

1997

The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights

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Recommended Citation

Susan A. Mort, *The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 Fordham Intell. Prop. Media & Ent. L.J. 173 (1997).

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Cover Page Footnote

The author wishes to thank Don Wallace, Jr., Terence P. Stewart, and Donald R. Dinan for their sage advice; Myles Getlan and Won-Kyong Kim for their helpful comments; Daniel B. Pickard for his support; and her family for everything.

The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights

Susan A. Mort*

Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

—WIPO Copyright Treaty¹

[A]nd to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.

—TRIPs Agreement²

The Internet is based on open standards

—James Barksdale, Netscape³

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1. World Intellectual Property Organization Copyright Treaty, art. 14(1), *adopted by Diplomatic Conference at Geneva, Dec. 20, 1996*, 36 I.L.M. 65 (1997) [hereinafter WIPO Copyright Treaty] (outlining provisions for protection of literary and artistic works in light of new technology).

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, pmbl., Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

3. James Barksdale, president and CEO of Netscape, *quoted in* Joshua Cooper Ramo, *Winner Take All*, TIME, Sept. 16, 1996, at 63.

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INTRODUCTION

International intellectual property law is racing to catch up with technology on the Internet. The goal: to make the Internet a reliable conduit for global commerce—a conduit with the potential to handle international trade of staggering proportions.

Throughout the twentieth century, numerous technological advances have created unprecedented opportunities for economic prosperity. A necessary result of this progress has been the burden of adapting legal systems to maintain firm standards while fostering financial growth. One clear example of this phenomenon involves the formation of new intellectual property rules aimed at the transmission of protected materials over the Internet.

In December 1996, the World Intellectual Property Organization (“WIPO”)⁴ convened more than 160 delegations in order to conclude new agreements covering the protection of copyright and neighboring rights in digital environments.⁵ The resulting two treaties⁶ contain broad provisions designed to apply to a variety of situations involving information technologies, including digital recordings, satellite broadcasts, and Internet transmissions.⁷ The importance of these agreements derives not only from their intellectual property principles, but also from their effect upon international trade.

Commerce over the Internet has the potential to exceed billions

4. Convention Establishing the World Intellectual Property Organization (“WIPO”), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 [hereinafter WIPO Treaty]. WIPO is a specialized United Nations agency established in 1970 with the goal of “promoting respect for, and the protection of, intellectual property throughout the world.” PAUL MARETT, MARETT: INTELLECTUAL PROPERTY LAW 230 (1996).

5. See WIPO Press Release No. 105 (visited Dec. 28, 1997) <<http://www.wipo.org/eng/diplconf/distrib/press105.htm>>.

6. WIPO Copyright Treaty, *supra* note 1; World Intellectual Property Organization Performances and Phonograms Treaty, *adopted by* Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter Phonogram Treaty] (detailing protection of performers, producers of phonograms, and broadcasting organizations in light of technological advancements).

7. See WIPO Press Release No. 106 (visited Dec. 28, 1997) <<http://www.wipo.org/eng/diplconf/distrib/press106.htm>>.

of dollars by the turn of the century.⁸ This growth will, to a large degree, depend upon the reliability of legal norms developed to control the Internet's content. For example, the participation of intellectual property holders in an electronic marketplace will be predicated upon whether their interests are sufficiently secure from piracy. In this way, these new Internet Treaties ("Internet Treaties")⁹ can play a significant role in developing the future shape of international trade.¹⁰

Apart from the substantive provisions of these Internet Treaties, the actual negotiations provide a useful context for examining the institutional relationship between the World Trade Organization ("WTO")¹¹ and WIPO. At the conclusion of the Uruguay Round,¹² the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement")¹³ established a symbiotic arrangement, whereby the WTO incorporated by reference certain international conventions administered by WIPO and made them subject to the WTO's dispute settlement procedures.¹⁴ The goal of

8. See Gary G. Yerkey, *U.S. Will Urge Other Countries to Take "Hands Off" Approach to Trade Over Internet*, 14 Int'l Trade Rep. (BNA) No. 4, at 111 (Jan. 22, 1997).

9. The phrase "Internet Treaties" is not an entirely accurate description of the two WIPO treaties concluded in December 1996. These documents apply to a very broad scope of digital technologies, many, but not all, of which bear upon the Internet. Because the agreements both address the legal gaps engendered by the Internet and recognize its burgeoning role in international trade, the author finds it appropriate to employ "Internet Treaties" as a shorthand.

10. See WIPO Copyright Treaty, *supra* note 1, pmbl. (discussing the need for adequate solutions to questions raised by new technological developments).

11. The World Trade Organization ("WTO") was created as part of the General Agreement on Tariffs and Trade ("GATT") revision signed April 15, 1994. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("Uruguay Round"), Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. The WTO administers a system to settle disputes and institute sanctions against noncompliant countries. See MARETT, *supra* note 4, at 234-37.

12. The Uruguay Round consisted of a series of negotiations between 1986 and 1993, which resulted in the revision of the GATT. See MARETT, *supra* note 4, at 235. The revision was signed by 125 countries on April 15, 1994. See Final Act, *supra* note 11.

13. As part of the 1994 revision of the GATT, the TRIPs Agreement established the WTO and created an enforcement mechanism to insure that international intellectual property treaties are upheld. TRIPs Agreement, *supra* note 2; see MARETT, *supra* note 4, at 236-39.

14. TRIPs Agreement, *supra* note 2, pmbl.

this endeavor was to strengthen international protection of intellectual property by providing it with an effective and forceful dispute resolution system.¹⁵

For its part, WIPO retained its leadership role in creating substantive intellectual property law. The conclusion of the Internet Treaties presents the WTO and WIPO with a challenge to this newly-formed cooperation. The ability of these institutions to successfully adapt intellectual property law to the changing technological times will prove crucial, not only to the future of the TRIPs Agreement, but also to the development of electronic and digital commerce.

This Article identifies the Internet Treaties as a crucial turning point in the evolution of intellectual property protection in the electronic marketplace. Part I provides an historical overview of international intellectual property law, beginning with the first international conventions during the late nineteenth century, continuing through the creation of WIPO in 1967, and concluding with the integration of intellectual property protection into the WTO through the TRIPs Agreement. Part II outlines the issues and identifies the players involved in the negotiation of the new Internet Treaties in Geneva during December 1996. Part III considers the problems and promise associated with the Internet Treaties, concentrating on (1) the pitfalls of drafting the United States implementing legislation, (2) the basic structure and provisions of the Internet Treaties, and (3) their potential place in the bifurcated WTO-WIPO intellectual property system. Despite the Internet Treaties' potentially debilitating problems, this Article concludes that the treaties mark an important first step on the road to securing intellectual property protection over the information superhighway.

I. WTO AND WIPO

Intellectual property conventions, which were originally enacted independently to establish international protection standards, have been consolidated under the auspices of WIPO. In turn, the TRIPs Agreement has formed a WTO-WIPO marriage by integrat-

15. See MARETT, *supra* note 4, at 236-39.

ing much of WIPO's substantive law into the WTO's trade regime. The TRIPs Agreement also contains other major innovations, including its enforcement provisions and its use of the WTO's Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding").¹⁶

A. *WIPO and its Conventions*

Since the late nineteenth century, international conventions have governed the protection of intellectual property passing between states.¹⁷ These conventions provide only the minimum standards of protection guaranteed in the international arena. Individual countries can, and often do, provide for higher levels of protection within their borders. The contracting parties simply agree to follow the principle of national treatment, thereby providing the same level of protection for nationals of other member states as they do for their own citizens.¹⁸ The logic behind this approach lies in the fact that wide disparities existed among the various national standards that predated the conventions. Thus, these treaties represent the most basic level of protection which all members could agree to respect.

