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Session III: Copyright Developments in WIPO

Berne Revision: The Continuing Drama[†]

Ralph Oman*

I. THE PROLOGUE: THE GATT/TRIPS/NAFTA MISE-EN-SCÈNE

One hundred years ago, Victor Hugo and his confrères who birthed the Berne Convention¹ took special pride in the establishment of the International Bureau—a secretariat with administrative and educational responsibilities and the mandate to prepare for periodic revisions of the Convention. In the generations that have followed, the United International Bureau for the protection of Intellectual Property, BIRPI, and now the World Intellectual Property Organization (“WIPO”) have been active players in the developments of international intellectual property law. In a UN system often characterized by passivity and political gridlock (whether North-South or East-West), the WIPO has been uniquely effective in promoting progressive change.

During the second half of the eighties, however, a number of apparent challenges developed to the preeminence of the WIPO and the conventions it administered. They came from different quarters, carrying different long-term and short-term implications for

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1. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised*, Paris, July 24, 1971, 828 U.N.T.S. 221.

the WIPO and the Unions central to its mission. The current program of the WIPO in the field of copyright is a partial response to those challenges. It is not an effort to blunt them, but rather to channel them away from the bilateral and trade fora and into traditional multilateral treaty structures that WIPO oversees.

The first and most visible challenge to the WIPO treaty system arose out of the Uruguay Round of the Multilateral Trade Negotiations to amend the General Agreement on Tariffs and Trade ("GATT")² and the deliberations of the Working Group on Trade-Related Aspects of Intellectual Property ("TRIPS" or "Dunkel text").³ The resurgent bilateralism of the United States also served to blunt interest in non-GATT fora for the resolution of contemporary problems. Most important, however, was the forceful emergence of the Commission of the European Communities as the copyright arbiter of Western Europe and the shaper of every copyright law from Dublin to Vladivostok.

The existence in the GATT of a genuinely enforceable copyright treaty obligation (including and exceeding the requirements of Berne) posed—and continues to pose—serious structural, legal, and political questions for the WIPO and the Berne Convention. It is not, as some suggest, a mere matter of WIPO vanity. It must be understood that the WIPO copyright program is basically about the future of the Berne Union, not about the WIPO. What the WIPO is aggressively defending is the Berne Union as an organization of states that for a century has carried on the world's copyright law business in a cautious, generally progressive fashion and without compulsion. It has inched forward by consensus.

After eight years of laying the groundwork for a much-needed update of the Berne Convention, the WIPO has floated a proposal now that examines the feasibility, desirability, and possible contents of two new intellectual property treaties. The Secretariat has

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

3. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA, Dec. 20, 1991 (submitted by former GATT Director-General Arthur Dunkel and sometimes known as the "Dunkel Draft"), Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (Annex III).

dubbed the first a "Protocol" of the Berne Convention⁴ and the second "A New Instrument" for the protection of performers and producers of phonograms.⁵ Both proposals share certain judgments: first, that we must bring the key copyright and related rights treaties concluded in the 1960s more fully and fairly into the high-tech

4. Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 1st sess., *Questions Concerning a Possible Protocol to the Berne Convention Part I*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/I/2 (July 18, 1991) [hereinafter Protocol Questions 1st sess. I]; Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 1st sess., *Questions Concerning a Possible Protocol to the Berne Convention Part II*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/I/3 (Oct. 8, 1991); Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 2d sess., Report adopted by the Committee, WIPO Doc. BCP/CE/II/1 (Feb. 19, 1992); International Union for the Protection of Literary and Artistic Works (Berne Union), Assembly, 13th sess., *Questions Concerning a Possible Protocol to the Berne Convention*, Memorandum by the Director General, WIPO Doc. B/A/XIII/1 (July 10, 1992); International Union for the Protection of Literary and Artistic Works (Berne Union), Assembly, 13th sess., Report adopted by the Assembly, WIPO Doc. B/A/XIII/2 (Sept. 29, 1992); Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 3d sess., *Questions Concerning a Possible Protocol to the Berne Convention Part I Introduction*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/III/2-I (Mar. 12, 1993) [hereinafter Protocol Questions 3d sess. I]; Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 3d sess., *Questions Concerning a Possible Protocol to the Berne Convention Part II Items Already Discussed*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/III/2-II (Mar. 12, 1993) [hereinafter Protocol Questions 3d sess. II]; Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, 3d sess., *Questions Concerning a Possible Protocol to the Berne Convention Part III New Items*, Memorandum prepared by the International Bureau, WIPO Doc. BCP/CE/III/2-III (Mar. 12, 1993) [hereinafter Protocol Questions 3d sess. III]; Committee of Experts on a Possible Protocol to the Berne Convention, 3d sess., Draft Report prepared by the International Bureau, WIPO Doc. BCP/CE/III/3 Prov. (June 25, 1993).

