright monopolized the headlines in any way comparable to the recent spate of stories about plans for the United States to impose \$1.08 billion in punitive tariffs on goods from the People's Republic of China because of copyright violations.⁷ Twenty-nine factories operating in southern and central China, some under government auspices, produce some 70 million pirated laser discs and audio compact discs annually.⁸ The United States threatened to respond by imposing tariffs on China.⁹ Furthermore, the United States threatened to bar China, because of its copyright piracy, from entry as a charter member of the World Trade Organization, constituted on January 1, 1995.¹⁰

It is appropriate that the roots of this Essay, detailing the end of the expansive perspective of traditional copyright protection, germinated at a Hollywood entertainment seminar entitled *Where Worlds Collide*;¹¹ even more apropos might have been *Where Worlds Implode*. Physicists posit a universe expanding ever since the Big Bang;¹² but one view holds that at some future point the mutual attraction of every particle in the universe will overcome that expan-

5. In 1993, the North American Free Trade Agreement implementation bill, Pub. L. No. 103-182, 107 Stat. 2057 (1993), contained two copyright provisions, although their import was drastically circumscribed. See 3 *Nimmer on Copyright* § 18.07 (Matthew Bender, forthcoming Dec. 1995). For the prior history of copyright in the international trade sphere, see generally id. §§ 18.01-.06.

6. See, for example, Reuter World Service (Jan. 5-7, 1995).

7. Prior to the delivery of the speech on which this Essay is based, for example, the lead headline of the Los Angeles Times for Sunday, February 5, 1995, introduced a story on Chinese copyright piracy and U.S. trade retaliation. Ronald Brownstein and Rone Tempest, *U.S. Plans China Trade Sanctions*, L.A. Times A1 (Feb. 5, 1995).

8. Id.

9. Id. Even the monologue on NBC's "Tonight Show" took note, with host Jay Leno commenting: "Thousands of people get run over in Tiananmen Square by tanks—no problem. But bootleg a copy of 'Ernest Goes to Jail,' and that's it—send in the troops." Daniel Williams, *China Finds "Comprehensive Engagement" Hard to Grasp*, Washington Post A17 (Feb. 13, 1995).

10. *U.S. Business Delegation Lashes Beijing Over Copyright*, Agence France Presse (Jan. 20, 1995) (referring to a statement by Jay Berman, Chairman of the Recording Industry of America). Later, the United States made good on its threat. Jeffrey Parker, *Wary China Signs Anti-Piracy Trade Pact with U.S.*, Reuter World Service (March 11, 1995).

11. See note *. The subject matter of that conference dealt with "convergence" issues, whereby Hollywood concerns intersect with those of Silicon Valley, and technology blurs the traditional distinctions between differing species of media.

12. John D. Barrow, *The Origin of the Universe* 11-18 (Basic Books, 1994).

sion.¹³ Time will then run backward and all matter will contract toward the Big Crunch.¹⁴ December 8, 1994, may be viewed in hindsight as that turning point in the legal universe. Under this view, time is now running backward, and all legal doctrines are collapsing into the gigantic crunch of trade law.

β. FOUR SEASONS

The bold thesis of this Essay, positing the end of traditional copyright jurisprudence, obtains notwithstanding a paucity of legal provisions actually legislated as part of the Act. Congress enacted just four copyright provisions on December 8, 1994.¹⁵ To appreciate the import of these four provisions, the discussion below first summarizes them briefly. It then takes a step back to survey their larger framework, before examining them in more detail and inquiring as to their constitutional underpinnings. Only after such an analysis can we then draw conclusions.

The first of the four copyright provisions is extremely simple. According to the rules of world trade now in effect,¹⁶ countries are obligated to bar the rental of three types of copyrightable goods: software, sound recordings,¹⁷ and cinematographic works. The first provision of the Act simply makes permanent the bar on rental of computer software,¹⁸ which in 1990 had been implemented on an interim basis.¹⁹ This amendment dovetails with a parallel extension implemented exactly one year earlier, pursuant to the North American Free Trade Agreement ("NAFTA") accords, converting the interim

13. *Id.* at 29.

14. One of the world's most eminent physicists concluded early in his career that "[p]eople in the contracting phase would live their lives backward: they would die before they were born and get younger as the universe contracted." Stephen W. Hawking, *A Brief History of Time* 150 (Bantam Books, 1988). Later, he recanted. *Id.* at 151.

15. Uruguay Round Agreements Act § 501, 108 Stat. 4809, 4973 (1994).

16. Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), Arts. 11, 14(4), reprinted in 33 *Intl. Legal Mat.* 1197, 1201-02 (1994).

17. For nations, unlike the United States, that have in force as of April 15, 1994, "a system of equitable remuneration of right holders in respect of the rental of phonograms," the pertinent protocol allows such systems to continue, "provided that commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders." TRIPs, Art. 14(4) (cited in note 16). This grandfather provision countenances the Japanese system. Ralph Oman, *Berne Revision: The Continuing Drama*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 139, 144 (1993) (calling the exemption "a necessary evil").

18. Uruguay Round Agreements Act § 511, 108 Stat. at 4974.

19. 17 U.S.C. § 109(b)(1)(A) (1994 ed.).

ban on rental of sound recordings (first passed by Congress in 1984)²⁰ into a permanent feature of United States copyright law.²¹

So much for software and sound recordings—what of the third category of works as to which the world trade order bans rental, i.e., movies? That rental prohibition is subject to an exception when such rentals do not materially impair exclusive rights of reproduction of such movies.²² Because of that exception, Congress has not mandated the closure of all video and laser disc rental stores in this country.

The next two provisions of the Act affect performance rights.²³ When a singer or an orchestra performs at a concert hall, what is transpiring differs from a fixed sound recording that can be purchased at a record store.²⁴ Protection for the performance in the United States typically has been conceptualized as arising under state law,²⁵ rather than under federal law.²⁶ But, since December 8, 1994, live performances are for the first time protected under Title 17 of the United States Code.²⁷ This anti-bootlegging right applies whether the subject at hand is a Grateful Dead concert,²⁸ Esa-Pekka Salonen, or even a music video of the Concertgebouw Orchestra.

20. 17 U.S.C. § 109(b) (1994 ed.).

21. 17 U.S.C. § 109(b) (1994 ed.).

22. TRIPs, Art. 11 (cited in note 16). See J. H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 171, 216 n.175 (1993) (noting that this provision "introduces a trade law concept like that of 'material injury' into intellectual property law for the first time"); Oman, 4 *Fordham Intell. Prop., Media & Enter. L. J.* at 144 (cited in note 17) (calling the provision "probably impossible to enforce").

23. Uruguay Round Agreements Act §§ 512-13, 108 Stat. at 4974.

24. See 17 U.S.C. § 102(a)(7) (1988 ed.) (describing the scope of copyright protection as including "original works of authorship fixed in any tangible medium of expression").

25. Such matters are discussed in 1 *Nimmer on Copyright* §§ 1.01[B][3][b], 1.08[C][2], 2.02 (Matthew Bender, 1994). Some cases are collected at id. § 1.08[C][2] n.39, including the U.S. Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (upholding Ohio's right to protect a daredevil's performance).

26. Without pretending to have undertaken any sort of scientific survey, a throw-away line in the legislative history states: "Although current State laws and judicial decisions provide some protection, these new provisions will provide uniform Federal enforcement." Senate Report at 225 (cited in note 4). The Statement of Administrative Action is to the same effect. Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. 103-316, 103d Cong., 2d Sess. 992 (1994) ("SAA"). It does, however, add the insightful point that such state laws "may not provide the necessary basis for border enforcement against bootleg sound recordings." *Id.*

27. Uruguay Round Agreements Act §§ 512-13, 108 Stat. at 4974.

28. I have shared the da's at many a multimedia conference with John Perry Barlow, lyricist for the Grateful Dead and retired Wyoming cattle rancher, as well as sometime copyright commentator. See John Perry 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* 84 (March, 1994).

The fourth and final provision of the Act restores copyright protection to durationally eligible²⁹ works of foreign origin that currently languish in the United States public domain.³⁰ This Essay explores that subject matter in more detail below.

γ. GATT AND ALL THAT

So why all the *sturm und drang*, if these four relatively circumscribed amendments constitute the sum and substance of the new law? To appreciate the new era that we have entered requires some knowledge of its greater context. The four copyright provisions appear in Title V of the Act, which generally addresses intellectual property and effectuates changes to the trademark and patent arena as well.³¹ Title V itself is a minor facet of the Act; in fact, it does not even register on the radar screen of the section-by-section commentary in the House and Senate Reports for this massive law.³²

Before grappling with the Act, however, we need to take a further step backward and look at the underlying Uruguay Round Agreements. Incident to the debate over the Act, the news media reported numerous stories about the General Agreement on Tariffs and Trade ("GATT").³³ Historically, amendments to GATT have been

29. By "durationally eligible," the intent is to refer to works for which the maximum conceivable term of protection has not yet expired. To illustrate, a work first published in 1935 enjoys a maximum term under United States copyright law until 2010, assuming all formal and other hurdles have been vaulted. See 17 U.S.C. § 304(b) (1994 ed.) (extending the duration of copyright protection in certain cases). Nonetheless, particular works published in 1935 may have entered the United States public domain promptly upon publication in 1935 because of invalid national status, in 1942 because of republication then without proper copyright notice, or in 1963 upon failure to secure appropriate renewal, to name three contingencies. In each of these cases, protection for the work has lapsed, notwithstanding that the work is still durationally eligible for protection.

30. Uruguay Round Agreements Act § 514, 108 Stat. at 4976.

31. *Id.* at 4973.

32. Uruguay Round Agreements Act, H.R. Rep. No. 103-826, 103d Cong., 2d Sess. (1994) ("House Report"); Senate Report (cited in note 4).

33. See, for example, Richard Alm, *U.S. Cracking Down on Intellectual Piracy*, Dallas Morning News 1D (Feb. 13, 1995); James O. Goldsborough, *Trade Dispute With China Shows the Value of an Idea*, San Diego Union-Tribune B7 (Feb. 13, 1995); Sheila Tefft, *U.S., China Trade Clash Worsens*, Christian Science Monitor 9 (Jan. 3, 1995).

called "negotiating rounds."³⁴ The just-completed round commenced in 1986 at Punta del Este, Uruguay, whence its name.³⁵

The United States wanted to broaden the Uruguay Round to include services such as investments; govern previously unregulated industries, such as agriculture; and, for the first time in the trade context, mandate standards for intellectual property.³⁶ Congress authorized the President to negotiate a deal, giving him a deadline of December 15, 1993.³⁷ Naturally, the United States Trade Representative went right down to that wire.³⁸

Given the Agreement Establishing the World Trade Organization, appended to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,³⁹ it should be noted

34. See Wolfgang Fikentscher, *GATT Principles and Intellectual Property Protection* in Friedrich-Karl Beier and Gerhard Schriker, eds., *GATT or WIPO? New Ways in the International Protection of Intellectual Property* 99 (VCH, 1989) (providing a history of GATT); Anna Mörner, *The GATT Uruguay Round and Copyright*, 25 *Copyright Bulletin* 7, 8 (No. 2, 1991) (providing a brief history of GATT); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 *Iowa L. Rev.* 273, 298 (1991) (providing a background and overview of GATT).

35. See note 34.

36. See generally A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 *Stanford J. Intl. L.* 57 (1987); *GATT Implementing Legislation: Hearings on S.2467 before the Senate Committee on Commerce, Science, and Transportation*, 103d Cong. 2d Sess 34 (1994) ("Committee Hearings") (the U.S. Trade Representative praised "landmark protection" for intellectual property, "our fastest growing industry in the country").