Until WIPO's creation in 1967, these conventions operated independently and without any institutional oversight. A necessary consequence of this independence was that, in order to enforce their convention-based rights, intellectual property holders had to seek redress in the national court system of a contracting party. Despite these difficulties, membership in international conventions

16. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994) [hereinafter Dispute Settlement Understanding].

17. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

18. The principle of national treatment requires that parties to an agreement extend the same protection to foreign nationals, from member nations, as they do domestic nationals. See INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 16 (Wilhelm Nordemann et al. eds. & Gerald Meyer trans., 1990).

grew steadily throughout the twentieth century, in large part due to the reciprocal benefits gained through participation.¹⁹

Today, nineteen such treaties exist,²⁰ ranging in subject matter from industrial property to satellite transmissions.²¹ For example, the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”)²² was completed in 1886 to set minimum standards of copyright protection between its members.²³ Presently, the Berne Convention has 127 members, approximately thirty of which have joined since 1992.²⁴ The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“Rome Convention”)²⁵ was concluded in 1961 and has grown to include fifty-five parties.²⁶ The other major intellectual property unions, including the Paris Convention for the Protection of Industrial Property (“Paris Convention”)²⁷ and the Madrid Agreement Concerning the International Registration of Trademarks (“Madrid Agreement”),²⁸ also have endured for more than a century.

The United Nations created WIPO in 1967 as a specialized

19. See *Contracting Parties of Treaties Administered by WIPO* (visited Dec. 28, 1997) <<http://www.wipo.org/eng/ratific>> (listing parties and dates of ratification).

20. See *Texts of Treaties Administered by WIPO* (visited Dec. 28, 1997) <<http://www.wipo.org/eng/iplx/index.htm>> (listing treaties).

21. See GEN. ACCT. OFF., INTERNATIONAL TRADE: STRENGTHENING WORLDWIDE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 23 (1987) [hereinafter GAO REPORT].

22. Berne Convention, *supra* note 17.

23. See *id.*

24. A current listing of Berne Convention members can be found at WIPO’s Internet website. See *Contracting Parties of Treaties Administered by WIPO, Berne Convention for the Protection of Literary and Artistic Works* (visited Dec. 29, 1997) <<http://www.wipo.org/eng/ratific/e-berne.htm>>.

25. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, *done at Rome*, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

26. A current listing of signatories to the Rome Convention can be found at WIPO’s Internet website. See *Contracting Parties of Treaties Administered by WIPO, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (visited Dec. 29, 1997) <<http://www.wipo.org/eng/ratific/k-rome.htm>>.

27. Paris Convention, *supra* note 17.

28. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, last revised at Stockholm, July 14, 1967, 828 U.N.T.S. 389 [hereinafter Madrid Agreement].

agency designed to promote the protection of intellectual property worldwide and to administer the major international conventions under the leadership of the United Nations Director General and Secretariat.²⁹ The Secretariat not only performs administrative functions, but also provides advisory and educational services for developing countries.³⁰ All 166 members of WIPO send delegates to the organization's General Assembly in Geneva for the purpose of conducting conferences, negotiating revisions to the conventions, and providing a multilateral forum for discussion.³¹ Nevertheless, for more than two decades, while serving as the sole international authority charged with oversight of these conventions, WIPO has failed to correct the key deficiency present in the conventions: the inability to enforce rights and resolve conflicts through formal dispute resolution procedures.³²

B. *Integration Into a Trade Regime*

In 1986, the United States and other countries began promoting the integration of intellectual property protection into the General Agreement on Tariffs and Trade ("GATT")³³ as a part of the Uruguay Round negotiations.³⁴ The United States was tired of the weak levels of protection under the WIPO conventions and maintained that stronger enforcement and dispute settlement procedures were necessary in order to eliminate the piracy of intellectual property.³⁵ Developing countries had continually hampered prior

29. See Monique Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 122 (1994).

30. See GAO REPORT, *supra* note 21, at 24.

31. As of December 10, 1997, 166 countries had joined the Convention Establishing the World Intellectual Property Organization. See *Contracting Parties of Treaties Administered by WIPO* (visited Dec. 29, 1997) <<http://www.wipo.org/eng/ratific/c-wipo.htm>>.

32. See Cordray, *supra* note 29, at 131-33.

33. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

34. See Hanns Ullrich, *GATT: Industrial Property Protection, Fair Trade and Development*, in *GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY* 127 (Friedrich-Karl Beier & Gerhard Schrickler eds. 1989); see also GAO REPORT, *supra* note 21.

35. See GAO REPORT, *supra* note 21; see also Myles Getlan, Comment, *TRIPs and the Future of Section 301: A Comparative Study in Trade Dispute Resolution*, 34 COLUM. J. TRANSNAT'L L. 173, 175-77 (1995).

efforts at raising standards, while jurisdictional difficulties prevented the reference of disputes to the International Court of Justice, as provided for under the Berne and Paris Conventions.³⁶ Commentators asserted that the “WIPO dispute settlement [was] ‘effectively worthless.’”³⁷

The United States and others hoped to change that trend by creating a trade-based sanction regime for noncompliance.³⁸ The United States, the European Community, and Switzerland each supported the establishment of a TRIPs Committee and an Expert Group of advisors, partially composed of WIPO representatives operating under the dispute settlement procedures of the General Assembly.³⁹ In contrast, the developing countries favored a more fluid and negotiative approach relying heavily on consultation.⁴⁰ At the end of the day, the more legalistic stance prevailed, making the Dispute Settlement Understanding applicable to complaints under the TRIPs Agreement.⁴¹

That initiative, however, did not intend to eliminate WIPO’s authority and expertise in matters relating to intellectual property standards.⁴² The United States considered that “while GATT may be competent to consider the trade aspects of piracy, WIPO is a more appropriate forum for debate on any intellectual property issue.”⁴³ Thus, from the Western perspective, the integration of intellectual property protection into a trade-based sanction regime was meant to create a symbiotic institutional relationship between the WTO and WIPO.

Although that integration was supported by many of the developed countries, detractors pointed out the problems and difficulties

36. See GAO REPORT, *supra* note 21, at 25; Berne Convention, *supra* note 17, art. 33; Paris Convention, *supra* note 17, art. 28.

37. Cordray, *supra* note 29, at 131 (quoting Frank Emmert, *Intellectual Property in the Uruguay Round—Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT’L L. 1317, 1343 (1990)).

38. See GAO REPORT, *supra* note 21, at 35-37; Getlan, *supra* note 35, at 175-78.

39. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2310-13 (Terence P. Stewart ed., Kluwer 1993) [hereinafter NEGOTIATING HISTORY].