5. International Union for the Protection of Literary and Artistic Works (Berne Union), Assembly, Report adopted by the Assembly, WIPO Doc. B/A/XIII/2 (Sept. 29, 1992); Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, 1st sess., *Questions Concerning Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms*, Memorandum prepared by the International Bureau, WIPO Doc. INR/CE/I/2 (Mar. 12, 1993) [hereinafter New Instrument Questions]; Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, 1st sess., Report adopted by the Committee, WIPO Doc. INR/CE/I/3 (July 2, 1993).

reality of the nineties; second, that we recognize the immensity of the political, legal, and commercial impediments to a successful near-term revision of the underlying treaties; third, that we acknowledge that both the successes and failures of the GATT TRIPS talks suggest a real potential for a limited, but important, expansion of the rights of authors, record producers, and performers; and last, that we must seek to bridge the gap between the "common law" and "civil law" approaches to authorship—including the treatment of juridical entities, the assignability of copyright, and producers' and performers' rights.

Lingering in the shadows of the big treaty agenda, I see several other potentially important programs. In particular, the WIPO has begun work on artificial intelligence, problems of character merchandising and rights of publicity, and intellectual property dispute settlement mechanisms applicable both to public law disputes between states and private law disputes of private citizens. While these are important, for our purposes, I will concentrate on the two major treaty programs. It will simplify matters to begin with some background—in particular, the substance and shortcomings of the TRIPS negotiation.

I cannot fully assess the present work program of the WIPO without first looking at the TRIPS negotiation, which has helped shape the recent WIPO copyright strategy.

The present TRIPS text is the outcome of four and a half years of public bloodletting. That ordeal has highlighted copyright policy differences between the United States and other Berne members. The United States in the Uruguay Round sought to bring the Berne Convention more fully into the GATT. We proposed, with others, what came to be known as a "Berne Plus" package, requiring GATT members to recognize all of the "economic" rights guaranteed by the Berne Convention, as well as a few additional economic obligations.

The TRIPS negotiation centered around eight international copyright obligations not found in Berne: (1) the right to control public distribution of copies of works, especially parallel imports; (2) rental rights for sound recordings and computer programs; (3) a definition of the term "public"; (4) affirmation of the entitlement

of a Berne state to treat corporations, in appropriate situations, as authors under national copyright laws; (5) copyright protection (or its close equivalent) for sound recordings; (6) an international "fair use" standard; (7) express incorporation into Berne of both computer programs (as literary works) and databases (as works that would qualify under Berne as collections or compilations); and (8) detailed obligations to provide rightsholders with the ability to enforce their rights and suppress piracy. Of these eight, several did not survive into the final TRIPS text.

One of the casualties was parallel imports. Although nothing in the text contradicted the territorial nature of copyright, and everyone recognized the importance of territorial licensing, the Third World and several industrialized states, such as Australia, New Zealand, and the Nordics, did not embrace the notion of the right to control parallel importation.

The rights of corporate authorship was another. While efforts continue to give employer-authors the rights they now enjoy in the United States and a few other countries, the effort to get corporate authorship into the fabric of world copyright law seems to have failed. The other "Great American Copyright Heresy"—copyright protection for sound recordings—has failed as well.

Finally, the TRIPS negotiation was, for the United States, dominated by an irrelevant issue: moral rights of authors. The 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.

The final TRIPS text addresses two important U.S. concerns: exclusion of moral rights from the scope of the GATT copyright obligations and affirmation of the protection of computer programs under Berne as literary works. With regard to computer programs, the present text avoids any compromise (1) on express exceptions from protection, (2) on limitations for certain uses of programs, and (3) on decompilation. These matters are dealt with in two provisions: one restates the idea-expression dichotomy, and another applies Article 9(2) of Berne to all rights secured under the TRIPS.

Article 9(2) now governs exceptions solely to reproduction rights.