37. Pub. L. No. 103-49, 107 Stat. 239 (1993).

38. Presidential Memorandum, *Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations*, 58 *Fed. Reg.* 67263, 67264 (Dec. 20, 1993). There was a flurry of stories around that date about how Hollywood "lost" the negotiations. There is some truth to that assessment. See *id.* at 67267. The Europeans were allowed to prop up their domestic film industries under an exception to Annex 1B to the Agreement Establishing the World Trade Organization, the General Agreement on Trade in Services. The Europeans were also allowed to place domestic quotas on television broadcasts. See *id.* Both of these non-tariff impediments to international trade are vexing to the copyright industries, as they may lessen the exploitation of works of U.S.-origin within Europe, and hence cut into the projected revenue stream. Nonetheless, these glitches do not detract from the legal accomplishments in the pure copyright sphere; for such exploitation as does take place must still be subject to scrupulous observance of all copyright norms. According to President Clinton, "we can best advance the interests of our entertainment industry by reserving all our legal rights to respond to policies that discriminate in these areas." *Id.*

39. Reprinted in 33 *Intl. Legal Mat.* 1125 (1994). The structure of the compact is as follows. First comes a one-page Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. *Id.* at 1143. Next is the nine-page Agreement Establishing the World Trade Organization ("WTO Agreement"). *Id.* at 1144. The main substance is then contained in the annexes to the WTO Agreement: Annex 1A is the Multilateral Agreement on Trade in Goods, comprised of the GATT 1994 plus twelve other agreements, *id.* at 1154; Annex 1B is the General Agreement on Trade in Services ("GATS"), *id.* at 1167; Annex 1C is TRIPs (cited in note 16), the subject matter of this Essay, *id.* at 1197; Annex 2 is the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), also discussed herein, *id.* at 1226-47; Annex 3 is the Trade Policy Review Mechanism, providing for periodic review of members' trade policies, see *id.* at 1153; and Annex 4 contains Plurilateral Trade Agreements

that the terminology "GATT" is now passé.⁴⁰ Instead, the World Trade Organization ("WTO") replaces the GATT secretariat and administers the brave new world of trade.⁴¹ On April 15, 1994, in Marrakesh, Morocco, 111 nations signed that Final Act.⁴² One may thus posit that April 15 is destined to become the most holy day of the year for internationalists. For those who stand at the opposite end of the spectrum, the "giant sucking sound"⁴³ affecting everything from copyright to United States sovereignty will long resonate as an echo of that day.⁴⁴

δ. STRANGE TRIPS

The great legal accomplishment in international copyright of the Uruguay Round Agreements is called the Agreement on Trade-Related Aspects of Intellectual Property Rights, abbreviated by the acronym "TRIPs."⁴⁵ The United States was the guiding force behind the adoption of TRIPs.⁴⁶ It is the highest expression to date of binding

regarding Government Procurement, Civil Aircraft, Dairy, and Bovine Meat, see *id.* (In contrast to multilateral agreements, which bind all Members, plurilateral agreements apply to a subset of members who have accepted them). See Amelia Porges, *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations-Introductory Note*, 33 *Intl. Legal Mat.* 1125, 1126 (1994) ("Introductory Note"). At the end are appended an assortment of ministerial decisions and declarations, such as the special provisions for least developed countries. See Senate Report at 3-4 (cited in note 4) (giving an overview of the many agreements which comprise the Uruguay Round Final Act).

40. There is a GATT 1994 (consisting simply of GATT 1947 with two brief pages of amendments added on), but that instrument occupies part of Annex 1A to the WTO Agreement (cited in note 39). GATT 1994 governs tariffs and the like; copyright exists in a completely separate sphere, namely Annex 1C. TRIPs (cited in note 16). In this particular instance, the worlds do not collide.

41. 58 *Fed. Reg.* at 67293 (cited in note 38) ("[t]he organization would not be different in character from that of the existing GATT Secretariat, however, nor is it expected to be a larger, more costly, organization"). The WTO "encompasses the existing GATT institutional structure and extends it to the new Uruguay Round disciplines on services, intellectual property, and investment." House Report at 12 (cited in note 32).

42. Senate Report at 5 (cited in note 4). Note that the authoritative Marrakesh text supersedes the earlier Geneva language. *Id.* at 3. See *Introductory Note* at 1126 (cited in note 39) (discussing the process of legal rectification of 26,228 pages of treaty text). On the rectification of TRIPs, see *id.* at 1128.

43. Opposing U.S. accession to NAFTA, Ross Perot coined this colorful term to predict a massive loss in U.S. jobs to Mexican industry. Given that "GATT is like 123 NAFTA's," House Debate at H11452 (cited in note 81) (remarks of Rep. Manzullo, Ill.), by the time debate over GATT adherence came before Congress, the phrase had already become commonplace. For examples of its use, see Committee Hearings at 8, 57, 87 (cited in note 36).

44. Any connection between tax protesters who wail about checks due the IRS on that day and opponents of the holy order of trade must await exploration in a future monograph.

45. See note 16.

46. On early efforts to introduce intellectual property into the GATT framework, see A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay*

intellectual property law in the international arena. In many ways, TRIPs is a convention to honor the Great Conventions governing intellectual property that stem largely from the 19th Century.⁴⁷ For instance, all WTO members must follow the Berne Convention in the sphere of copyright (except for its moral rights provision), the Paris Convention in the patent sphere, the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, and the Rome Convention for performances and neighboring rights.⁴⁸ The United States already adheres to the Paris and Berne Conventions, but surprisingly not to the Washington Treaty or the Rome Convention for neighboring rights.⁴⁹

But TRIPs goes beyond incorporation. It contains its own elaborate recitation of minimum rights and standards.⁵⁰ In addition, its most unique innovation in the law of international trade concerning intellectual property is that it has enforcement mechanisms. Indeed, it embodies "trade with teeth."⁵¹ (But along with bite, as we shall see, comes the potential for backbite.⁵²)

ε. PREVENTIVE DENTISTRY

The need for these enforcement mechanisms arises because of Conventional failures. The United States joined the Berne Convention with much fanfare in 1989.⁵³ China has also belonged to the Berne Convention since 1992.⁵⁴ One could therefore conclude, on paper, that there is no copyright problem between these two

Round: Laying the Foundations, 23 *Stanford J. Intl. L.* 57, 64-65 (1987). By 1988, TRIPs had become one of three "must-have" items in GATT revision for the United States. Bruce H. Turnbull, *Intellectual Property and GATT: TRIPs at the Midterm*, *J. Proprietary Rights* 9, 10 (March, 1989).

47. "Each WTO member country is required to apply the substantive obligations of the world's most important intellectual property conventions, supplement those conventions with substantial additional protection, and ensure that critical enforcement procedures will be available in each member country to safeguard intellectual property rights." Senate Report at 224 (cited in note 4).

48. See TRIPs, Art. 1(3) (cited in note 16).

49. See Marshall A. Leaffer, ed., *International Treaties on Intellectual Property* at 456 (BNA Books, 1990) (Washington Treaty signatories); *id.* at 416 (Rome Convention signatories).

50. TRIPs, Arts. 1-14 (cited in note 16).

51. One observer compares the new WTO to a saber-tooth tiger. Committee Hearings at 371 (cited in note 36) (remarks of Ralph Nader). See also note 63 (discussing the enforcement measures of TRIPs).

52. See Part λ (arguing that copyright law has been subsumed within the law of trade).

53. Irvin Molotsky, *Senate Approves Joining Copyright Convention*, *New York Times* C5 (Oct. 21, 1988).

54. 6 *Nimmer on Copyright* App. 20 (Matthew Bender, 1994).

nations—because the United States and China are both Berne Convention signatories, copyright must be effectively protected in both places. But that conclusion is in error: the Achilles' heel of all the Great Conventions is that they uniformly lack enforcement tools.⁵⁵

Imagine a film company that is perturbed by the production in China of pirated laser discs of its latest release. There is no private right of action under the Berne Convention.⁵⁶ Therefore, its only remedy is to go to the United States State Department to ask the government to file suit against the People's Republic of China before the International Court of Justice ("ICJ"). How many copyright cases have been brought in The Hague? A grand total of zero.⁵⁷

Even if such a case were brought, and even if it were won, the ICJ can only enforce a judgment in China if China accedes to it, or with the aid of the United Nations Security Council.⁵⁸ Therefore, the whole enterprise of enforcement under the Berne Convention is effectively pointless.

Copyright has thus migrated from the World Intellectual Property Organization ("WIPO"), which administers the Berne Convention, to the World Trade Organization.⁵⁹ The purpose of the emigration is to grant enforcement mechanisms—de facto protection, rather than de jure protection that is ultimately unenforceable.

ζ. DE JURE IS OUT

In the most honest sense, who cares about de jure protection? Imagine that China reacted to the pressure brought by Jack Valenti of

55. Some have derided the Berne Convention's dispute settlement mechanisms as "effectively worthless." Monique L. Cordray, *GATT v. WIPO*, 76 J. Patent & Trademark Off. Soc'y 121, 131 (1994); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L. Rev. 273, 275-76, 294, 300-02 (1991).

56. Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* at 906 (Center for Commercial Law Studies, Queen Mary College, 1987).

57. Emery Simon, *GATT and NAFTA Provisions on Intellectual Property*, 4 Fordham Intell. Prop., Media & Enter. L. J. 267, 270 (1993); Cordray, 76 J. Patent & Trademark Off. Soc'y at 131 (cited in note 55) (arguing that nobody would ever sue in The Hague "because the sued state would interpret the action as an unfriendly act").

58. Cordray, 76 J. Patent & Trademark Off. Soc'y at 132 (cited in note 55).

59. Relative to TRIPs, WIPO eventually conceded that it had "neither the funds nor the mandate from its members to consider the issue." *Id.* at 141. See Lisa Barons, Note, *Amending Section 337 to Obtain GATT Consistency and Retain Border Protection*, 22 L. & Policy in Int'l Bus. 289, 310 (1991) ("Directors-General of the GATT and WIPO agreed that 'there were no jurisdictional reasons not to proceed' with intellectual property negotiations in the GATT"); Anna Mörner, *The GATT Uruguay Round and Copyright*, 25 Copyright Bulletin 7, 9 (No. 2, 1991) (discussing the various reasons why copyright issues were addressed by GATT rather than WIPO).

the Motion Picture Association of America and Jason Berman of the Recording Industry Association of America⁶⁰ by announcing: "We will shut down all twenty-nine illicit factories and we will even execute copyright pirates.⁶¹ But the cost is that we will remove from our statute books the very sophisticated copyright laws that currently exist." Would the United States balk at such an arrangement? It reminds me of the joke where the Hollywood agent meets with the Devil, who promises, "You can have sex, power, money, and success—just sign on the dotted line and give me your immortal soul." The agent replies, "Okay—but what's the catch?" I think the United States Trade Representative would have said something similar: "What's the catch?" De jure protection is not really the goal here.

It could be that domestic industries in China and in other countries may desire copyright statutes on the books to foster their own creativity in nascent industries.⁶² But from a trade perspective, Americans do not care much about the legal rights that exist abroad so much as the practical protection that they receive abroad.

Thus we have a whole new world order. TRIPs itself includes an unprecedented armamentarium for a copyright compact.⁶³ Its provisions include injunctions and damages, seizure and interdiction

60. Both gentlemen attended talks in China leading to the abortive trade war discussed in notes 7-10 and accompanying text. *China Piracy Targeted*, Daily Variety 23 (Jan. 19, 1995). In addition, both gave testimony at a congressional hearing that considered a predecessor bill. General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions, Joint Hearing on H.R.4894 and S.2368 before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary and the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 103d Cong., 2d Sess. 225, 258 (1994) ("Joint Hearings").