40. See *id.*

41. See *id.*

42. See *id.* at 2247-48; GAO REPORT, *supra* note 21.

43. GAO REPORT, *supra* note 21, at 37.

involved. Some commentators argued that the TRIPs Agreement negotiations would suffer from a lack of input from intellectual property specialists like those at WIPO's Secretariat.⁴⁴ The inclusion of specialists amongst the TRIPs Agreement negotiating teams appeared to allay these fears. Even so, developing countries delayed the negotiations by debating whether WIPO could better serve their interests as a dispute settlement forum.⁴⁵

The developing world had already established a strong voice within WIPO, using it to argue against higher intellectual property standards. This voice would have significantly strengthened the position of developing countries had WIPO followed through on its initiative to create their own GATT-independent dispute settlement procedures.⁴⁶ But the United States wielded its section 301⁴⁷ sword, bringing pressure to bear upon the developing world and ensuring their belated acceptance of the WTO's Dispute Settlement Understanding.⁴⁸ Other critics cautioned against the possibility of duplicative efforts and overlap between the work of the new TRIPs Council and WIPO.⁴⁹

In response to these concerns, the two bodies concluded a cooperative agreement in 1995, in an attempt to coordinate their efforts.⁵⁰ The TRIPs Agreement already requires WIPO and the

44. See Ulrich Joos & Rainer Moufang, *Report on the Second Ringberg-Symposium, in GATT OR WIPO? NEW WAYS IN INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 1*, 32 (Friedrich Karl Beier & Gerhard Schricker eds., 1989).

45. See *Trade-Related Intellectual Property Talks Bog Down Again Over GATT-WIPO Forum Debate*, 7 Int'l Trade Rep. (BNA) No. 11, at 373 (Mar. 14, 1990).

46. See Michael L. Doane, *TRIPs and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465, 489-90 (1994). See Gopal Das, *Intellectual Property Dispute, GATT, WIPO: Of Playing By the Game Rules and Rules of the Game*, 35 IDEA 149, 174-78 (1994), for a discussion of WIPO's proposed dispute settlement system.

47. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (Jan. 3, 1975) (codified as amended at 19 U.S.C. § 2411 (1988)).

48. See Getlan, *supra* note 35, at 204.

49. See Joos & Moufang, *supra* note 44, at 32-33.

50. See World Intellectual Property Organization-World Trade Organization: Agreement between the WIPO and the WTO, at Geneva, Dec. 22, 1995, 35 I.L.M. 754 (entered into force Jan. 1, 1996) [hereinafter WIPO/WTO Agreement]; see also Adrian Otten & Hannu Wager, *Nature and Scope of the Agreement: Compliance with TRIPs: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 410-11 (1996); WTO Group to Propose Accord with WIPO on Coordinating Intellectual Property, 12 Int'l Trade Rep.

WTO to consult regarding the creation of a central registrar for transparency rules and regulations under article 63(2).⁵¹ The WIPO/WTO Agreement extends this “mutually supportive relationship” to areas of legal-technical assistance and cooperation while providing for open accessibility to each other’s legal resources.⁵² A final check on possible overlap comes from the fact that the TRIPs Agreement covers only four of the nineteen conventions administered by WIPO.⁵³ Despite all of the criticism, the TRIPs Agreement came into force along with the rest of the Uruguay Round on January 1, 1995.⁵⁴

C. *The TRIPs Agreement and the WTO*

In one sweeping move, the TRIPs Agreement took many of the substantive provisions of the main WIPO conventions, made them applicable to WTO members, and created new measures covering enforcement and dispute settlement. The TRIPs Agreement itself established only a handful of new international rights, such as a right to trade secrets.⁵⁵ By incorporating the substantive rights of the Berne, Rome, and Paris Conventions,⁵⁶ along with the Treaty on Intellectual Property in Respect of Integrated Circuits,⁵⁷ the TRIPs Agreement maintained a minimum standards level of protection.⁵⁸

The TRIPs Agreement’s minimum standards formula, a direct

(BNA) No. 38, at 1598 (Sept. 27, 1995).

51. TRIPs Agreement, *supra* note 2.

52. WIPO/WTO Agreement, *supra* note 50, pmb., arts. 2, 4.

53. WIPO administers the Paris Convention, the Berne Convention, the Madrid Agreement, and the Rome Convention. *See* Cordray, *supra* note 29, at 122-24.

54. *See* TRIPs Agreement, *supra* note 2.

55. *See* Otten & Wager, *supra* note 50 (describing the differences in protection between the WIPO treaties and the TRIPs Agreement); J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT’L LAW. 345 (1995) [hereinafter Reichman I]; John G. Byrne, Comment, *Changes on the Frontier of Intellectual Property Law: An Overview of the Changes Required by GATT*, 34 DUQ. L. REV. 121 (1995).

56. Berne Convention, *supra* note 17; Rome Convention, *supra* note 25; Paris Convention, *supra* note 17.

57. Treaty on Intellectual Property in Respect of Integrated Circuits, *opened for signature at* Washington, D.C., May 26, 1989, 28 I.L.M. 1477 (1989) [hereinafter *Integrated Circuit Treaty*].

58. *See* Otten & Wager, *supra* note 50, at 394-97.

descendant of that used previously in international intellectual property conventions, contrasts sharply with those of other WTO Agreements, such as the Agreement on Technical Barriers to Trade (“Technical Barriers Agreement”)⁵⁹ and the Agreement on Sanitary and Phytosanitary Measures (“Phytosanitary Measures Agreement”).⁶⁰ Although these other agreements attempt to harmonize national measures through general guidelines, the TRIPs Agreement actually establishes a group of specific rights, which serve as a baseline beneath which no member may fall.⁶¹ For example, the TRIPs Agreement requires all WTO members to abide by articles 1 through 21 of the Berne Convention, whether or not a particular member actually belongs to the Berne Convention.⁶² Due in part to these specific statutory requirements, membership of the WIPO conventions has expanded. Membership in the Berne Convention, for example, has “virtually doubled” since 1986.⁶³

Integration into the WTO, however, involved more than just the cannibalization of the WIPO conventions. In addition to expanding the effective application of the WIPO treaties, the TRIPs Agreement reinforced the crucial principles of national treatment and most favored nation, which aim to eliminate discrimination on both the national and international levels.⁶⁴

Undoubtedly, the most important and controversial aspects of intellectual property’s integration into the WTO were enforcement and dispute settlement. Under the TRIPs Agreement, “members

59. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1381 (listing agreement reproduced at 18 I.L.M. 1079) [hereinafter Technical Barriers Agreement].

60. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (visited Sept. 11, 1997) <<http://www.wto.org/wto/legal/15-sps.wp5>> [hereinafter Phytosanitary Measures Agreement].

61. TRIPs Agreement, *supra* note 2.

62. *See id.* art. 9.

63. Eric H. Smith, *Impact of the TRIPs Agreement on Specific Disciplines: Copyrightable Literary and Artistic Works: Worldwide Copyright Protection Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT’L L. 559, 561 (1996). Other possible reasons for this expansion include the membership of several newly-independent states and the long-delayed accession of the United States.

64. *See* TRIPs Agreement, *supra* note 2, arts. 3, 4; *see also* Reichman I, *supra* note 55, at 347-51.