The TRIPS provision dealing with rental rights is a classic compromise, convoluted and fraught with problems. An exclusive rental right for computer programs is a definite plus. The grandfathering of Japan's mixed system of exclusivity and a right to remuneration for sound recordings is probably a necessary evil. The provision for exclusive rental rights in motion pictures only where widespread copying of rented films "materially impair[s] the reproduction right" is probably impossible to enforce.

What is more interesting about the TRIPS text is what is not there. The Dunkel text does not deal with certain special problems related to private copying. Countries need not give national treatment in private copying regimes. Nor does the Dunkel text provide a framework to resolve the international legal status of "videogram producers." It has no provisions relating to the conflicts of law, to contract interpretation, or to the free exercise of rights and benefits that arise out of national private copying regimes.

The Dunkel text also fails to deal with several developments that have preoccupied the WIPO for many years. These issues continue to evade express treaty resolution: direct satellite broadcasting, satellite signal "poaching," self-help technologies to protect against unauthorized copying (e.g., SCMS, Macrovision, IDEK) encryption systems used to protect satellite signals, and the entire concept of "theft of service" in relation to cable and satellite communications.

Even with those shortcomings, we should not dismiss the TRIPS text as a failure. The changes that the United States sought for the world copyright order—but not our law—are so sweeping that we probably could never have achieved them in one negotiation. The Dunkel text for copyright has one great strength—it puts teeth into the economic obligations of the Berne Convention. That bare fact is an immense achievement.

II. ACT I: THE PROTOCOL

Just as TRIPS was "Berne Plus," so the Berne Protocol exercise has become a "TRIPS Plus" exercise. This state of affairs arose

from three sources. First, obviously, is the TRIPS negotiation itself. What we achieved in TRIPS that goes beyond Berne is, in the eyes of the WIPO, a space that must be fenced in and brought under cultivation. Second, the emergence of the European Community as the shaper of European copyright law is a direct challenge to the WIPO and, more importantly, to the global balance of the Berne Union. Third, the perceived political impossibility of amending the Berne Convention through a formal revision conference—a procedure that requires unanimity—prompted a search for an administrative alternative to a formal revision conference.

The Protocol is roughly based upon five years of work carried on by the WIPO before and during the Uruguay Round. This work began with two years of meetings on copyright problems affecting various categories of protected works. It then moved on to a synthesis of principles that should govern the adaptation of copyright legislation to new technological circumstances. Finally, in 1989-1990, the WIPO convened the world copyright clan in Geneva to devise a model copyright law and model sound recording law. These model law programs provided a minor testing ground for issues now arising under the WIPO programs for a Protocol to Berne and a New Instrument for the Protection of Performers and Producers of Phonograms.

Over these last two years, the WIPO has identified a number of subjects for possible inclusion in an agreement complementary to the Berne Convention. The WIPO appears to contemplate a special agreement under Article 20 of the Berne Convention. Such an agreement must not conflict with the provisions of the Convention and can only provide *higher* rights than those already secured by the Convention. This formulation is itself the source of some difficulty, since it can inadvertently raise questions about the protection under the basic Convention of rights or subject matter specially treated in the Protocol. Indeed, this was a major problem in the early days of political reflection on a Protocol. Put simply, some were very nervous about an "*a contrario* problem." This meant, for example, that proposals relating to computers and computer uses of works would have to be offered as statements of existing protection. The concern was how to draft provisions in a Protocol

without casting doubts on protection under the existing Berne text. If, in seeking absolute clarity in a Protocol, we cast shadows over rights we think already exist under Berne, we may pay too high a price for clarification. This danger is especially grave because if the final product is worth the inevitable battles, many countries may not ratify the Protocol, and the protection of computer programs in the eyes of some countries will be left hanging in limbo.

The WIPO first formally tabled new subject areas of protection for possible inclusion in a Protocol in November 1991. Their list included express protection for computer programs, for databases, for "artificial intelligence" and for works created with the assistance of computers. The November meeting gave collective vent to a reluctance to introduce into the Protocol any provisions relating to computer programs. Ultimately, key industrialized countries would have accepted the minimalist TRIPS text. Yet, in a Protocol to Berne, that might require as well a full history to make clear the Protocol was only restating, expressly, the requirements of *all* acts of the Berne Convention. The same approach was adopted for databases. Other information industry issues—artificial intelligence and computer generated works—were seen as premature for express treatment in the Protocol.

III. ACT II: THE NEW INSTRUMENT

The WIPO proposed another major issue for consideration in the Protocol—provisions protecting producers of phonograms.⁶ When these discussions began in 1991, the United States had high hopes that the world community was finally prepared to accept the notion of introducing sound recordings into the Berne Convention.