61. Simultaneous with official denunciations of U.S. one-sidedness in the incipient Sino-American trade war, the People's Daily reported that an Intermediate People's Court in southeastern China sentenced an individual to life imprisonment for pirating 689,000 copies of several different book titles. *China Warns U.S. "Stands to Lose" in Any Trade War*, Deutsche Press-Agentur (Jan. 9, 1995). In a similar vein, the London-based International Federation of the Phonographic Industry announced that China had agreed to the anti-piracy step of tagging the molds for all legitimate compact discs pressed in that country. *Organization Cites China Piracy Progress*, Daily Variety 34 (Jan. 9, 1995).

62. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 Iowa L. Rev. 273, 282-83 (1991) (describing a change in attitudes among developing nations that are beginning to see the benefits of strong copyright protection).

63. Monique L. Cordray, *GATT v. WIPO*, 76 J. Patent & Trademark Off. Socy. 121, 135 (1994) (calling enforcement provisions "the most significant milestone in TRIPs"); Ralph Oman, *Berne Revision: The Continuing Drama*, 4 Fordham Intell. Prop., Media & Enter. L. J. 139, 144 (1993) (observing that TRIPs "puts teeth into the economic obligations of the Berne Convention. That bare fact is an immense achievement"). Given the high level of de jure copyright protection in most countries of the world, the problems facing copyright proprietors prior to TRIPs was "inadequate enforcement rather than a lack of substantive protection." Leaffer, 76 Iowa L. Rev. at 287 (cited in note 62).

at the border, right down to mandated discovery devices to force infringers to finger their suppliers, criminal penalties, and a host of other provisions.⁶⁴

η. THE DSU OF THE WTO

All these various fingers fit into the larger glove of the WTO. Moving from Annex 1C (TRIPs) to the WTO Agreement, Annex 2 consists of an Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").⁶⁵ Eighteen pages of minute regulations binding all WTO members now govern disputes in the world of copyright trade (as well as other trade).⁶⁶

To draw a practical example, imagine a music company, aggrieved over pirated audiocassettes being sold in Thailand. The object here is practical relief. The music company does not really care if Thailand has an autonomous copyright law, if it adheres to the Berne Convention, or if its judges simply issue rulings ad hoc based on what they ate for breakfast that morning. The point is that the plaintiff wants effective relief, and it wants that relief expeditiously and economically. If the Thai courts do not grant that relief for whatever reason, we have a trade problem.

In the past, there has been no relief from such problems, as copyright was not part of the historic GATT. Therefore, if Thailand violated United States copyrights, the United States could respond by saying, "Thailand, unless you get your act in order, we in the United States will give no more copyright protection to Thai music!" That response, of course, was not terribly frightening ("What's the catch?")

64. TRIPs, Arts. 42-46, 59-61 (cited in note 16).

65. "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." DSU, Art. 3(2) (cited in note 39). The U.S. Trade Representative had labeled the old system "one of the major shortcomings of the GATT" and declared that its reform was of "immense importance" to the United States. J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 Vand. J. Transnatl. L. 747, 760 n.36 (1989).

66. See Committee Hearings at 35 (cited in note 36) (statement by the U.S. Trade representative calling DSU "a critical element in this Uruguay Round"). In 21 articles and four appendices, the DSU is nearly as long as the entire TRIPs annex. Of course, it applies across the board to trade disputes, and has no special application to copyright—or even more generally, intellectual property—disputes. DSU, Art. 1(1) (cited in note 39). Nonetheless, it should be noted that an instance of infringement of an obligation under TRIPs "is considered prima facie to constitute a case of nullification or impairment," meaning that it presumptively exerts an adverse impact on other members. *Id.* at Art. 3(8).

again comes to mind as a riposte).⁶⁷ On the other hand, if the United States retaliated by slapping a tariff on the importation of jade from Thailand, then the United States would have been considered a violator of the world trade order of the GATT that then governed.⁶⁸ Under that old framework, the United States would have been an outlaw and Thailand would not have been a violator.⁶⁹

Annex 2 introduces the innovation of international panels to hear complaints about, for example, copyright violations.⁷⁰ Let us imagine that in the WTO framework a dispute arises between the United States and Korea over American movies. Three judges might be chosen to adjudicate that dispute—a judge from Denmark, one from Ghana, and one from Peru.⁷¹ Of course, no Americans or Koreans would be permitted on the panel.⁷² Following the detailed evidentiary and procedural rules contained in Annex 2, the panel would issue a timely report.⁷³ The losing party could then appeal that judgment to the WTO's standing Appellate Body.⁷⁴ At the end of the day, justice should emerge relatively quickly.

67. Thus, whereas threats against Brazilian software are inefficacious to induce Brazil to protect U.S. software, threats against Brazilian export of coffee or rubber footwear may produce "an entirely different dynamic." Emery Simon, *GATT and NAFTA Provisions on Intellectual Property*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 267, 271 (1993).

68. Monique L. Cordray, *GATT v. WIPO*, 76 *J. Patent & Trademark Off. Soc'y* 121, 134 (1994). "Imposing a sanction for not having adequate intellectual property laws is not a justification that is accepted in the GATT—it is a violation of the GATT." *Id.* at 134 n.58. See Reichman, 22 *Vand. J. Transnatl. L.* at 888-89 (cited in note 65) (arguing that industrialized nations cannot expect developing nations to obey international intellectual property law unless they, too, obey such laws).

69. Lisa Barons, Note, *Amending Section 337 to Obtain GATT Consistency and Retain Border Protection*, 22 *L. & Policy in Intl. Bus.* 289, 308-09 (1991). Note the dilemma from operating in a world trade scheme that excludes intellectual property: "the United States is perceived to be violating the GATT when it attempts to act within the void left by the GATT and protect intellectual property rights by imposing regulations allegedly in violation of the GATT." *Id.*

70. The old GATT panel dispute mechanism had become "notorious for interminable hearings and extreme politicalization by member countries." Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 *Iowa L. Rev.* 273, 301 (1991). It also suffered from the fatal flaw that any country—even the offending party—could block adoption of a panel report. Cordray, 76 *J. Patent & Trademark Off. Soc'y* at 133 (cited in note 68). The new order hopefully remedies that defect: "Most significantly, a losing party can no longer block a panel report under the Draft Final Act—a report is adopted unless all parties agree that it should *not* be adopted." *Id.* at 135.

71. DSU, Art. 8(5) (cited in note 39).

72. *Id.* at Art. 8(3).

73. On panel procedures, see *id.*, Art. 12, App. 3. On the applicable timetable, including a detailed breakdown of steps that should occur over 30 weeks, see *id.*, App. 3(12). When multiple complaints apply, see *id.*, Art. 9. For intervention by third parties, see *id.*, Art. 10.

74. The Appellate Body is composed of seven persons "of recognized authority, with demonstrated expertise," of whom three serve in any given case. *Id.* at Arts. 17(1), 17(3). On appellate procedures, see *id.* at Art. 17(9).

The key innovation here is the permissibility of cross-sectoral retaliation.⁷⁵ Thus, if the United States wins and Korea is adjudged a copyright violator, then Korea must proceed to honor copyrights in the American movies. If it does not do so, the United States is permitted to slap a punitive tariff on the importation of Hyundais from Korea.⁷⁶ Unlike the old scenario concerning importation of Thai jade, this is now a perfectly permissible trade action.⁷⁷

The hope at the end of the day—and the reason that the United States so fervently pushed for both TRIPs and a dispute settlement mechanism—is that there should be effective relief for Americans. No longer will we be at the mercy of unclear local statutes. Nor will it be availing for some country to tell us they have antiquated language in their copyright act; they are obligated under TRIPs to give effective relief to United States copyrights. No longer may they plead the excuse of an inefficient court system; it does not matter if it takes ten years to go to trial in India, for, under the WTO Agreement, India is obligated to protect American copyrights effectively. Nor does it matter if we are dealing with a bribe-prone culture or a law that is not up to snuff⁷⁸—the result is what counts, and the WTO is designed to produce results.

Ø. PARSING THE AMENDMENTS

With the above background in mind, we can take a deeper look at the Act. Its first salient feature is that it is exactly that—an act,

75. Presidential Memorandum, Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations, 58 Fed. Reg. 67263, 67293 (Dec. 20, 1993). Effort should be made initially to retaliate within the same sector. *Id.* at Art. 22(3)(a) (cited in note 39). If impractical, successive broadening of the retaliation is permitted. *Id.* at Art. 22(3). With respect to TRIPs explicitly, see *id.* at Arts. 22(3)(f)(iii), 22(3)(g)(iii). Complaints about the magnitude of retaliation are subject to arbitration. *Id.* at Art. 22(6).

76. 58 Fed. Reg. at 67292 (cited in note 75). See House Report at 15 (cited in note 32) (stating that the new agreement establishes “time limits for country conformity with panel rulings and recommendations and authorization of retaliation if such limits are not met”).

77. J. H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 171, 262 (1993); Joel R. Reidenberg, *Trade, TRIPs and NAFTA*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 283, 284 (1993); Anna Mörner, *The GATT Uruguay Round and Copyright*, 25 *Copyright Bulletin* 7, 9 (No. 2, 1991).

78. Traditional problems stemmed from such factors as cultural predilections towards bribery to idiosyncratic evidentiary requirements—that a movie's star, for instance, travel to a distant land to conclude a video piracy case. Simon, 4 *Fordham Intell. Prop., Media & Enter. L. J.* at 276 (cited in note 67).

and not a treaty.⁷⁹ One can read floor statements from the House and the Senate quoting Professor Laurence Tribe of Harvard⁸⁰ and others to the effect that the new world order of trade should be presented to the Senate for ratification.⁸¹ Nonetheless, the Clinton Administration decided that an authorization statute sufficed and that there was no need to present any treaty to the Senate for ratification.⁸²

The four copyright features of the Act emanate directly from the Uruguay Round Agreements. The United States, of course, is obligated to follow the standards set forth thereunder no less than Korea, Thailand, India, Denmark, and every other adhering country.⁸³ More specifically, the copyright amendments are rooted in the need for TRIPs conformity, so that the United States is not hauled before a WTO panel and found to be in violation.

A. *Bootlegging Parsifal et al.*

Regarding the Act's provisions, the two major changes are anti-bootlegging and restoration of foreign works from the United States public domain. Anti-bootlegging is set forth in a simple provision.⁸⁴ It provides that one who makes a fixation or a broadcast without per-

79. Notwithstanding longstanding U.S. participation in the GATT, historically it was never presented for Senate ratification. Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 801, 896-97 n.441 (1995).

80. For a detailed rejection of Professor Tribe, see *id.* at 917-25, 923-24 n.517 ("it seems wiser to refuse Professor Tribe's offer of instruction in advanced tea-leaf reading"). The return broadside against those authors is set forth in Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1223 (1995).

81. Consideration of the Uruguay Round Agreements Act, H.R.5110, 103d Cong., 2d Sess. (Sept. 27, 1994), in 140 Cong. Rec. S15302, S15303 (Dec. 1, 1994) ("Senate Debate") (remarks of Sen. Kempthorne, Idaho) (quoting a letter from Professor Tribe to President Clinton). See Consideration of the Uruguay Round Agreements Act, H.R.5110, 103d Cong., 2d Sess. (Sept. 27, 1994), in 140 Cong. Rec. H11454 (Nov. 29, 1994) ("House Debate") (remarks of Rep. Burton, Ind.) (paraphrasing Bruce Fine of the Reagan Administration as to the possibility that GATT violates Article II, § 2 of the U.S. Constitution).