[must] provide domestic procedures and remedies so that right holders can enforce their rights effectively.”⁶⁵ The twin goals of enforcement include (1) facilitating fair and equitable enforcement, and (2) deterring future infringement.⁶⁶ As a corollary to these goals, the TRIPs Agreement contains transparency requirements⁶⁷ which obligate members to inform the TRIPs Council of any laws or regulations directly impacting on enforcement.⁶⁸ Because international intellectual property law had previously said little about enforcement standards, these additions were considered necessary to guarantee the full enjoyment of the TRIPs Agreement’s substantive rights.

In addition, the TRIPs Agreement incorporates by reference the Dispute Settlement Understanding and its progressive approach to problem solving.⁶⁹ Noncompliance with the provisions of the TRIPs Agreement constitutes a nullification and impairment of the benefits accruing to WTO members on the basis of GATT articles XXII and XXIII.⁷⁰ Together, the enforcement and dispute settlement provisions of the TRIPs Agreement gave international intellectual property conventions the strength they previously lacked.

Since the formation of the WTO, the TRIPs Agreement has been invoked in numerous disputes.⁷¹ It was only recently, how-

65. Otten & Wager, *supra* note 50, at 403; *see also* TRIPs Agreement, *supra* note 2, arts. 41-60.

66. TRIPs Agreement, *supra* note 2, arts. 41-60; Otten & Wager, *supra* note 50, at 403.

67. *See supra* text accompanying notes 50-51 (discussing the transparency requirements).

68. TRIPs Agreement, *supra* note 2, art. 63.

69. *Id.* art. 64(1).

70. TRIPs Agreement, *supra* note 2, art. 64; *see also* NEGOTIATING HISTORY, *supra* note 39, at 2310-13.

71. As of October 20, 1997, this includes one issued panel report, *see India—Patent Protection for Pharmaceutical & Agricultural Chemical Products*, WTO Doc. WT/DS50/R (Sept. 5, 1997); one active panel, *see Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS55/8 (Aug. 5, 1997) (complaints by the United States at WT/DS59); and three pending consultations, *see India—Patent Protection for Pharmaceutical & Agricultural Chemical Products*, WTO Doc. WT/DS79/3 (Nov. 27, 1997); *Ireland—Measures Affecting the Grant of Copyright and Neighbouring Rights*, WTO Doc. WT/DS82/1 (May 26, 1997); *Denmark—Measures Affecting the Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS83/1 (May 21, 1997). Three cases relying on TRIPs principles already have reached settlement. *See Overview*

ever, that the Dispute Settlement Body released its first panel report interpreting the TRIPs Agreement.⁷² The *India Patent* panel upheld a United States challenge to India's implementation of a "mailbox" filing system for pharmaceutical and agricultural patent applications.⁷³ Article 70(8) of the TRIPs Agreement requires developing nations, such as India, who provide for no product patents, to create interim filing procedures so that applications can be considered when such protection is eventually created.⁷⁴

According to the panel report, India failed to fulfill its obligations under articles 70(8) and 63, by implementing its system through an executive order, rather than through legislative amendment.⁷⁵ India also violated article 70(9) by not instituting exclusive marketing rights for applicants.⁷⁶ While the Indian government is appealing the decision formally, it simultaneously is seeking to forge a domestic political consensus, which will allow it to fulfill its WTO obligations.⁷⁷ This indicates a willingness on the part of India to work within the framework of the Dispute Settlement Understanding and to respect its commitments under the TRIPs Agreement, a quality which has been the hallmark of success in disputes involving the other WTO disciplines.⁷⁸

of the State-of-Play of WTO Disputes (visited Jan. 2, 1998) <<http://www.wto.org/wto/dispute/bulletin.htm>>.

72. See *India—Patent Protection for Pharmaceutical & Agricultural Chemical Products*, WTO Doc. WT/DS50/R (Sept. 5, 1997).

73. See *id.*

74. See TRIPs Agreement, *supra* note 2, art. 70(8). Developing nations must phase-in patent protection by January 1, 2005. See *id.* art. 66(1).

75. See Marc Selinger, *Barshefsky Hails WTO 'Precedent' in Drug Patent Dispute With India*, 14 Int'l Trade Rep. (BNA) No. 36, at 1522 (Sept. 10, 1997).

76. See *id.*

77. See N. Vasuki Rao, *India to Appeal WTO Ruling on Patent System*, J. COM., Sept. 12, 1997, at 4A.

78. See, e.g., *European Community—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R (Aug. 18, 1997) (hormones in livestock farming); *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (Jan. 29, 1996) (regulating fuel and fuel additives), WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) (Appellate Body report); *Canada—Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/R (Mar. 14, 1997) (prohibiting importation of split-run editions of United States periodicals), WTO Doc. WT/DS31/AB/R (June 30, 1997) (Appellate Body report); *European Community—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R7/HND (May 22, 1997) (distributing bananas in Europe), WTO Doc. WT/DS27/AB/R (Sept. 9, 1997) (Appellate

While it would be premature to label the *India Patent* case as a victory for the TRIPs Agreement and the WTO system, the initial outlook is promising. Ultimately, however, the successful future of international intellectual property protection depends on more than just the merger of substantive law with enforcement and dispute settlement procedures. It rests on the ability of substantive law to adapt to the rapidly changing world of technology. This is because the TRIPs Agreement “leaves notable gaps and loopholes . . . especially with respect to nontraditional objects of intellectual property protection.”⁷⁹ The question of how the WTO and WIPO will respond to this challenge may well prove the ultimate test of the TRIPs Agreement and of the symbiotic institutional arrangement it created.

II. THE INTERNET TREATIES

Major issues and players are responsible for shaping the negotiation of the Internet Treaties. Because of the potential impact of these treaties upon the burgeoning electronic marketplace, this part considers the intrinsic difficulties in applying traditional copyright principles to the Internet. The Diplomatic Conference, which resulted in the new treaties, debated these difficulties at length. Typically, the discussion diverged along two lines: (1) those supporting the extension of traditional copyright principles to digital technologies (the “copyright purists”),⁸⁰ and (2) those championing the loose application or modification of current theory (the “innovators”).⁸¹ By examining the views of these groups, along with the influence they wielded at the Diplomatic Conference, it is possible to gain a clear understanding of how the proposed texts evolved into the final drafts.

A. *The Internet and Intellectual Property Challenges*

One of the most pressing and difficult challenges for intellectual property lawyers in recent years has involved reconciling tra-

Body report).

79. Reichman I, *supra* note 55, at 347. Examples include weak industrial design protection and no *sui generis* rights for functional design.

80. *See infra* Part II.C.1.

81. *See infra* Part II.C.2.

ditional intellectual property rights with the rapidly changing technology of the information superhighway.⁸² The word "Internet" has become ubiquitous in our daily vocabulary, referring to an interlocking system of computer networks which communicate with each other by transmitting data through a series of servers.⁸³ A useful analogy is a spider web, such that "[a]t each point where the strands meet is a computer/server. Data goes down the strands, often through several intermediate servers before arriving at final destinations."⁸⁴

This web lacks any central organization and expands well beyond the conventional boundaries of territory or government regulation. The reason for this decentralization lies in the Internet's historical roots. In the 1960s, the Defense Department's Advanced Research Projects Agency began to experiment with linking the military's command computers in an effort to protect them from a Soviet attack.⁸⁵ Because of its usefulness, this "Arpanet" eventually grew to include governmental and educational organizations, thereby garnering the new moniker "Internet."⁸⁶

Today, 11 million American households access the World Wide Web, a text and graphics-based interface, and 50 million web pages exist.⁸⁷ Over \$200 million in commerce was completed over the Internet in 1995, with the growth potential for billions by the year 2000.⁸⁸ The Internet is quickly changing the way in which the world communicates, interacts, and does business.