For the first time, a number of influential states seemed willing to consider bringing record producers and performers under the Berne umbrella. This posed interesting possibilities, since performers and record producers under our law are joint authors of sound recordings. The sole authorship of the record production company is often a consequence of the work made for hire rules of the U.S.

6. Protocol Questions 1st sess. I, *supra* note 4, ¶¶ 56-70, at 20-23.

Copyright Act,⁷ but for Berne purposes it was thought possible to bring the performer and the producer into the picture, contingent upon an acceptable agreement on ownership and transfer rules. It was not to be.

Informal discussions with a group on industrialized countries that came to be known as “the Stockholm Group” rapidly revealed strong resistance to protection of producers and performers in any Berne framework. More fundamentally, a difference over the purpose of a Protocol to the Berne Convention emerged between the United States and several key delegations.

To the United States, the Protocol was not only an instrument that would advance the norms of the Berne Convention. It would also act as a “bridge” convention between countries that favor neighboring rights protection for sound recordings, and those that favor copyright. In my mind, the Protocol as a bridge was an important concept, but very hard to draft. I was thinking of an agreement that had a solid copyright core, dealing with “literary and artistic works,” and a discrete chapter on protection of record producers and performers. It would provide a core of minimum rights and provide that states that protected sound recordings under Berne would be entitled to national treatment in Berne states protecting phonogram producers and performers under the Rome Convention.⁸ With the Protocol bridging the chasm, we could get national treatment for our sound recordings in the neighboring rights countries. We wanted to reconcile differences between how Europe protects record producers and performers and how we protect authors of sound recordings—in short, a bridge between the principles of authorship, subject matter, and ownership that the United States brings to Berne and others have brought to the Rome Convention. It went down in flames, although I console myself with thoughts of the phoenix. The idea of a “New Instrument” was built on the ruins of the Protocol bridge.

7. 17 U.S.C. § 201(b) (1988).

8. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, Rome, 496 U.N.T.S. 48 [hereinafter Rome Convention].

IV. ACT III: THE WIPO MEETING IN JUNE

In June and July of this year, the Committee of Experts on a Possible Protocol to the Berne Convention will meet for the third time. The experts will debate the two documents. They will discuss all the issues that have so far been raised in connection with the possible contents of a Protocol to Berne, and they will examine the detailed proposals for the contents of a New Instrument to protect performers and phonogram producers. Fortunately, the second document is accompanied by what the Governing Bodies had requested of the Secretariat: a *tour d'horizon* of the present situation of record producers and performers.

Let me briefly describe these documents and comment on issues that should receive concerted attention at the June meeting.

On the Protocol to Berne, a two part document⁹ recapitulates the earlier discussions of the Committee on seven possible subjects for a Protocol: subject matter protection of computer programs¹⁰ and databases;¹¹ rental rights;¹² non-voluntary licensing for the sound recording of musical works;¹³ non-voluntary licensing of primary broadcasts and satellite communications;¹⁴ duration of protection for photographs;¹⁵ and communication to the public by satellite broadcasting.¹⁶

Three new items for possible inclusion in the Protocol are discussed in the third part of the document prepared for the June meeting: distribution rights,¹⁷ enforcement,¹⁸ and national treatment.¹⁹

9. See Protocol Questions 3d sess. I, *supra* note 4; Protocol Questions 3d sess. II, *supra*.

10. Protocol Questions 3d sess. II, *supra* note 4, ¶¶ M19-R88, at 3-11.

11. *Id.* ¶¶ M40-R95, at 12-14.

12. *Id.* ¶¶ M118-R107, at 15-19.

13. *Id.* ¶¶ M104-R86, at 20-22.

14. *Id.* ¶¶ M144-R135, at 23-25.

15. *Id.* ¶¶ M159-R160, at 26-28.

16. *Id.* ¶¶ M136-R128, at 29-32.

17. Protocol Questions 3d sess. III, *supra* note 4, ¶¶ 4-49, at 3-13.

18. *Id.* ¶¶ 50-79, at 14-24.

19. *Id.* ¶¶ 80-142, at 25-36.

A. Distribution Rights

Distribution rights encompass the power of copyright owners to control some or all of the uses to which copies of protected works may be put by the owners or possessors of such copies. As such, it includes many of the most controversial problems in not only the TRIPS and North American Free Trade Agreement ("NAFTA") negotiations, but at the 1967 Stockholm Conference as well.