82. Tribe, 108 Harv. L. Rev. at 1234 n.47 (cited in note 80). For ruminations on the constitutional explosions that would follow hypothetical judicial rejection of that conclusion, see Ackerman and Golove, 108 Harv. L. Rev. at 925-29 (cited in note 79). For instance, given the manner of implementation of the Bretton Woods Agreements, U.S. membership in the World Bank and International Monetary Fund would be called into question. *Id.* at 922 n.516. See Senate Debate at S15296 (cited in note 81) (remarks of Sen. DeConcini, Ariz.) (suggesting that the breakdown of GATT would bring a "chaotic system which, I fear, would bring international economic growth to a grinding halt").

83. One should note, in addition, that large-scale intellectual property violations are not limited to the Third World; the phenomenon is rampant in Europe, and in the United States as well. See J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 Vand. J. Transnatl. L. 747, 755, 769 n.80 (1989).

84. 17 U.S.C. § 1101 (1994 ed.).

mission of the performer is subject to copyright-like liability.⁸⁵ The same is true for those who copy that work and who otherwise traffic in it.⁸⁶ Besides civil liability, criminal penalties are provided in the new law as well.⁸⁷

This new provision has been implemented because TRIPs requires compliance with the Rome Convention on neighboring rights, notwithstanding that United States law does not embody the distinction between *droits d'auteur* and *droits voisins*⁸⁸ that led other countries to adopt the Rome Convention rationale and notwithstanding that the United States itself does not adhere to the Rome Convention for precisely that reason.⁸⁹ Whether we adhere or not, we are obligated under TRIPs to give protection according to Rome Convention norms.⁹⁰ For that reason, Congress amended our law.

An example of a violation of this new provision would be an unauthorized broadcast of the Three Tenors Concert from Dodger Stadium, for example, or a do-it-yourself music video of a Sinéad O'Connor concert recorded with a VCR camera. The provision of the law is so simple, however, and the language that Congress legislated so spare, that most questions one could ask are simply not addressed in its implementation.

A few examples: first, the statute is apparently retroactive. "Apparently" because the statute does not explicitly address this seemingly vital issue.⁹¹ The language is broad enough, however, to encompass retroactive protection.⁹² Therefore, one who has been selling a bootleg Sinatra or Elvis performance for years and who continues to sell it after December 8, 1994, is now perhaps a felon. The statutory protection, as well as being possibly retroactive, apparently

85. 17 U.S.C. § 1101(a)(1).

86. 17 U.S.C. § 1101(a)(3).

87. 18 U.S.C. § 2319A (1994 ed.).

88. These French terms refer to "author's rights" and to "neighboring rights." 2 *Nimmer on Copyright* § 8E.01[A] (Matthew Bender, forthcoming Dec. 1995). In brief, works of high authorship—novels, for example—find protection under the former, whereas products of less genius—photographs, for example—are protected under some systems pursuant to the latter regime. *Id.*

89. See note 49.

90. TRIPs, Arts. 1(3), 14(6) (cited in note 16).

91. See 2 *Nimmer on Copyright* at § 8E.03[C][2] (cited in note 88) (discussing the statute's application to prior recordings).

92. The amendment applies to "any act or acts that occur on or after the date of the enactment," December 8, 1994. 17 U.S.C. § 1101(c). Any distribution after that date is actionable if the subject phonorecord is "as described in paragraph (1)" defining unauthorized acts. 17 U.S.C. § 1101(a)(3). That first paragraph in turn applies to all unauthorized fixations of live musical performances, without any prospective limitation. 17 U.S.C. § 1101(a)(1).

lasts forever—no ending date is specified.⁹³ Combining retroactivity and perpetuity yields some curious results. Let us say that for the last seventy-two years you have been selling a century-old Enrico Caruso recording made without the great tenor's consent. If you continue to sell it today, you are in apparent violation of the law.⁹⁴ What we have here, unfortunately, is an instance of very sloppy drafting.⁹⁵

A few more questions: no statute of limitations is included.⁹⁶ In fact, the section of the Copyright Act embodying the statute of limitations was specifically excluded from incorporation in the anti-bootlegging provision.⁹⁷ There is also no incorporation of the work-for-hire doctrine.⁹⁸ So query whether one must get permission while recording the Los Angeles Philharmonic from the second bassoonist, and whether failure to do so makes one a bootlegger?⁹⁹ There is also no explicit fair use defense to protect First Amendment concerns.¹⁰⁰

93. See 17 U.S.C.A. § 1101.

94. See 2 *Nimmer on Copyright* at § 8E.03[C][3] (cited in note 88) ("Soothsayers are as well equipped as punctilious music practitioners to answer that question, given no hint of a solution from the legislature").

95. Perhaps Congress felt bootlegging so odious that its stigma should endure forever, and no quarter should be shown even to reliance parties trafficking in ancient Caruso recordings. On the other hand, interpreting the legislation in light of its underlying TRIPs and Rome Convention rationale, there is no need for protection beyond fifty years. See *id.* at § 8E.02. Moreover, application of Article 18 of the Berne Convention *mutatis mutandis* to this realm counsels mightily towards granting such reliance parties a reasonable sell-off period. *Id.* Compare the solicitude for reliance parties in the retroactivity provisions of the Act. 17 U.S.C. § 104A(c) (1994 ed.). See 2 *Nimmer on Copyright* at § 9A.04[C] (cited in note 88) (discussing the recent phenomenon of Congress's rescuing works from the public domain in the interest of promoting free trade).

The problem with the former interpretation is that moral condemnations are absent from the legislative history, as is almost everything else. See 3 *Nimmer on Copyright* § 18.06[C][2][b] (Matthew Bender, forthcoming Dec. 1995) ("What is surprising . . . is not the relative dearth of commentary concerning implementation of TRIPs into U.S. law, but its almost complete absence"). The problem with the latter is that Congress expressly wished to disavow any direct reliance on instruments of the Uruguay Round Agreements, such as the TRIPs annex, limiting interpretation to the face of its own enactment and the SAA. See also note 26 (providing additional commentaries). Because each of those commentaries neglects the instant question, one is left guessing. See 2 *Nimmer on Copyright* at § 8E.03[C][5] (cited in note 88) (discussing difficulties in interpreting the statute).

96. See 2 *Nimmer on Copyright* at § 8E.03[C][4].

97. The Act subjects bootleggers "to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright." 17 U.S.C.A. § 1101(a)(3). The civil statute of limitations is set forth in section 507. 17 U.S.C. § 507(b) (1994 ed.).

98. The work-for-hire doctrine is set forth in 17 U.S.C. § 201(b) (1994 ed.). It also is not incorporated in the language quoted in note 97 above.

99. See 2 *Nimmer on Copyright* at § 8E.03[A][3] (cited in note 88) ("Taping with due permission solely from the impresario or conductor risks liability to [the other] performers").

100. One of the rare instances of legislative history addresses this matter: "It is intended that the legislation will not apply in cases where First Amendment principles are implicated, such as where small portions of an unauthorized fixation of a sound recording are used without permission in a news broadcast or for other purposes of comment or criticism." Senate Report

Finally, in general, the anti-bootlegging provision has been added to Title 17, but not incorporated into the flow of that Title.¹⁰¹ The application of virtually every doctrine of copyright law is thus up in the air at present. Much confusion reigns.

B. *The Flying Dutchman*

Turning from anti-bootlegging to the other major provision of the Act, namely, recapture from the public domain, we confront a most elaborate technical amendment. Instead of saying too little, Congress went to the other extreme and added what might currently be the longest section of the United States Copyright Act.

1. Copyrights Undead

In brief, the recapture provision implements, on a belated basis, Article 18 of the Berne Convention. Article 18 requires newly adhering states, such as the United States in 1989, to recognize the copyrights of other Berne signatories that are still protected in their home countries.¹⁰² Simplifying a bit, an example would be the case of the Egyptian Nobel Prize winner, Naguib Mahfouz.¹⁰³ Prior to Berne adherence in 1989, the United States did not have copyright relations with Egypt.¹⁰⁴ Hence, his published works were in the United States public domain, while still protected in Egypt.¹⁰⁵ When the United States joined the Berne Convention in 1989, Article 18 required her to accord recognition to such works as *The Thief and the Dogs* and *Wedding Song*.¹⁰⁶ Did the United States do that in

at 225 (cited in note 4). That statement is made following a comment on the criminal bootlegging provisions, *id.*; but a parallel statement in the SAA expressly applies it to the civil realm as well. SAA at 992 (cited in note 26). Unfortunately, these valuable precatory statements appear unconnected to any precise statutory language.

101. See 2 *Nimmer on Copyright* at § 8E.03[B][2][a] (cited in note 88).

102. "[T]o exclude retroactivity altogether will work harshly against the foreign author, and deprive the new convention of much of its *raison d'être*." Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* at 666 (Center for Commercial Law Studies, Queen Mary College, 1987).

103. The discussion in this subsection draws from David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 L. & Contemp. Probs. 211, 229 (Spring, 1992).

104. *Id.*

105. *Id.* at 230.

106. *Id.* at 229-30. The views of the commentators fall into three classes—(1) actual practice of Berne Convention adherents allows outright abrogation of the retroactivity principle; (2) a reasonable application of Article 18(1) requires protection for at least some pre-existing works; and (3) lack of compliance with Article 18(1) may be excused to the extent needed to safeguard those who detrimentally relied on the public domain status of particular works. *Final Report of*

1989?¹⁰⁷ The answer is “no.”¹⁰⁸ The United States explicitly declined to recognize the works of Mahfouz and other works that were in the public domain,¹⁰⁹ but promised to look at the question again.¹¹⁰

“Again” arrived in 1994. We are now making amends. Mahfouz’s *oeuvre* is being restored to United States copyright protection in toto. The effective date of that restoration is the effective date of TRIPs with respect to the United States.¹¹¹ What is that date? Unfortunately, it is still clouded in mystery. The United States Copyright Office has indicated that the pertinent date is January 1, 1996.¹¹²

the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 Colum.-VLA J. L. & Arts 513, 593 (1986).

107. See Berne Convention Implementation Act of 1988, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 51 (1988) (acknowledging that “a number of foreign experts expressed the view that some degree of retroactive protection for works in the public domain for reasons other than expiration of term was desirable at least as a matter of the ‘spirit’ of Article 18”).

108. *Id.* at 52; Nimmer, 55 L. & Contemp. Probs. at 229-30 (cited in note 103). See *Final Report*, 10 Colum.-VLA J. L. & Arts at 592 (cited in note 106) (conceding that “some have informally suggested that the history of the Berne Convention and the at least implicit focus of international agreements on the protection of published works do not support this theory” of non-resurrection). The relevant balance to be struck here is between local (i.e., American) industries that have arisen in reliance on given works being in the public domain within its territory (i.e., the United States) and foreign authors whom the Convention is designed to protect. See Copyright Amendments Act of 1990, H.R. Rep. No. 101-735, 101st Cong., 2d Sess. 7 (1990) (describing that Act as “an important balancing of interests”).

109. “[T]hought must be given to those who have, quite properly, taken steps to exploit these works and who would be financially embarrassed, to say the least, if the authors suddenly acquired exclusive rights to control what they had been freely doing (publishing, performing, adapting, etc.)” World Intellectual Property Organization, *Guide to the Berne Convention* 101 (1978). See Emery Simon, *GATT and NAFTA Provisions on Intellectual Property*, 4 Fordham Intell. Prop., Media & Enter. L. J. 267, 280 (1993) (discussing the constitutional and political issues that arise when re-establishing protection of works currently in the United States’ public domain).

110. H.R. Rep. No. 100-609 at 52 (cited in note 107).

111. The statute refers to “the date on which the Agreement on Trade-Related Aspects of Intellectual Property referred to in section 101(d)(15) of the Uruguay Round Agreements Act enters into force with respect to the United States.” 17 U.S.C. § 104A(h)(2)(A) (1994 ed.). Section 101(d)(15), in turn, provides that Congress explicitly approves not only the WTO Agreement but its TRIPs protocol.