The Internet's growing importance and expansive nature gives

82. See generally Bruce A. Lehman, *Global Intellectual Property in the Twenty-First Century*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 9 (1996) (addressing the global information infrastructure and the evolution of intellectual property laws).

83. See Ramo, *supra* note 3, at 58-59.

84. Patrick F. McGowan, *The Internet and Intellectual Property Issues*, 455 PLI/PAT. 303, 312 (1996).

85. See *id.*; see also Christine Biederman & Jamie Murphy, *Rebellion Over Who Controls the Net*, N.Y. TIMES CYBERTIMES (Nov. 23, 1996) (visited Jan. 2, 1998) <<http://www.cybertimes.com>>.

86. See Benjamin R. Kuhn, Comment, *A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow*, 10 TEMP. INT'L & COMP. L.J. 171, 180 (1996); Biederman & Murphy, *supra* note 85.

87. See Betty Ann Bowser, *NewsHour* (PBS television broadcast, Dec. 25, 1996).

88. See Yerkey, *supra* note 8.

intellectual property owners reason for concern about the dissemination of their protected property. For example, when an author of a story places text on a web page, he or she instantaneously makes it available to users of the Internet. It is difficult to determine at which point the text is sufficiently “fixed” to qualify for copyright protection.⁸⁹ Several alternatives exist: (1) when it is saved on the author’s hard drive,⁹⁰ (2) when it appears on a computer screen, (3) when it is temporarily copied on a series of intermediate servers, or (4) when a copy is printed onto paper. Moreover, it is unclear which country’s law would apply to someone who downloaded the text in another country and consequently infringed upon the author’s copyright,⁹¹ or to what extent the “fair use” exception⁹² would apply. Who exactly would carry the burden of policing infringers also is uncertain. Current international intellectual property conventions provide no ready answers to any of these questions. Truly, “[c]opyright laws are under technological siege.”⁹³

B. *Movement Toward a Conference*

In 1989, WIPO organized the Committee of Experts on a Possible Protocol to the Berne Convention “destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the

89. United States law provides, in relevant part, that “[c]opyright protection subsists, in accordance with this title, in 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.” 17 U.S.C.A. § 102(a) (West Supp. 1996) (emphasis added).

90. *See, e.g.,* MAI Sys. Corp. v. Peak Comp. Servs. Inc., 991 F.2d 511 (9th Cir. 1993) (holding that temporary copies on a computer’s RAM constitute a copy under section 101 of Copyright Act).

91. *See, e.g.,* Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc., 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996) (holding that the Italian defendant violated the injunction against distributing its product in United States because soliciting customers through the defendant’s web page constituted “deliberate and intentional contact with the United States”).

92. The fair use exception grants a privilege in others than the copyright owner to use the copyrighted material in a reasonable manner without the owner’s consent. *See* Rosemont Enters., Inc. v. Random House, Inc., 256 F. Supp. 55, 65-66 (S.D.N.Y. 1966) (applying the U.S. fair use exception).

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

extent to which that Convention applies.”⁹⁴ Doubts existed because traditional copyright principles are based upon national boundaries.⁹⁵ The Internet makes many of these principles obsolete because “anything from music to software can be duplicated and distributed at the click of a computer mouse.”⁹⁶ The Committee of Experts met in 1991 and 1992 to discuss several possible answers to these questions, including the extension of the Berne Convention to electronically transmitted works and the creation of an agreement covering the rights of sound recording producers.⁹⁷

More specialized committees met over the next four years in an attempt to establish an agenda for an eventual conference to negotiate both a Berne Convention Protocol and a treaty covering performances and phonograms. After the European Community adopted a directive to provide databases with *sui generis* protection in early 1996,⁹⁸ both the Europeans and Americans began to push an additional proposal aimed at creating a commensurate international right.⁹⁹ Following discussions on proposals made by various states, a Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (“Diplomatic Conference”) was finally scheduled for December 1996 in Geneva, Switzerland.¹⁰⁰

At the September 1996, Information Superhighway Summit in Singapore, WIPO began to circulate three proposals for discussion

94. *Basic Proposal on the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference*, at ¶ 1, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter *WIPO Basic Proposal—Copyright*].

95. See *Subafilms, Ltd. v. MGM-Pathe Communs. Co.*, 24 F.3d 1088 (9th Cir. 1994).

96. *Cyberspace Piracy is Target of Geneva Talks*, N.Y. TIMES, Dec. 3, 1996, at C10 [hereinafter *Cyberspace Piracy*].

97. See Robert A. Cinque, Note, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258, 1261 (1995); see also *WIPO Basic Proposal—Copyright*, *supra* note 103, ¶ 2.

98. See Council Directive 96/977, 1996 O.J. (L 96) 2.

99. See John B. Kennedy & Shoshana R. Dweck, *WIPO Pacts Go Digital: Proposed International Treaties Will Open Up Domestic Debate on Treatment of Electronic Works*, NAT'L L.J., Jan. 27, 1997, at C1.

100. *WIPO Basic Proposal—Copyright*, *supra* note 94, ¶ 4-11. Proposals and comments were submitted by Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, South Africa, the Sudan, the United States, and Uruguay.

at the Diplomatic Conference.¹⁰¹ The first proposal, entitled “Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works,” dealt with expanding the protection of literary and artistic works under the Berne Convention.¹⁰² The second text, “Treaty for the Protection of the Rights of Performers and Producers of Phonograms,” used the Rome Convention as a model, in an attempt to raise performers and producers of phonograms to the same level of protection as authors.¹⁰³ Finally, the “Treaty on Intellectual Property in Respect of Databases” marked the first attempt at a treaty protecting compilations of data.¹⁰⁴

C. *The Players*

Although most observers agreed on the need for some sort of international accord dealing with digital and electronic intellectual property transmission, reactions to the WIPO proposals varied greatly.¹⁰⁵ Indeed, much of the debate over this topic has become polarized among various sectors, each of which exerted its influence during the Diplomatic Conference.¹⁰⁶ A recent law review article provides an interesting analogy by which to understand this political dynamic.¹⁰⁷

Professor Hugh Hansen of Fordham University School of Law compares the different philosophies of lawyers involved in the international copyright field to those of various religious figures.¹⁰⁸ Copyright lawyers are likened to a “secular priesthood” because of their devotion to traditional intellectual property ideals, while newer, more technologically-minded attorneys receive the title of “agnostics and atheists” on the basis of their questioning attitude

101. See *WIPO Should Strengthen Copyright Standards on Internet, Conferees Say*, 13 Int'l Trade Rep. (BNA) No. 36, at 1406 (Sept. 11, 1996) [hereinafter *Conferees*].

102. See *id.*

103. See *id.*

104. See *id.*

105. See Lewis, *supra* note 93.

106. See Seth Schiesel, *Global Agreement Reached to Widen Law on Copyright*, N.Y. TIMES, Dec. 21, 1996, at A1 [hereinafter Schiesel I].