This is an area where the Berne Convention is largely silent. There is no express right of first public distribution; no minimum rights with respect to rental, importation, the so-called *droit de destination*, or exhaustion of distribution rights. The WIPO proposes that the Protocol first affirm that authors now enjoy the exclusive rights to control first distribution and importation for public distribution in Berne States as an incident of the Berne Convention's guarantees of the reproduction right.²⁰ WIPO then would begin with a rule of exhaustion of distribution rights with respect to a particular copy of a work following the first sale of that copy, similar to U.S. law.²¹ Exceptions to the exhaustion rule are proposed for sheet music, computer programs, audiovisual works, and works embodied in recordings and any work stored in a digital format.²² The proposal attempts to duplicate the TRIPS grandfathering provision for the Japanese record rental system (that mixes rights of control and remuneration).

I see these proposals as controversial. We will probably have the most important immediate debate over the assertion that the right to control parallel imports is subsumed in the Berne Convention's right of production.²³ For countries that have come close to declarations of war over parallel imports, this assertion may be the worst of all worlds.

The remainder of the distribution right recommendations²⁴ will also spark familiar debate over video rental rights (i.e., whether we should perpetuate the option to limit exclusive rental rights to a

20. *Id.* ¶ 49(a), at 11.

21. *Id.* ¶ 49(b)(ii), at 12.

22. *Id.* ¶ 49(b)(iii), at 12.

23. *Id.* ¶ 49(b)(vi)-(vii), at 13.

24. *Id.* ¶ 49(b)(iv)-(v), at 12-13.

remuneration) and over express rental rights in sheet music—an important issue that has so far been ignored in favor of video and audio recordings.

Quietly, in the dark of the moon, the proposal for rental rights in any work stored in an electronic format has crept in.²⁵ Modestly phrased, it is still a startling suggestion that I can only hope produces an interesting and informed discussion.

B. Enforcement

The provisions respecting enforcement of rights are in two parts: first, the proposals of the WIPO (gleaned from an earlier meeting on sound recording protection and anti-piracy laws); and, second, the enforcement sections of the TRIPS text. As will be known to any reader of the WIPO memoranda, the United States and a few other countries proposed, with emphasis, that the starting point for discussion at the June meeting should be the GATT TRIPS enforcement text—pure, simple, and unadulterated.²⁶

C. National Treatment

Finally, the provisions of the WIPO memorandum on national treatment²⁷ are of particular interest and importance. They reopen questions initially posed in 1977 by Elisabeth Steup, concerning problems for the proper application of the rule of national treatment to private copying levies, cable royalties, and other new rights of authors. The WIPO memorandum promises, in my view, a long overdue discussion of what is a right under the Berne Convention, or more narrowly what kinds of rights of, and benefits to, authors are subject to the Berne Convention's rule of national treatment? And what rightsholders are entitled to national treatment under Berne?

The WIPO has raised important questions about the relationship of new neighboring rights benefits and beneficiaries upon the Berne-based rights of authors and their successors in interest. In this broader but entirely appropriate sense, national treatment impli-

25. *Id.* ¶ 49(b)(iii), at 12.

26. *Id.* ¶ 62, at 16.

27. *Id.* ¶¶ 80-142, at 25-36.

cates denials of such treatment in connection with, for example, certain private copying levies. It also implies inequities in the application of the rule of national treatment in connection with contract interpretation.

I see the provisions proposed for the New Instrument of Protection of Performers and Producers of Phonograms²⁸ as a potential back-alley cat fight. In the long view, the WIPO has proposed a much closer identity between the rights of producers of phonograms and performers and those enjoyed by authors. Much of the program for the Protocol is quite literally lifted into the New Instrument. This is most obvious with distribution rights, standards for national exceptions to protection, along the lines of Berne Article 9(2); moral rights for performers; and adaptation rights in respect of phonograms. There is also a stronger identity of rights between phonogram producers and performers than one finds in present Rome-based neighboring rights systems. These are major structural changes in copyright and neighboring rights.

The proposals lack specificity in regard to the exercise and transfer of rights. Whether this subject should be included is a matter WIPO ducks, and asks the experts to decide. The experience of U.S. phonogram producers and performers in negotiating over the Audio Home Recording Act of 1992²⁹ convinced me that these groups can accept compromise solutions to the problem of how to maintain desirable freedom of contract between parties with unequal bargaining power.