112. Copyright Office, *Copyright Restoration of Certain Berne and WTO Works*, 60 Fed. Reg. 7793, 7794 (Feb. 9, 1995). The Copyright Office notes that “the Justice Department predicated its memorandum to the General Counsel to the United States Trade Representative as to the constitutionality of the restoration provisions on the date of restoration being January 1, 1996.” *Id.* (citing Christopher Schroeder, Memorandum to Ira S. Shapiro, General Counsel, USTR, *Whether Certain Copyright Provisions in the Draft Legislation to Implement the Uruguay Round of Multilateral Trade Negotiations Would Constitute a Taking Under the Fifth Amendment* (July 29, 1994)). Mr. Schroeder’s Memorandum addressed, not the bill that became the Act, but an earlier Senate bill, S.2368. See Joint Hearings at 149 (cited in note 60) (including a statement by Mr. Schroeder to the effect that statutory damages will be available only from the year 2000 onward, a characterization that accurately reflected the Senate bill then pending, *id.* at 27, but not Section 104A as ultimately enacted). See 2 *Nimmer on Copyright* § 9A.04[B][1][b] (Matthew Bender, forthcoming Dec. 1995) (discussing the effective date of TRIPs); Joint Hearings at 141 (including Ira S. Shapiro’s statement that “[t]he Office of

President Clinton has also issued a proclamation alighting on that date.¹¹³ Notwithstanding those heavy hitters, my own reading of the statute points towards January 1, 1995.¹¹⁴ Suffice it to say that Egyptian works and countless other works either already have been or soon will be rescued from limbo and restored to United States copyright protection.

It bears emphasis that the grounds of loss of protection are irrelevant. Some works are currently in the United States public domain because of ineligible national status.¹¹⁵ Mahfouz is an example of that phenomenon.¹¹⁶ But other works of foreign provenance are in the United States public domain today for various other reasons—for instance, works that were not timely renewed twenty-eight years following publication.¹¹⁷ Other works might be in the public domain because of notice defects or because of the manufacturing clause.¹¹⁸ The reason does not matter. Come one, come all—regardless of reason, all of G-d's children are equal in the kingdom of heaven, and resurrection is liberally dispensed by this amendment.

It must be added, however, that some works are actually more equal than others because foreigners are benefited over Americans with respect to the current amendments (and, by the way, Article 18

Legal Counsel of the Department of Justice has submitted for the record, an analysis of the 5th Amendment aspects of S.2368”).

113. Presidential Proclamation, To Implement Certain Provisions of Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations, and for Other Purposes, 60 Fed. Reg. 15845 (March 27, 1995).

114. The clearest indication comes from the Schroeder Memorandum itself, which underlay the Copyright Office's conclusion. See note 112. The bill construed in that memo, S.2368, contained an express definition: “The term ‘TRIPs effective date’ is the date upon which the obligations under the Agreement on Trade-Related Aspects of Intellectual Property become effective with respect to the United States.” Joint Hearings at 35 (cited in note 60). Because the obligations of TRIPs do not kick in until one year after it enters into force, Mr. Schroeder accurately interpreted that bill to restore copyrights as of January 1, 1996. See TRIPs, Art. 65 (cited in note 16) (stating that TRIPs does not go into effect until “the expiry of a general period of one year following the date of entry into force of the WTO Agreement”). But because the law as enacted no longer uses the bill's reference to “obligations” and simply refers to the date that TRIPs “enters into force,” the amended language points unambiguously (even if foolishly for the policy reasons adduced by the Copyright Office) to January 1, 1995. See Norman J. Singer, 2A *Statutes and Statutory Construction* § 48.18 (CBC, 5th ed. 1992) (“Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill.”) As to the proclamation, the President manifestly lacks power to delay for one year implementation of a law duly enacted by Congress (which, in this instance, the President himself had previously signed into law).

115. 17 U.S.C. § 104A(h)(6).

116. 2 *Nimmer on Copyright* at § 9A.02[A][1] (cited note 112).

117. 17 U.S.C. § 104A(h)(6).

118. *Id.* See also 2 *Nimmer on Copyright* at § 9A.02[A][2] (cited in note 112) (discussing formal defects which might result in a work's being in the public domain).

of the Berne Convention is completely consistent with that implementation). If a studio forgot to renew its 1962 movie on a timely basis in 1990, that movie remains in the public domain today if it is of American origin. On the other hand, if that movie is of Berne Convention origin—a French movie, for example, first published in France or Germany—then the movie is rescued and either now has or shortly will have a new United States copyright term, lasting until the end of its term of protection, i.e., seventy-five years from publication in 1962, if it was a work for hire.¹¹⁹

A song from 1952 that was published without a copyright notice is governed by the same consideration. It is either in the public domain if it is an American song, or it is protected if it hails from a Berne Convention or WTO member country.¹²⁰ Consider a sound recording from before February 15, 1972, the date on which Congress first extended prospective protection to sound recordings.¹²¹ If you own an early sound recording by Everett Dirksen, that work has always been in the federal public domain and will stay in the United States public domain for copyright purposes. A different result, however, is implemented if you happen to own a 1963 sound recording by Boris Yeltsin, because those works that are definitionally ineligible for copyright protection if of United States origin have now been given a new full copyright term if they are of foreign origin. Even a seventy-four-year-old sound recording is thus eligible for one more year of federal protection.

2. *Walpurgisnacht*

This change, of course, creates myriad issues and questions, which is why the recapture provision is so lengthy. Addressing only a few of these issues, consider first warranties and undertakings. Imagine that you represented and warranted that a given work did not infringe a United States copyright. Now that same work does infringe the copyright. Congress forgives you. You benefit by a special provision that says you are not held to that representation and warranty.¹²²

119. 17 U.S.C. § 304(a)(1)(B) (1994 ed.).

120. 17 U.S.C. § 104A(h)(3) ("The term 'eligible country' means a nation, other than the United States, that is a WTO member country, adheres to the Berne Convention, or is subject to a proclamation under section 104A(g)"). Note in addition that nations may qualify for protection via Presidential proclamation. 2 *Nimmer on Copyright* at § 9A.04[A][3] (cited in note 112).

121. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

122. See 17 U.S.C. § 104A(f)(1) (1994 ed.):

Imagine that you agreed several years ago to perform a given public domain work during 1996. Now that work is newly infringing. You are released from that obligation by special Congressional dispensation.¹²³

Combining the two releases into a nightmare scenario, one could imagine a deal undertaken in 1993, whereby X pays Y \$3 million for the privilege of screening on national television in 1996 motion picture F, Y representing and warranting that F does not infringe any United States copyright. Based on that warranty, X could pay network Z \$2 million to screen F ten times during 1996. For its \$5 million investment, X might be confident of being able to realize \$10 million in advertising revenue. But with the resurrection of copyrights under the Act, publicly performing F may now constitute copyright infringement.¹²⁴ Z may thereupon decline to screen F, meaning that X will ultimately realize exactly zero revenue. Does Y, now released from its representations and warranties, need to repay X the \$3 million for which they constituted consideration? Does Z, now released from its performance obligations, need to repay X the \$2 million for which they constituted consideration? In one of many "slight" oversights, Congress forgot to say.¹²⁵

3. *Götterdämmerung*

Imagine a movie—whether vintage 1934 or produced in 1994—with a song of foreign origin on its soundtrack or based on a

Any person who warrants, promises or guarantees that a work does not violate an exclusive right granted in section 106 shall not be liable for legal, equitable, arbitral, or administrative relief if the warranty, promise, or guarantee is breached by virtue of the restoration of copyright under this section, if such warranty, promise, or guarantee is made before January 1, 1995.

123. 17 U.S.C. § 104A(f)(2) provides:

No person shall be required to perform any act if such performance is made infringing by virtue of the restoration of copyright under the provisions of this section, if the obligation to perform was undertaken before January 1, 1995.

124. Perhaps F was in the U.S. public domain in 1993 and X paid Y for access to the only celluloid print extant. Alternatively, this scenario could unfold if, as in the following subsection, F consists of a movie protected by copyright, based on a public domain story of foreign origin, the copyright to which is resurrected under the Act. See note 133 (discussing infringing conduct).

125. The Act does not address the issue; the House Report and Senate Report have nothing to say on the subject; the SAA is similarly mute; and all the floor statements that I have reviewed similarly ignore it. Although a hearing on a predecessor bill to the Act did ventilate constitutional issues under the Takings Clause of the Fifth Amendment as to reliance parties in general, Joint Hearings at 145-86 (cited in note 60) (including the testimony and statements of Christopher Schroeder and Eugene Volokh), even those analyses ignore the "takings" (or due process and contract impairment) implications of these two releases, notwithstanding that they formed part of S.2368 then under review. *Id.* at 30.

foreign short story. The song may have lapsed into the public domain when synchronized, but be protected today (or no later than January 1, 1996). What is the legal status of the movie under the Act? Several basic choices were available to Congress in the abstract. Under the statutory termination-of-transfers provision that Congress passed in 1976, someone who executes a termination of transfer gets the rights back in the work;¹²⁶ nonetheless, the owner of a derivative work (say a movie based on the song following termination of rights in the song) is still permitted to continue to exploit that work (the movie) with little restraint.¹²⁷ That is one model.

On the other hand, we have a very different model coming out of the 1909 Act¹²⁸ renewal provisions when there has been a reversion of renewal rights in a work, such as happened to the movie *Rear Window* in *Stewart v. Abend*.¹²⁹ In that situation, if rights in the song or the short story have lapsed, then continuing exploitation of the movie incorporating the song or the short story—continued exploitation of the derivative work—constitutes copyright infringement subject to damages.¹³⁰ According to the Ninth Circuit in the *Abend* case, however, an injunction would be denied in that particular instance.¹³¹ The Supreme Court let that ruling stand without addressing the issue of remedies.¹³²

For this third instantiation of the same question, Congress had a choice. It could have provided, parallel to termination of transfers, for continued exploitation of the derivative work; alternatively, it could have followed the *Abend* scenario and adopted a provision that would make continued use infringing (albeit not subject to injunction,

126. 17 U.S.C. §§ 203, 304(c) (1994 ed.).

127. 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) ("A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination").

128. The current Copyright Act, codified in Title 17 of the United States Code, was enacted in 1976. The predecessor Act, which then occupied Title 17, was passed in 1909.

129. 495 U.S. 207 (1990).

130. *Id.* at 235-36.

131. *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988). A previous Ninth Circuit case had suggested that the district court could, on remand, consider using the same rationale to resolve a difficult issue of relief. *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 976 (9th Cir. 1981), rev'd on other grounds, 464 U.S. 417, (1984). Both Ninth Circuit opinions cited to *Nimmer on Copyright* for the proposition that an injunction could be denied notwithstanding liability. 863 F.2d at 1479; 659 F.2d at 976.