107. See Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 VAND. J. TRANSNAT'L L. 579 (1996).

108. See *id.*

toward the traditionalists.¹⁰⁹ “Missionaries” include trade-oriented persons who seek to expand copyright protection around the world, particularly through the WTO.¹¹⁰

While this paradigm provides insight into the legal ideologies competing in the international copyright community, many other economic and technological factors come into play when dealing with intellectual property and the Internet. Various interests contributed their own perspectives and agendas to the debate over the final texts of the treaties during the Diplomatic Conference.¹¹¹ Although the distinction is somewhat artificial, this Article groups these interests into two categories: “copyright purists” and “innovators.”

1. Copyright Purists

“Copyright purists” include a wide cross-section of interests, such as intellectual property practitioners, the Clinton Administration, WIPO officials, and copyright holders in the entertainment and music industries.¹¹² The purists believe “that copyright laws provide the best protection for the upcoming boom in electronic commerce and information transfer.”¹¹³ The purists’ motivation, however, comes not only from an affinity for the intellectual framework of copyright; it derives equally from the desire “to halt the growing international trend to pirate billions of dollars’ worth of intellectual property. Without stronger protections, they argue, there will be no incentive to develop new material to sate the appetite of the emerging global-information infrastructure.”¹¹⁴

Indeed, the film and recording industries found themselves aligned with President Clinton’s Administration in their support for most of WIPO’s proposals, largely because they would gain greatly from strong copyright standards involving the Internet.¹¹⁵

109. *Id.*

110. *Id.*

111. *See Schiesel I, supra* note 106.

112. *See generally id.* (identifying supporters and opponents of new treaties).

113. *Conferees, supra* note 101, at 1406 (citing U.S. Patent and Trademark Office (“PTO”) senior legal counselor Michael Keplinger).

114. Lewis, *supra* note 93.

115. *See id.*

As a part of President Clinton's digital agenda,¹¹⁶ the negotiating team in Geneva emphasized the importance of the Internet Treaties as "the cornerstone of international economic law for the information and technological age of the 21st century."¹¹⁷ This position is taken with good reason; United States copyrights account for over \$50 billion of exports each year, an amount greater than any manufacturing sector.¹¹⁸

Given the ease with which otherwise protected materials can be accessed and infringed over the Internet, without any remuneration to the copyright holder, it is understandable that in the absence of a legal regime protecting their rights, copyright holders would likely refrain from entering into an electronic marketplace.¹¹⁹ The result would be to significantly chill the development of the Internet as a forum for international trade.¹²⁰ In light of the intimate connection between the Internet, intellectual property, and the development of an electronic marketplace, President Clinton's Administration has embraced WIPO as a harbinger of economic change.¹²¹ Thus, the position of "purists," that traditional copyright intrinsically governs the transmission of protected works over the Internet, must be viewed in light of the substantial economic factors involved.

2. The Innovators

On the other side of the debate, the "innovators" include a large and diverse group of scholars, technicians, librarians, consumer groups, and corporations.¹²² They believe that traditional copyright principles can adequately protect digital and electronic

116. President William J. Clinton, *State of the Union Address*, in WASH. POST, Feb. 5, 1997, at A18.

117. Schiesel I, *supra* note 106 (quoting PTO Commissioner Bruce Lehman).

118. See Jonathan Newcomb, *Creators Have Most to Lose in Copyright Pact*, N.Y. TIMES, Dec. 23, 1996, at A14.

119. See Lewis, *supra* note 93; J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994) [hereinafter Reichman II].

120. See Schiesel I, *supra* note 106; see also Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 300 (1996).

121. See Schiesel I, *supra* note 106.

122. See generally James Neal, *Copyright & Cyberspace: A Librarian's View of the WIPO Conference*, AM. LIBR., Feb. 1997, at 34 (describing how most librarians view the WIPO Conference).

works only if they are loosely applied or modified.¹²³ For example, a member of the American Library Association's executive board recently noted that "[l]ibraries' ability to support the information needs of their users is severely threatened by those forces seeking to combat electronic piracy and to create an Internet commerce."¹²⁴ Therefore, these innovators are primarily concerned with finding a balance between fostering both the growth of the Internet and the free flow of information while respecting the interests of intellectual property holders.¹²⁵

This is particularly true for telecommunications ("telecom") companies and Internet service providers ("ISPs") who fear the heavy cost and obligation of policing for potential infringers.¹²⁶ If ISPs had to monitor transmissions passing through their servers, the additional costs would likely slow down service and raise prices, thereby retarding the Internet's growth.¹²⁷

The innovators also worry that "premature or excessive regulation might discourage the development of network architecture and the emergence of new business and cultural models."¹²⁸ In this way, the norms created at WIPO's Diplomatic Conference will govern not only the digital transmission of intellectual property, but the future face of world trade. Although care should be taken to note other developing areas of digital commerce, including electronic data interchange, the U.N. Model Law on Electronic Commerce, and trade in culture, the treaties resulting from the Diplomatic Conference are notable for the crucial role they will play in shaping the content of the Internet and the influence that the purists and innovators had in crafting it.

123. *See id.*

124. Neal, *supra* note 122.

125. *See* Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 620 (1996).

126. *See* Seth Schiesel, *Copyright Pacts are Still Facing Foes in Congress*, N.Y. TIMES, Jan. 1, 1997, at 61 [hereinafter Sciesel II].

127. *See* Fraser, *supra* note 122, at 796-97.

128. Peter Jaszi, *Essay* (visited May 16, 1997) <<http://ksgwww.harvard.edu/iip/jaszi.html>>.

D. *The Internet Treaties*

WIPO's Diplomatic Conference on Certain Copyright and Neighboring Rights Questions convened in Geneva from December 2 to 20, 1996.¹²⁹ In the end, the participants reached a consensus on treaties dealing with copyright¹³⁰ and performances and phonograms.¹³¹ The database proposal, however, met with significant opposition and was tabled for further discussion at a Spring, 1997 meeting in the Philippines.¹³² The substantial lack of acrimony between the developed and developing countries surprised commentators.¹³³ According to the United States delegation leader, Patent and Trademark Office ("PTO") Commissioner Bruce Lehman, the "enthusiasm [at the conference] was not limited to major producers of intellectual property like the United States, the European Union, India, South Africa and Japan."¹³⁴

In fact, of the thirty-five delegations to sign the two Internet Treaties by December 22, 1997, many are members of the developing world.¹³⁵ The United States was not among the initial signatories because of limitations in the delegation's negotiating authority, but it did sign the Final Act of the Conference.¹³⁶ According to their terms, the Internet Treaties remained open for signature by any WIPO member until December 31, 1997.¹³⁷ The final texts

129. See WIPO Press Release No. 105, *supra* note 5.

130. WIPO Copyright Treaty, *supra* note 1.

131. See Phonogram Treaty, *supra* note 7.

132. See *WIPO Official Produces, Withdraws Redraft of Online Copyright Treaty*, 13 Int'l Trade Rep. (BNA) No. 50, at 1946 (Dec. 18, 1996) [hereinafter *WIPO Official*].