On the other major subjects, the proposals break no new ground. Protection of sound recordings under the New Instrument would be formality free, endure for fifty years, and include enforcement obligations already proposed in the Protocol context.

Looking at the big questions, I see the exclusion of broadcasters from the scope of the agreement as a threshold question. Another is the general applicability of the Instrument to performers. Is this *all* performers, or only performers in certain media? The WIPO

28. New Instrument Questions, *supra* note 5.

29. Pub. L. No. 102-563, 106 Stat. 4237 (1992).

did not propose any answer to this critical question, and, while the Secretariat proposed sending the question to the Governing Bodies, it will engender very heated discussion in July.

Some of the most important rights contemplated in the WIPO document reflect the extraordinary impact of digital technology on the recorded music industry. WIPO proposes to make clear that the protection of phonogram producers extends to those who digitally remaster pre-existing recordings. Assuming standards of originality are met, protection generally for aural modifications to an aural work is potentially available under the U.S. copyright statute. But, to my knowledge, the question has not been discussed in an international, intergovernmental forum.

Performers, the WIPO proposes, should enjoy moral rights tracking Article 6^{bis} of the Berne Convention. This will be an important issue at the meetings, and I am curious whether a discussion outside the copyright context will permit clear-headed consideration of the contractual exercise of moral rights.

The New Instrument would contain newly minted definitions of "communication to the public"³⁰ and "public performance,"³¹ largely incorporating United States law and the TRIPS text. These may cast useful light on how we might materially improve the TRIPS and NAFTA texts dealing with the definition of "public."

Finally, performers and producers would enjoy express rights to *authorize* the doing of restricted acts.³² That is a new word for performers' rights, since the Rome Convention now speaks only of the performers' "possibility of preventing" specified acts.³³ The Rome language is purposeful; it was intended to give states wide discretion on the legal regime they would adopt to satisfy the obligations of the Convention respecting performers. The new language implies an affirmative property right. It remains to be seen whether the costs and benefits of this change are real or semantic.

I cannot resist another observation on the Protocol. Since 1908,

30. New Instrument Questions, *supra* note 5, ¶ 28(i), at 10.

31. *Id.* ¶ 28(j), at 11.

32. *Id.* ¶ 35, at 11, ¶ 56, at 18.

33. Rome Convention, *supra* note 8, art. 15.

the Berne Convention has allowed the compulsory licensing of the right to reproduce a musical work in a sound recording. That right has been mirrored in U.S. copyright law since 1909.³⁴ Much of the world appears to have decided that it no longer needs this compulsory license to protect against a possible abuse of monopoly—all, that is, except the United States. The U.S. recording industry, which was fairly enthusiastic about the possibilities of the New Instrument improving protection for their works, would walk away from the Protocol if it jeopardized the compulsory license.

I recognize the problems of the recording industry executives in this area. I even sympathize with them. But I firmly believe that if recent and remote history tells us anything about negotiations, it is that you cannot always take without giving something in return. We are too big and too powerful in world copyright trade—too inviting a target for the envy and protectionism of others—to continue playing the game of “Let’s change *your* law. Our law is just fine.”

V. THE EPILOGUE

I wish to conclude this paper with some personal observations about the Protocol and the New Instrument. Influential leaders in influential industries have said recently that the Protocol/New Instrument process is either irrelevant to or destructive of important interests in their industry. The WIPO program has triggered a great deal of tension in the American software and entertainment industries, particularly in the audiovisual area. Labor relations is always a difficult subject, and the implications of a new agreement touching on performers’ rights could entail a tough negotiation that many in the United States producer community would prefer to avoid. Much of what the WIPO proposes in its working documents for the June meetings is so frankly Eurocentric that it will need serious reworking if it can ever qualify as a credible international standard.

I also share some of the doubts of many of my colleagues in

34. 17 U.S.C. § 115 (1988).

the private sector about whether the WIPO program can resolve the hard questions that have hamstrung us for so many years—authorship, conflicts, free assignability and divisibility of copyright, even parallel importation rights. What is now on the table will not do the job, and I foresee difficult negotiations ahead.

We have failed to resolve these issues before and may fail again. Maybe our best hope really was the trade negotiations, where countries can win trade concessions in exchange for a concession on, for example, national treatment for producers of sound recordings. An altruistic appeal for simple justice prompts only a disdainful snicker from our European trading partners. The WIPO negotiations may not offer up enough in the way of juicy morsels to encourage broad compromise. The Europeans seem convinced that they have nothing to gain, and money to lose, by reaching agreement with the United States in the WIPO.