132. In fact, the Court went out of its way twice to sidestep the issue. 495 U.S. at 216, 235-36. Previously, the *Universal City Studios* dissenters had approved the imposition of damages. 464 U.S. at 499-500. Finally, in *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 n.10 (1994) (citing the Ninth Circuit's opinion in *Abend*, 863 F.2d at 1479), a unanimous Supreme Court approved the imposition of damages rather than an injunction. Note that the SAA interpreting the Act likewise cites to that footnote in *Campbell*. SAA at 998 (cited in note 26).

pursuant to the pure Ninth Circuit model). In the Act, Congress basically chose the latter option. In line with *Abend*, continued exploitation following restoration of copyright in a formerly public domain song now requires payment, but no injunction by congressional mandate.¹³³ Thus, an action can be brought today¹³⁴ in United States District Court. Judge Hauk, the judge in the Central District of California who presided over the trial in *Abend*, might draw this new venting of the same underlying issues. For this new case, Congress has directed Judge Hauk to consider various factors, including the "relative contributions of expression of the author of the restored work and the reliance party to the derivative work."¹³⁵ Under that language, more payment should be accruing to the owner of the short story on which a movie is based than to the owner of a song used for five minutes on the soundtrack, for example.¹³⁶

1. LIFE IN THE FAST TRACK

We have now taken a very brief look at the provisions of the Act. Procedurally, its most salient feature is that it was implemented on a fast-track basis.¹³⁷ After the Act was introduced on September 27, 1994, Congress promptly adjourned for its midterm election

133. 17 U.S.C. § 104A(d)(3)(A) (1994 ed.). Query whether the subject conduct should not be called infringing, notwithstanding that it is subject to damages. The statute states that the affected reliance party "may continue to exploit that work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation for conduct which would be subject to a remedy for infringement but for the provisions of this paragraph." *Id.* Arguably, this status is tantamount to a compulsory license pursuant to a court-determined royalty. On the other hand, the statute's reference to "infringement" makes the contrary interpretation equally plausible. Certainly Z could not be faulted for interpreting F to be infringing in the second hypothetical posited in note 124.

134. Or following January 1, 1996, depending on the effective date discussed above in notes 111-14 and accompanying text.

135. 17 U.S.C. § 104A(d)(3)(B). "In some cases, the harm to the actual or potential market of the restored work will exceed the revenue generated by the exploitation of the derivative work. Subsection (d)(3) is not intended to limit compensation due to the owner of a restored copyright in such cases." SAA at 997 (cited in note 26).

136. 17 U.S.C. § 104A(d)(3)(B). Without offering any support, the SAA predicts that "it is likely that the owner of the restored copyright and the reliance party will agree on the amount of compensation to be paid." SAA at 997 (cited in note 26). From my experience, that prediction is naïve—when no money is at stake, the parties' dispute may be bridgeable, but when a successful work is at issue, the opposite dynamic will typically prevail.

137. 19 U.S.C. § 2191 (1994 ed.); Senate Report at 4 (cited in note 4); House Report at 19 (cited in note 32). Fast track procedures provide that any member of Congress "may move to consider an implementing bill, and the motion to proceed to consideration is highly privileged, unamendable and not debatable." H.R. Rep. No. 103-128, 103d Cong., 1st Sess. 3 (1993). For a discussion of the constitutional dimensions of this procedure, see Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 801, 904-07 (1995).

campaigns. When passed in December by a largely lame duck Congress,¹³⁸ not one comma was altered.

Notwithstanding that copyright and even GATT was not foremost on the minds of the members of Congress during a tumultuous election period,¹³⁹ both the House and the Senate managed to issue lengthy reports on the Act.¹⁴⁰ Those reports contain virtually nothing about copyright and the matters treated in this Essay.¹⁴¹ The Clinton Administration conveyed a 2,800-page Statement of Administrative Action ("SAA")¹⁴² to Congress to accompany the introduction of the Act, and Congress adopted it as quasi-legislative history.¹⁴³ The lengthy SAA incorporates few pages explicating the copyright provisions.¹⁴⁴

K. CONSTITUTIONAL MODULATIONS

In a federal system based on delegated powers, it is invariably important to inquire after the constitutional basis for any piece of legislation. In that regard, it is most instructive to scrutinize the Act, as well as its House Report, Senate Report, and the Administration's SAA. In the aggregate, the way that these voluminous materials ad-

138. Passage of the bill should not be mistaken for universal satisfaction with its contours, or of the fast-track procedure. It was claimed variously that President Clinton "abused his fast track authority" by making a "power play" to a lame duck session, including in the bill "payoffs and sweetheart deals" not required by GATT. See House Debate at H11456 (cited in note 81) (remarks of Rep. Rohrabacher, Calif.) ("[Congress] should have second thoughts about treating in our foreign trade policies monstrous Nazi and communist-type regimes with other democratic societies"). See Senate Debate at S15298 (cited in note 81) (remarks of Sen. Gramm, Texas) ("I believe that in the process that the Clinton administration has probably killed the fast-track process as we know it").

139. House Debate at H11454 (cited in note 81) (remarks of Rep. Burton, Ind.) (betting that not more than 20 out of 435 members of the House had even read the bill).

140. See Senate Report (cited in note 4); House Report (cited in note 32). The point is that the copyright implications of the bill were lost in the shuffle, not that Congress failed to realize the momentous impact of the bill. See House Debate at H11455 (cited in note 81) (remarks of Rep. Burton, Ind.) (calling GATT "the most important piece of trade legislation in the history of the world").

141. Agreement could not even emerge over how long the bill was. See House Debate at H11454 (cited in note 81) (remarks of Rep. Gibbons, Fla.) (443 pages); *id.* (remarks of Rep. Burton, Ind.) (800 pages); Senate Debate at S15294 (cited in note 81) (remarks of Sen. Nickles, Okla.) (over 600 pages).

142. See note 26.

143. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4819 (1994). According to the Senate Report, Congress decided not to legislate concerning certain matters, but instead to effectuate them through administrative action under the SAA. Senate Report at 4-6 (cited in note 4).

144. See SAA at 991-99 (cited in note 26).

dress the issue of constitutionality is: not.¹⁴⁵ One seeks in vain for evidence that anyone in Washington even considered the constitutional basis for these vitally important amendments to United States copyright law.¹⁴⁶ We are therefore relegated to our own devices to try to find a vehicle to justify the recent amendments.

A. *Command Performance*

With our ears attuned to constitutional frequencies, let us examine the anti-bootlegging provision that now protects unfixed performances. All previous enactments under Title 17 have been grounded in the Copyright and Patent Clause of the United States Constitution.¹⁴⁷ One basic bedrock provision in the interpretation of that clause has been that its reference to "Writings" denotes fixation.¹⁴⁸ In other words, "Writings" may be a broad term that embraces sculptures, maybe player piano rolls,¹⁴⁹ possibly even mask works for semiconductor chips etched in silicon.¹⁵⁰ But no respectable interpretation of the word "Writings" embraces an untaped performance of someone singing at Carnegie Hall. Because that singer at Carnegie Hall is now clothed with protection under Title 17, it must be concluded that this amendment is not rooted in the Copyright Clause.

Consider an alternative: The Supremacy Clause of the United States Constitution exalts treaties as binding law¹⁵¹ and also gives Congress the authority to enact whatever necessary and proper provi-

145. Virtually the only exception is the solicitude for First Amendment concerns in the bootlegging context. See note 100. In addition, lengthy debate attended the question whether the Senate needed to ratify a treaty, or the Uruguay Round Agreements could be presented as a congressional/executive agreement. See Committee Hearings at 285 (cited in note 36). But that discussion is, of course, far afield from pure copyright concerns.

146. In conjunction with the predecessor bill, there was discussion of the Takings Clause, see note 125, and Professor Perlmutter discussed its Copyright Clause grounding. Joint Hearings at 187-213 (cited in note 60) (including the statement of Shira Perlmutter).

147. See 1 *Nimmer on Copyright* § 1.09 (Matthew Bender, 1994).

148. *Id.* at § 1.08[C][2] ("A work is not written if it is not recorded in some manner").

149. See *White-Smith Music Publishing Co. v. Apollo, Co.*, 209 U.S. 1 (1908) (holding that "[a]s the act of Congress now stands," player piano rolls are not protected). Note that current law effectively rejects the construction of that case. See 17 U.S.C. § 102(a) (1994 ed.) (extending copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

150. See 17 U.S.C. §§ 901-14 (1994 ed.) ("Chapter 9-Protection of Semiconductor Chip Products"). Note that Congress took care to ground this enactment in the Copyright Clause, and also inserted Commerce Clause grounding as a prudent back-up. 2 *Nimmer on Copyright* § 8A.02[B] (Matthew Bender, 1994).

151. U.S. Const., Art. VI, § 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land").

sions are required to carry out its enumerated powers.¹⁵² Those provisions furnish no help here—the United States never adhered to the Rome Convention, which serves as the benchmark for the anti-bootlegging provision. And what about TRIPs and the WTO Agreement? As noted above, because the Clinton Administration believed that the authorization statute was enough, no treaty was ever presented to the Senate.¹⁵³

As a residual basis, one can always look to the Commerce Clause.¹⁵⁴ The impetus for the United States to join the World Trade Organization came, of course, from the world of trade. Presumably, it is within Congress's Commerce Clause authority to implement trade agreements.¹⁵⁵ Notwithstanding that the anti-bootlegging provision unquestionably violates Copyright Clause authority, let us assume for the moment that it falls within Commerce Clause authority.

B. *After the Fat Lady Has Already Sung*

Turning now to resurrection of works from the public domain, similar challenges arise. The Copyright Clause, besides being limited to the writings of authors, also authorizes legislation only for "limited [t]imes."¹⁵⁶ Those limited times have now expired. If we are looking at a French movie that was protected for twenty-eight years and then not renewed, it previously enjoyed a limited term which lapsed.¹⁵⁷ Resurrected protection for that work, to be valid, would seem to require a basis from some source outside of the Copyright Clause once again.¹⁵⁸

152. U.S. Const., Art. I, § 8, cl. 18.

153. 3 *Nimmer on Copyright* § 18.06[C][2][d] (Matthew Bender, forthcoming Dec. 1995).

154. U.S. Const., Art. I, § 8, cl. 3.

155. Congress's commerce power historically has been construed extremely broadly. See 1 *Nimmer on Copyright* § 1.09 (Matthew Bender, 1994). Ironically, soon after enactment of the Act, the Supreme Court issued a ruling overturning the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1994 ed.), as beyond Congress's delegated commerce power. *United States v. Lopez*, 115 S. Ct. 1624 (1995). Although that precedent demonstrates that Congress's power under the Commerce Clause is not infinite, it does not remotely threaten the viability of this trade law, given how close to the core of economic activity the Uruguay Round Agreements lie.

156. U.S. Const., Art. I, § 8, cl. 8 (see note 2 for the complete text).

157. 17 U.S.C. § 304 (1994 ed.) ("Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured").

158. Professor Perlmutter defends 17 U.S.C. § 104A directly under the Copyright Clause. Joint Hearings at 187-213 (cited in note 60). Conceding that "[i]f a work has fallen into the public domain because its term of protection has expired, it would violate the 'limited times' requirement to revive it," she nonetheless maintains that no such problems attend recapture of works that lapsed due to formal defects. *Id.* at 206. That logic would appear problematic, as Congress can extend copyright protection—it did so from 1962 through 1976, see 2 *Nimmer on Copyright* § 9.01[C] (Matthew Bender, 1994); and in addition, a bill introduced shortly after passage of the Uruguay Round Agreements Act would add twenty years to U.S. copyright

Reverting to the bootlegging provision, it should be recalled that protection thereunder is arguably perpetual.¹⁵⁹ We previously encountered the Caruso example of protecting a work from a century ago and for centuries into the future—that is the antithesis of “limited [t]imes.” Again, it seems that this amendment must not be rooted in the Copyright Clause to the United States Constitution.

This time, however, we could look to the treaty authority of the United States Congress. For unlike the Rome Convention, the Berne Convention was ratified by the Senate in 1989.¹⁶⁰ The residual basis of the Commerce Clause equally pertains in this context.