133. See *USIA: Bruce Lehman on New Intellectual Property Treaties*, M2 PRESSWIRE, Apr. 7, 1997.

134. *Id.*

135. Signatories of both treaties include: Bolivia, Burkina Faso, Chile, Croatia, Ghana, Hungary, Indonesia, Kazakhstan, Kenya, Mongolia, Namibia, Nigeria, Republic of Moldova, Togo, Uruguay, and Venezuela. See *Signatories of Treaties Administered by WIPO not yet in force: WIPO Copyright Treaty* (visited Dec. 28, 1997) <<http://www.wipo.org/eng/ratific/s-copy.htm>>; *WIPO Performances and Phonograms Treaty* (visited Dec. 28, 1997) <<http://www.wipo.org/eng/ratific/s-perf.htm>>.

136. *Final Act of the Diplomatic Conference*, WIPO Doc. CRNR/DC/98 (Dec. 23, 1996). The Internet Treaties will not be be ratified as treaties under U.S. law because fast track procedures are unavailable and because of the difficulty of obtaining the required two-thirds ratification vote in the Senate. Rather, the Internet Treaties will be incorporated into U.S. law through implementing legislation.

137. See WIPO Copyright Treaty, *supra* note 1, art. 19; Phonogram Treaty, *supra*

vary in some key ways from the original proposals, illustrating important qualities of the negotiations and posing interesting questions about WIPO's relationship with the WTO.¹³⁸

1. The Databases Proposal

The Databases Proposal would have established, for the first time, a form of *sui generis* protection "irrespective of any protection provided for a database or its contents by copyright or by other rights granted by [Berne Convention members] in their national legislation."¹³⁹ Major support for this initiative came from the European Community, which, in 1996, enacted a similar protection to be implemented in 1997. Under the TRIPs Agreement and in the United States, database protection exists only for "compilations . . . when there is copyrightable authorship by virtue of the selection, coordination, or arrangement of information or data."¹⁴⁰ Because this *sui generis* system is so new, and as yet untested in the European Community, the delegates universally agreed to postpone their deliberations until a meeting in early 1997 to schedule further preparatory work.¹⁴¹

2. WIPO Copyright Treaty

The WIPO Copyright Treaty supplements the Berne Convention by providing copyright protection while considering the need for the free flow of information. Nevertheless, although the WIPO Copyright Treaty establishes crucial rights, it has left significant gaps in the law which must be resolved by national legislation.

note 7, art. 28. The signature deadline will likely be extended to ensure the treaties' entry into force.

138. See discussion *infra* Parts II.D.1-2.

139. *Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/6 (Aug. 30, 1996), art. 1(3).

140. Eric J. Schwartz, *Impact of the Two New WIPO Copyright Treaties*, 3 INTELL. PROP. STRATEGIST No. 4, at 1, Jan. 1997; see also TRIPs Agreement, *supra* note 2, art. 10(2).

141. See Kennedy & Dweck, *supra* note 99; *Recommendation Concerning Databases*, WIPO Doc. CRNR/DC/100 (Dec. 23, 1996).

a. The Scope of the WIPO Copyright Treaty

The Preamble to the WIPO Copyright Treaty sets the tone of the document and provides some context for its substantive provisions. Along with expressing a desire to maintain effective and uniform protection of literary and artistic rights, it recognizes the need for new rules and the reinterpretation of old ones, to provide this protection in light of developing information and communication technologies.¹⁴² Two provisions added during the course of negotiations emphasize the importance of copyright as an incentive for creative efforts, while recognizing the need to balance rights of the authors with the public interest in the free flow of information.¹⁴³ These additions echo the concerns of telecom companies, ISPs, and other “innovators” who lobbied the WIPO Conference heavily to ensure that their interests were considered in the formulation of the WIPO Copyright Treaty’s substantive law.

During its initial preparatory stages, the WIPO Copyright Treaty was envisioned as a protocol to the Berne Convention, updating that agreement for the first time since 1971.¹⁴⁴ As it emerged from the Diplomatic Conference, however, the WIPO Copyright Treaty is “not an accessory to the Berne Convention. Its objective is rather to supplement and update the international regime . . . based fundamentally on the Berne Convention.”¹⁴⁵ This is despite the WIPO Copyright Treaty’s status as a “special agreement” within the meaning of article 20 of the Berne Convention.¹⁴⁶

Special agreements typically involve bilateral accords granting higher levels of protection or, as in the case of the WIPO Copyright Treaty, documents establishing rights in related areas.¹⁴⁷ The WIPO Copyright Treaty does, indeed, rely heavily on Berne by extending its eligibility, definition, and guaranteed rights provisions

142. WIPO Copyright Treaty, *supra* note 1, pmbl.

143. *See id.*

144. *See WIPO Basic Proposal—Copyright*, *supra* note 94, art. 1(1)-(3).

145. *See id.* at n.0.01.

146. *Id.* art. 1(1). Berne permits these types of agreements “in so far as [they] grant to authors more extensive rights than those granted by [Berne], or contain other provisions not contrary to [it].” Berne Convention, *supra* note 17, art. 20.

147. *See* SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 685-86 (1987).

mutatis mutandis and mandating compliance with articles 1 through 21 and the Appendix.¹⁴⁸ This change in status reflects the delegates' desire to supplement international copyright protection in these new areas, without derogating from any of the rights already established in Berne.¹⁴⁹

The general scope of copyright protection enunciated in article 2 includes expression *per se* rather than "ideas, procedures, methods of operation or mathematical concepts as such."¹⁵⁰ In that same vein, data compilations receive the same protection as under the TRIPs Agreement's article 10—only in so far as the selection or arrangement of content involves intellectual creativity, as data itself cannot be copyrighted.¹⁵¹ Article 4 additionally extends protection to computer programs as literary works, whatever the mode or form of their expression, thereby broadening slightly the protection previously granted under the TRIPs Agreement, which is limited to "source or object code."¹⁵² Although these provisions essentially codify current copyright practice,¹⁵³ article 9 modifies the twenty-five year period of protection for photographic works, initially established in the Berne Convention, by extending it to the general fifty year rule.¹⁵⁴ Berne's provisions for application in time, however, are retained.¹⁵⁵

b. Substantive Provisions

The WIPO Copyright Treaty establishes three crucial rights:

148. WIPO Copyright Treaty, *supra* note 1, art. 3 (applying articles 2 through 6 of the Berne Convention). The WIPO Copyright Treaty contains provisions explaining the scope of copyright protection. *Id.* art. 2.

149. *Id.* art. 1(1)-(2).

150. *Id.* art. 2.

151. *Id.* art. 5. Some minor differences in language exist between the TRIPs Agreement and the WIPO Copyright Treaty. The substance of their protection, however, remains the same. *See* TRIPs Agreement, *supra* note 2, art. 10(2).

152. *See id.* art. 10(1); WIPO Copyright Treaty, *supra* note 1, art. 4.

153. *See* WIPO Copyright Treaty, *supra* note 1, arts. 2, 4, 10.

154. *See id.* art. 9; *see also* Berne Convention, *supra* note 17, art. 7(4).