What can resolve this impasse? It will take more than the forceful personality of the Director-General. It may take some hard swallows and sacrifice on the part of some of the major United States industries. If we got our own house in order, legislatively and otherwise, we could win this war. For instance, if we finally grant a performance royalty to sound recordings, we could qualify for our share of the royalty now denied us in Germany, and that fact could bear heavily on the German position in the negotiations.

But until we amend our laws, I urge my colleagues to put aside their fears and support this process. The WIPO is an excellent international forum in which to attempt resolution of global problems. There is a basic, underlying agreement between performers and producers on the necessity of national treatment with appropriate contract rights understandings. There are increasing royalty pools in new media that U.S. rightsholders—authors, producers, and performers—cannot now get their fair shares of. Even if these groups disagree on what is a fair share among each other—they know how important it is to them as a whole, as a creative community, to get the foreign earnings into their pockets, i.e., into the American system of production and distribution. Surely, with so much to be gained, an effort at compromise seems worthwhile.

There is an even larger reason why we should support the

WIPO effort and be a vigorous, positive, and accommodating negotiating partner to the other members of the Berne Union. A few weeks ago, Bill Hughes, Chairman of the U.S. House of Representatives Subcommittee on Intellectual Property and the Administration of Justice, held a hearing on performance rights in sound recordings. He highlighted the position of the performers. During the hearing, the Chairman underscored the importance of engaging Congress in the process of international copyright standard setting at the outset and not as a take-it-or-leave-it *fait accompli* sent to Congress on a fast track.

His sentiment is right on target. Congress has a right to be concerned when treaty negotiations create legislative obligations, or when they foreclose policy or political options. But the subtext of Chairman Hughes' statement seemed different. He accepted, without complaint or anxiety, the notion that international and domestic issues are now materially intertwined. And he evidenced a willingness to examine the need for changes to United States law where it promotes balanced global protection. Chairman Hughes did not sign onto anyone's agenda, but I believe he has issued an invitation for a partnership between Congress and the Executive, between foreign and domestic rightsholders, to examine the possibilities of bringing the United States and the emerging copyright regimes of Europe into a pragmatic harmony that will sustain a global system based on national treatment.

Anyone who heard the cannon fire and smelled the black powder during the TRIPS and NAFTA battles knows full well how hard it is to negotiate a strong treaty when the United States declares at the outset that its own laws are off-limits. This problem transcended moral rights. The curious NAFTA language on rental rights and the exceptions clauses, as well as the norms on performers' rights and on public performance rights in sound recordings, show how fair solutions are distorted by the perceived impossibility of amending United States law.

We are in the midst of a rapid evolution in international copyright. It reflects the increased importance of intellectual property in world trade, national identity, the social and economic well-being of nations. What could not be secured in the WIPO in the

1970s set the agenda for the GATT in the eighties. What could not be secured in the GATT in the eighties fills the agenda of regional groups such as the European Community and the NAFTA in the nineties. And what is not or cannot be settled there is the most ambitious and important part of the agenda for the WIPO in the years ahead.

We are now in the middle of a great transition in copyright. We are at the cusp of change, and technology drives us forward. In this hemisphere, and in Europe, national markets are merging into regional markets.

The United States now must seek international solutions to our problems. We no longer have the luxury of designing quirky, eccentric solutions for the United States market that disregard the outside world. More and more frequently, legislative changes in the United States will be driven not by a consensus reached among parochial United States interests. As large as problems such as moral rights and the compulsory license for musical works in sound recordings may seem, they are, in the global perspective, tribal conflicts of an almost embarrassing localism.

More and more, Congress and our policy makers will be compelled to make decisions based on overall national interest, with an eye on the international balance of trade, and in the expectation that strong United States law could maximize United States revenues in foreign markets. Even where the impetus to legislate is purely local, Congress will fashion a solution that does no damage to our international legal posture, one that is compatible with our other international policy initiatives.

If my reading of Chairman Hughes' attitude is correct, the Berne Protocol and New Instrument process may prove a powerful armature for resolving many of the current disruptive international disharmonies in copyright, disharmonies that continue despite United States adherence to the Berne Convention, disharmonies that hurt authors everywhere, disharmonies that poison the climate of international trade.