C. *We Shall Be Released*

One final constitutional issue: the release from warranties and performance obligations. Recall that Congress forgives you for those various things that you improvidently agreed to do in 1937 or in 1963 or in 1994, prior to implementation of the Act.¹⁶¹ A party like X may have bargained in good faith and paid \$5 million in consideration and placed reliance on the promises of others. Congress has now thrown those promises out the window. If this provision is constitutional, then whatever due process concerns stood in the way have been overborne by the supremacy of world trade. The same holds true for the First Amendment concerns not addressed by the anti-bootlegging features discussed above.¹⁶²

The conclusion is that two centuries of rooting copyright enactments in the Copyright Clause now appears, from the present perspective, to have been simply a phase. It is difficult indeed to discern any limits here. If unfixed works can be protected perpetually with something akin to copyright, then what conceivable implementation lies beyond Congress's powers? The affirmative grant of limited

protection to take advantage of a comparable extension in the European term of protection. H.R. 989, 104th Cong., 1st Sess. (Feb. 16, 1995). See note 180 and accompanying text. If the constitutionality is conceded of both extensions of term for subsisting works and of recapture of works that lapsed for formal defects, it is difficult to conceptualize why the recapture of works for newly extended terms is to be condemned. More consistent is the position that Congress may extend subsisting copyrights but may not, under the Copyright Clause alone, revive copyrights that were previously protected and entered the public domain for any reason. *Nimmer on Copyright*, § 5.1 (Matthew Bender, 1967). See *Graham v. John Deere Co.*, 383 U.S. 1 (1966) (“Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available”).

159. See Part 6.

160. See note 53.

161. See note 122-23.

162. See note 100.

powers to Congress via the Copyright Clause is irrelevant because vastly greater affirmative powers have been arrogated under the commerce technique. Furthermore, the negative restraints on Congress via the Due Process Clause and First Amendment, if a broad interpretation of the new amendments is sustained, also do not effectively constrain Congress from implementing whatever it will in the copyright sphere.

λ. THE MASTER CLASS

If copyright today is not rooted in the Copyright Clause of the Constitution, then what are the goals that copyright serves? Copyright, it seems, now has a new master. Rather than there being an inherent value in serving "to promote the Progress of Science and the useful Arts,"¹⁶³ copyright has been transformed into an instrumentality towards (what Congress perceives to be) a greater good. The orchestrator of that instrumentality, of course, is the law of trade. Because copyright now serves as an adjunct of trade, were my father composing his treatise today, instead of in 1963,¹⁶⁴ the most accurate title he could choose would be *Nimmer on the Implementation Within the United States of Annex 1C to the Agreement Establishing the World Trade Organization*. Mired in notions of marketing and reader recognition, the publisher has unaccountably refused to budge from the current title, *Nimmer on Copyright*, notwithstanding that it has become an anachronism.

This new master is indeed powerful.¹⁶⁵ So powerful, in fact, that in the world of trade, we must ask: who really cares about what the United States Supreme Court has ruled in, for example, the "old" (i.e., pre-WTO) cases of *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁶⁶ or *Campbell v. Acuff-Rose Music, Inc.*?¹⁶⁷

163. U.S. Const., Art. 1, § 8, cl. 8.

164. *Nimmer on Copyright* (Matthew Bender, 1963).

165. Ralph Nader calls implementation of the WTO Agreement "trade über alles." Committee Hearings at 351 (cited in note 36).

166. 499 U.S. 340 (1991).

167. 114 S. Ct. 1164 (1994).

A. A Feisty Reappraisal

Turning first to *Feist*, the Supreme Court there construed the limitation in the Copyright Clause that Congress could only protect the "Writings" of "Authors."¹⁶⁸ The Court concluded unanimously that only something creative, evincing intellectual effort, qualifies as the "Writings" of "Authors" under the Constitution.¹⁶⁹ On that basis, the decision ruled that telephone book white pages stand outside constitutional protection.¹⁷⁰

Now imagine that the Council for Trade-Related Aspects of Intellectual Property Rights, which is established pursuant to TRIPs,¹⁷¹ votes in 1996 that copyright protection must extend to telephone book white pages.¹⁷² Would Congress hesitate to amend our laws to bring them in conformity, lest we be bitten by a WTO panel ruling? The precedent has already been set that the Constitution's limitation to "Writings" stands as no bar to augmenting protection under Title 17, as proven by the new anti-bootlegging provision. Why is a telephone book any further afield than a performance at Carnegie Hall? Indeed, it is probably less afield, given the line of cases that *Feist* overruled.¹⁷³ The accident that the Supreme Court has already addressed the *Feist* fact pattern and has not yet addressed the performance case is purely adventitious. One must postulate good odds, therefore, that Congress would blindly follow suit and jettison *Feist* to comply with the hypothetical Council vote.

B. Less Pretty Now

Turning now to *Campbell v. Acuff-Rose*,¹⁷⁴ the Supreme Court inclined towards upholding as fair use 2 Live Crew's send-up of Roy Orbison's song "Oh, Pretty Woman."¹⁷⁵ That holding is very doubtful to the mindframe of a copyright practitioner who matured, not under our Anglo-American copyright system, but instead under a Continental system that reflects Berne Convention norms. The "mutilation" of

168. 499 U.S. 340, 345-46 (1991).

169. *Id.* (citing 1 *Nimmer on Copyright* §§ 2.01[A], [B] (Matthew Bender, 1990)).

170. *Id.* at 364.

171. TRIPs, Art. 68 (cited in note 16).

172. To the extent that the United States blocks the Council from adopting that construction, imagine instead that a WTO panel (to be discussed below) issues such a ruling.

173. 499 U.S. at 352-53.

174. 114 S. Ct. 1164 (1994).

175. *Id.* at 1179.

the Orbison song, it seems to me, would probably violate the author's integrity right under Article 6*bis* of the Berne Convention.¹⁷⁶

One must hasten to add that, by itself, a violation of Article 6*bis* of the Berne Convention does not place the United States in breach of international law because Article 6*bis* is explicitly excluded from the obligations that the TRIPs protocol requires.¹⁷⁷ Moral rights, in other words, are not by their own terms incorporated into governing law by virtue of TRIPs. But, of course, that exclusion is not going to stop a clever advocate arguing to a WTO panel. If one body of law is unavailable, she will simply find an argument under another body of law that is available. In this case, the clever advocate need not look far. Article 9 of the Berne Convention, under one view, arguably forbids the United States from following the interpretation embodied in *Campbell*.¹⁷⁸ The Dane, the Ghanaian, and the Peruvian who constitute the hypothetical WTO panel invoked above might indeed be persuaded that Article 9 of the Berne Convention forbids the Supreme Court's *Campbell* construction.

If the exigencies of world trade so demand, why should Congress scruple at that crossroad from altering United States law to jettison *Campbell* and to get rid of that unfavorable gloss? In a world governed by trade, in which copyright serves that master, no satisfactory negative answer is apparent.

C. Judicial Comeuppance

Judge Hauk has a new boss too, as indeed does the entire federal judiciary. When I was a federal prosecutor, my office once suffered dismissal of a criminal case under the Speedy Trial Act because

176. See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* at 468-70 (Center for Commercial Law Studies, Queen Mary College, 1987).

177. TRIPs, Art. 9(1) (cited in note 16). As stated by the then Register of Copyrights, "[t]he United States has made clear to hostile negotiating partners that U.S. copyright owners will abandon any proffered benefit in order to prevent any increased moral rights obligations under Berne from becoming enforceable or even subject to toothless legal scrutiny. Period. End of discussion." Ralph Oman, *Berne Revision: The Continuing Drama*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 139, 143 (1993).

178. See Paul Edward Geller, *Can the GATT Incorporate Berne Whole?*, 12 *European Intell. Prop. Rev.* 423, 425 (1990) (stating that the "open-ended criteria of possible exceptions [contained in Article 9] are . . . subject to conflicting interpretations"). For other examples, see J. H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 *Fordham Intell. Prop., Media & Enter. L. J.* 171, 224-35 (1993) (describing the application of TRIPs to borderline technologies). Professor Reichman counsels that the path of wisdom is to settle disputes rather than force WTO panels to issue rulings under TRIPs. *Id.* at 262. Would that one could place one's reliance on wise counsel prevailing.

of delay.¹⁷⁹ It was a delay not caused by the government, but rather caused by the district court's own schedule. Nonetheless, the Ninth Circuit, as I recall, affirmed that dismissal, stating that judges are part of the government in the larger sense, and hence, the "government" denied that criminal defendant his right to a speedy trial.

The same dynamic exists today in the European Union. A term harmonization directive currently requires all member states throughout the European Union to lengthen their copyright terms and mandates implementation no later than July 1, 1995.¹⁸⁰ Italy and other states have not legislated a change as of this writing. Imagine that they delay and delay and still have not acted by the deadline. In the view of some commentators, the European Court of Justice has treated local courts as instruments of the member states' governments, which are equally obligated to implement changes.¹⁸¹ Therefore, the specter arises that the Italian courts could conceivably be directed to change the law as part of the "government," even if the Italian Parliament has not acted.

So positing that Judge Hauk has a new master merely applies the same logic to this scenario. TRIPs mandates expeditious and economical resolution of all intellectual property disputes. To quote from the protocol itself: procedures must "not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."¹⁸² Imagine that Judge Hauk in an international copyright dispute takes a matter under submission for longer than the foreign claimant likes, or that the claimant spends sums that it deems unduly large in order to vindicate its rights before his court. Judge Hauk's conduct in that case could form the basis of a WTO panel citation. Just as American copyright proprietors do not care that the Indian court system is bogged down and takes ten years to reach a resolution, so our foreign victim does not give a fig for whatever we care to say about the United States legal structure. If ruled illegitimate by a WTO panel, the pressure to institute changes will be powerful.

179. See 18 U.S.C. §§ 3161-74 (1994 ed.).

180. Council Directive 93/98 (Oct. 29, 1993).

181. Letter from Lisa M. Brownlee of Trenité Van Doorne, Amsterdam, to David Nimmer of Irell & Manella, Los Angeles 4-6 (June 13, 1995) (on file with the Author) (explaining that the European Court of Justice, in *Francovich and Bonifaci v. Italian Republic*, Cases C-6, C-9/90 [1992] I.R.L.R. 84, "permitted a damage action against Italy for failing to timely implement a directive which provided compensation for employees if their employer became insolvent").

182. TRIPs, Art. 41(2) (cited in note 16).

D. *His Master's Voice*

If indeed the new master of copyright is the world of international trade, if the events of last December are sustained in a broad construction, then the Constitution must simply follow compliantly behind. Copyright today serves not the needs of authors nor even the popular good, whereby works are relegated to the public domain to become the heritage of all humanity and copyright is simply a temporary way station to reward authors on the road to that greater good. Instead of those goals, the balance of payments has become all-decisive. Whatever bows to that god is now worthy of implementation.

μ. FACING THE MUSIC

Where does this lead us in the future?¹⁸³ What are the alternatives? How can Congress resist WTO panel rulings,¹⁸⁴ for instance, to jettison the "bizarre" construction of *Campbell v. Acuff-Rose*¹⁸⁵ as some WTO panel might conceivably find in the future, or to micromanage Judge Hauk's courtroom as another WTO panel could conceivably order? A number of possibilities exist.

183. Copyright issues for the future may focus on universal digitization and interconnectedness, with their potential for effortless copying and rendering the possibility of enforcement chimerical, even more so than on trade. If trade threatens the end of copyright, multimedia in the view of some will work its death. See, for example, John Perry 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 84 (March, 1994) (arguing that information is a life form that wants to be free); Esther Dyson, *Intellectual Property on the Net*, Release 1.0 at 1 (Dec., 1995). See also Richard A. Lanham, *The Electronic Word: Democracy, Technology, and the Arts* xii, 18-19, 134-35 (Chicago U., 1993) (noting that copyright lawyers are "still trying to plot new epicycles on a Ptolemaic cosmos"). That subject matter is pondered endlessly at the profusion of multimedia conferences that seem to characterize this era. See, for example, Remarks of John Perry Barlow, "Digital World," Beverly Hills, June 5, 1991; Remarks of David Nimmer, "Euroforum Conference on the Music Industry," London, December 8, 1994; Remarks of Robert Lucky, "Roundtable in Multimedia," Los Angeles, April 6, 1995.

TRIPs does not address this cutting-edge constellation of issues. See Ralph Oman, *Berne Revision: The Continuing Drama*, 4 Fordham Intell. Prop., Media & Enter. L. J. 139, 144 (1993) (listing issues not dealt with by TRIPs). Nonetheless, one commentator saw the interconnectedness among copyright law, world trade, and the technological explosion of new media almost two decades ago. Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 Stan. L. Rev. 499, 553-54 (1967).

184. Note that rulings by a WTO panel do not constitute authoritative interpretations binding on all the members. "Only the Members themselves (acting through the Ministerial Conference or General Council) could adopt such an interpretation." Presidential Memorandum, Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations, 58 Fed. Reg. 67263, 67294 (Dec. 20, 1993).

185. 113 S. Ct. 490 (1991).

The first possibility is that the United States can successfully play the role of the elephant in international trade.¹⁸⁶ We are the largest world trader, and could try to throw our weight around to squash opponents.¹⁸⁷ Perhaps through a combination of diplomacy, blandishments, and intimidation, the United States can use the new world order to secure benefits from India, Korea, et al.¹⁸⁸ She could make them reform their own practices and court systems, while simultaneously resisting pressure from any WTO panel about what goes on in the United States.¹⁸⁹ Possibly.¹⁹⁰

A second possibility is that the United States could simply withdraw from the WTO and turn our backs on the last eight years of efforts to implement TRIPs as the world's premier international trade

186. The United States "will not be outvoted by small nations in the developing world [as they] will not jeopardize their export opportunities by antagonizing the largest economy in the world . . ." House Debate at H11452 (cited in note 81) (remarks of Rep. Manzullo, Ill.).

187. On the other hand, some maintain that the structure of the WTO "will clearly stack the deck against the United States, since most countries want unlimited access to the coveted U.S. market." Senate Debate at S15304 (cited in note 81) (remarks of Sen. Exon, Neb.). See House Debate at H11454 (cited in note 81) (remarks of Rep. Burton, Ind.) (claiming that the U.S. will be outvoted in the WTO 122 to 1).

188. A problem afflicting previous enforcement of GATT sanctions was that only a handful of countries adhered to the disciplines of the 1979 Tokyo Round; the bulk of the world, therefore, was a "free rider" in this sphere. 58 Fed. Reg. at 67293 (cited in note 184).

Under the new regime, by contrast, increased market access for U.S. exports to such developing countries as India, Brazil, and Malaysia is expected to result, as "there will be no 'free riders,' as has been the case in the past." House Report at 17 (cited in note 32).

189. Is this likely? Although the default under the WTO Agreement is decision-making by consensus, absent the ability to arrive at such consensus, "the matter shall be decided by voting." WTO Agreement, Art. IX(1) (cited in note 39). See J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403, 2461 (1991) ("reaching consensus under the shadow of the vote is altogether different from reaching it under the shadow of the veto"). "[F]or the first time in history in an international organization with sanction-imposing powers the United States would have no veto over any sanction imposed by a WTO panel." Committee Hearings at 293 (cited in note 36) (remarks of Prof. Tribe).

190. See note 200. One Congressman quoted Prime Minister Hosokawa of Japan as stating that the American usage of unilateral trade sanctions would be countered through the WTO. House Debate at H11454 (cited in note 81) (remarks of Rep. Burton, Ind.). See Joel R. Reidenberg, *Trade, TRIPS and NAFTA*, 4 Fordham Intell. Prop., Media & Enter. L. J. 283, 284 (1993) (describing the difficulties associated with the United States' recent unilateral actions). Congress registered its disagreement in the legislative history: "[T]he Uruguay Round agreements do not amend or restrict the remedies available to the U.S. Government" to respond unilaterally. Senate Report at 13 (cited in note 4). On May 16, 1995, the United States announced imposition of 100% tariffs on 13 models of Japanese luxury automobiles, based on perceived failures of Japan to allow market access to U.S. imports. James Gerstenzang, *U.S. Sets 100% Tax on Japan Luxury Cars in Trade Dispute*, Los Angeles Times A1 (May 17, 1995). That conflict had been long brewing. See Committee Hearings at 23 (cited in note 36). Japan vowed to challenge those unilateral sanctions before the WTO in Geneva. The day before the sanctions were to take effect, however, both sides announced a resolution from their Geneva negotiations. James Gerstenzang, *U.S., Japan Reach Trade Pact on Cars*, Los Angeles Times A1 (June 29, 1995) ("It may require the automotive trade equivalent of a Talmudic scholar to determine whether the multiple elements of the agreement are being met in coming years").

protocol. Indeed, there is an escape hatch built into the new legislation that says that if three WTO rulings bash us, essentially Congress will reconsider and might decide to back out.¹⁹¹ That would be a rather disappointing culmination to years of American effort, to say the least.

A third possibility is that we could thumb our nose at WTO panel rulings.¹⁹² In that case, we would be open to cross-sectoral retaliation.¹⁹³ The United States might refuse to accord copyright standards according to international norms as determined by the WTO, for example, and the result would be that American wheat and rice, for instance, would be subject to punitive tariffs in Japan and in other countries. This does not sound like a very pleasant prospect.

A fourth possibility is that we could simply pay off the aggrieved party.¹⁹⁴ For instance, if Berne Convention National Q files a WTO panel complaint and the United States is found to be in violation, one possibility is that the United States could simply pay Q off for the damages that Q suffers because of this trade status. The problem is that once Q is compensated, M, N, O, and P may line up in the gravy train to get their share of payments from the United States as tribute for not bringing their own DSU complaints. That too does not sound very pleasant.

A fifth possibility is that we might suffer adverse WTO panel rulings and simply decide to change the offending law or practice that gave rise to the citation.¹⁹⁵ Thence arose the scenarios of jettisoning *Campbell* and Judge Hauk's autonomy invoked above.¹⁹⁶ The floor

191. Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809, 4833-34 (1994). "If the WTO violated U.S. sovereignty three times in five years, any member of Congress could introduce a resolution to have the U.S. pull out of the WTO. So, even if the worst fears of the detractors of GATT come true, the U.S. will retain many opportunities to withdraw from the system." House Debate at H11452 (cited in note 81) (remarks of Rep. Manzullo, Ind.). "After the third bad WTO decision, Congress will vote on whether to withdraw from the WTO." *Id.* at H11455 (remarks of Rep. Ballenger, N.C.) (discussing the "'three strikes and we're out' program").

192. One industry spokesman criticized the U.S. Trade Representative for testifying before Congress that the U.S. could ignore adverse WTO rulings: "If we can ignore it, 120 other countries can ignore it, too, so you are absolutely nowhere." Committee Hearings at 123, 126-27 (cited in note 36) (remarks of Kevin Kearns, President, U.S. Business and Industrial Council).

193. Senate Debate at S15302 (cited in note 81) (remarks of Sen. Kempthorne, Idaho).

194. 58 Fed. Reg. at 67289, 67292 (cited in note 184). Sanctions include voluntary compensation or suspension of concessions. DSU, Art. 22(1) (cited in note 39). As a legal matter, payment of compensation may constitute only a stop-gap matter, not relieving the United States of its obligation to change the offending law. See Committee Hearings at 210-11 (cited in note 36).

195. Senate Debate at S15302 (cited in note 81) (remarks of Sen. Kempthorne, Idaho) (suggesting that "the certainty of trade retaliation or penalties will lead the [federal] Government to pressure a state to change a law that the WTO considers an impediment to trade").

196. See notes 172, 182 and accompanying text.

statements from the Senate and the House contain innumerable claims that the Uruguay Round Agreements exert no impact whatsoever on United States sovereignty.¹⁹⁷ We will see in the future whether there is any truth to those congressional protestations. As a dry, technical matter, it is true that United States law is formally determined by the national and state legislatures.¹⁹⁸ But whether, as a practical matter, we can resist the tidal wave¹⁹⁹ that we have set in motion remains to be seen.²⁰⁰

197. "GATT will not override any U.S. law. [I]t clearly states that no U.S. law can be overridden by GATT. Period." House Debate at H11452 (cited in note 81) (remarks of Rep. Manzullo, Ill.). "That is pretty plain. It is pretty simple. They cannot overturn U.S. laws or State laws in GATT." Senate Debate at S15295 (cited in note 81) (remarks of Sen. Nickles, Okla.) (quoting Judge Bork's interpretation of GATT's effect on U.S. sovereignty). See House Debate at H11457 (remarks of Rep. Hughes, N.J.); Senate Debate at S15301 (remarks of Sen. Bingaman, N.J.).

198. The Senate Report provides that if a DSU panel, were to determine that a particular Federal statute was inconsistent with any of the Uruguay Round agreements, the Congress would retain full authority to determine whether to amend, modify, or repeal that law. The panel or Appellate Body does not have any authority to order the United States, or any other country, to change its laws, regulations, or practices when those are found inconsistent with a Uruguay Round agreement.

Senate Report at 13 (cited in note 4). Compare House Report at 55-61 (cited in note 32).

If an adverse decision is rendered against the United States under GATT, this does not invalidate any Federal, State, or local laws. The result is rather that the successful complaining country will be authorized to take retaliating [sic] action against us. Of course any country has that same option at the present time.

Senate Debate at S15301 (cited in note 81) (remarks of Sen. Bingaman, N.M.).

199. It should be recalled that the old GATT mechanism allowed the offending country to block implementation of a panel ruling. "Since historically the United States has brought more cases to the GATT than any other country and we have seen many rulings favorable to the United States be blocked, the WTO procedures could well work to our advantage." Senate Debate at S15296 (cited in note 81) (remarks of Sen. DeConcini, Ariz.). That blockage no longer pertains under the new system. Some claim that the United States will benefit from the change. See House Debate at H11457 (cited in note 81) (remarks of Rep. Hughes, N.J.) (arguing that the U.S. is "the largest exporter facing the most restraints"). Others disagree: "While [the current] system has not worked well every time, it has preserved the U.S.'s ability to veto GATT decisions contrary to our interests. Under the Uruguay round of GATT now before the Senate, this veto power will be lost." Senate Debate at S15302 (remarks of Sen. Kempthorne, Idaho).

200. Yes, as the proponents preach and preach and preach again, only the United States can change its laws in response to a WTO dispute resolution. But it must also be said that only the WTO has the power to determine if another country is justified in imposing trade sanctions against the U.S. law. This they do not preach.

Senate Debate at S15304 (cited in note 81) (remarks of Sen. Exon, Neb.). Even more colorfully, the Chair of a Senate Committee replied to one witness's claim that the United States "can still act unilaterally" with the observation that "you can unilaterally cut your wife's throat and kill her" given that the "law of murder does not prevent you from doing it, but you have got to pay the penalty." Committee Hearings at 140-42 (cited in note 36) (remarks of Sen. Hollings, S.C.).

v. FANFARE FOR THE NU

So where should we head from here? It seems that we are moving headlong into the world of trade. I have sketched five possible destinations where the current train of events may lead us. Undoubtedly, none that have been contemplated in this Essay will be the precise one to eventuate. Rather, the future will perforce be much, much stranger than anything that any of us can imagine today. The one thing that seems clear is that practitioners and scholars trained in the discipline formerly called "copyright" will in the future be called upon to answer ever more questions, which will increase geometrically in complexity. Though old-fashioned copyright may have ended, that new dynamic has already begun.