155. *See* WIPO Copyright Treaty, *supra* note 1, art. 13; Berne Convention, *supra* note 17, art. 18. Protection under Berne and the WIPO Copyright Treaty only extends to works which, at the moment of the agreement's entry into force, "have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Berne Convention, *supra* note 17, art. 18(1).

distribution, rental, and communication to the public.¹⁵⁶ The right of distribution previously existed under the Berne Convention, but only for cinematographic works.¹⁵⁷ Article 6 of the WIPO Copyright Treaty extends this right to authors of all literary and artistic works, whether the distribution is accomplished through sale or other means of transferring ownership.¹⁵⁸ An understanding was reached limiting this right to fixed, tangible copies capable of circulation.¹⁵⁹

Delegates at the Diplomatic Conference, however, could not agree on the scope of the doctrine of exhaustion for distribution rights after first sale.¹⁶⁰ The initial WIPO proposal provided two alternatives: (1) national or regional exhaustion, which was favored by the United States, or (2) global or international exhaustion, supported by Australia, Canada, and China.¹⁶¹ In a compromise, the delegates decided to allow each state to define exhaustion within its own borders.¹⁶² An accompanying right of importation, which would have given copyright holders the exclusive right to authorize importation of their works, fell by the way-side during the negotiations.¹⁶³

Article 7 vests the exclusive right of commercial rental in authors of computer programs, cinematographic works, and works embodied in phonograms.¹⁶⁴ Previously, no right of rental existed under the Berne Convention. The TRIPs Agreement created this right for the first time in cinematographic works and computer

156. WIPO Copyright Treaty, *supra* note 1, arts. 6-8.

157. Berne Convention, *supra* note 17, art. 14(1)(i).

158. WIPO Copyright Treaty, *supra* note 1, art. 6(1).

159. *See Agreed Statements Concerning the WIPO Copyright Treaty*, art. 6, 7, WIPO Doc. CRNR/DC/96 (Dec. 23, 1996) [hereinafter *Agreed Statements—Copyright*].

160. *See WIPO Basic Proposal—Copyright*, *supra* note 94, at n.8.02 (“In many jurisdictions, the principle is that in respect of a copy of a work the right of distribution ceases to exist, i.e., is exhausted, after the first sale of that copy.”).

161. *See WIPO Basic Proposal—Copyright*, *supra* note 94, at n.8.04.

162. WIPO Copyright Treaty, *supra* note 1, art. 6(2).

163. *See WIPO Basic Proposal—Copyright*, *supra* note 94, at n.8.05.

164. WIPO Copyright Treaty, *supra* note 1, art. 7(1). Delegates agreed that an exclusive right of commercial rental need not be granted with respect to phonograms in Contracting Parties whose law provides no phonogram protection. *See Agreed Statements—Copyright*, *supra* note 159, art. 7.

programs, but limits its application in two situations.¹⁶⁵ First, it exempts cinematographic works where their rental has led to copying so widespread it materially impairs the exclusive right of reproduction.¹⁶⁶ The second situation excludes computer programs “where the program itself is not the essential object of the rental.”¹⁶⁷ These two exceptions are retained in the WIPO Copyright Treaty, which also grandfathers equitable remuneration systems for authors of rented works embodied in phonograms.¹⁶⁸ This right of rental differs significantly from WIPO’s original proposal, which would have covered all literary and artistic works, except for those whose rental resulted in an impairment of the right of reproduction.¹⁶⁹

Perhaps the most important right contained in the WIPO Copyright Treaty regards the Internet; the right of public communication permits copyright holders to make their works available by “wire or wireless means.”¹⁷⁰ Included within this right is the ability to make works available to the public “in such a way that members of the public may access [them] from a place and at a time individually chosen by them.”¹⁷¹ This logically includes transmission over the Internet, even though the WIPO Expert Committee felt strongly that the crucial act in terms of “communication” involves “making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.”¹⁷² According to the Expert Committee’s original proposal, communication does not involve any exhaustion of rights because that doctrine only involves the distribution of tangible copies.¹⁷³ Where communication permits recipients to reproduce a tangible copy, national law must define

165. See TRIPs Agreement, *supra* note 2, art. 11.

166. See *id.*

167. *Id.*

168. See WIPO Copyright Treaty, *supra* note 1, art. 7(2), (3). The equitable remuneration systems for works embodied in phonograms must have existed prior to April 15, 1994, and must continue to the present day. See *id.* art. 7(3).

169. See WIPO Basic Proposal—Copyright, *supra* note 94, art. 9(1).

170. WIPO Copyright Treaty, *supra* note 1, art. 8.

171. *Id.*

172. See WIPO Basic Proposal—Copyright, *supra* note 94, at n.10.10.

173. See *id.* at n.10.20.

liability for infringement.¹⁷⁴

ISPs and telecom firms in the United States, in fact, have demanded a clarification of article 8 as a condition of any legislation of domestic implementation.¹⁷⁵ These companies fear that “a broad interpretation of article 8 could lead to lawsuits against telecom carriers from copyright . . . owners.”¹⁷⁶ Other legislative clarifications undoubtedly will be necessary because all of the rights created in the WIPO Copyright Treaty simply establish their international scope and leave the details of enforcement to the contracting parties.

Another area in which national legislation must fill in the blanks left by the WIPO Copyright Treaty involves its limitations and exceptions. Article 10 permits the contracting parties to flesh out the WIPO Copyright Treaty’s details, as long as they “do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”¹⁷⁷ These limitations and exceptions include those already recognized under the Berne Convention and any new ones deemed appropriate in light of the digital network environment.¹⁷⁸

Two additional obligations close out the substantive provisions. The contracting parties must provide adequate legal protection and effective remedies for authors where infringers circumvent technical measures used in the exercise of rights under either the WIPO Copyright Treaty or the Berne Convention.¹⁷⁹ Similar provisions must be made to protect authors against the removal or alteration of rights management information.¹⁸⁰ Rights management information includes the identity of the work, its author, any rights holder, or the terms and conditions of its use.¹⁸¹

174. *See id.* at nn.10.20-10.21.

175. *See Coalition Urges Clarification of Global Copyright Treaties*, Telecom Rep. (BRP) (Mar. 3, 1997).

176. *Id.*

177. WIPO Copyright Treaty, *supra* note 1, art. 10(1).

178. *Id.* art. 10(2); *see also Agreed Statements—Copyright*, *supra* note 159, art. 10.

179. WIPO Copyright Treaty, *supra* note 1, art. 11.

180. *Id.* art. 12(1).

181. *Id.* art. 12(2).

c. Enforcement Provisions

One of the most significant changes which occurred during the negotiation process of the WIPO Copyright Treaty concerned its enforcement provisions. The original WIPO proposal included two alternatives, each based upon the TRIPs Agreement's enforcement articles.¹⁸² Alternative A incorporated by reference the TRIPs Agreement's articles 41 through 61 via an annex which would have formed an "integral" part of the treaty.¹⁸³ Alternative B instead required that the contracting parties integrate articles 41 through 61 into their national laws.¹⁸⁴ Although most of the delegates preferred incorporating the TRIPs Agreement's provisions into the new treaty in some way,¹⁸⁵ neither approach was adopted.¹⁸⁶

Following the United States's position, article 14 of the final draft simply requires national authorities to adopt those measures necessary to ensure the WIPO Copyright Treaty's application and to punish and prevent infringement.¹⁸⁷ This constitutes a stunning rejection of the TRIPs Agreement's enforcement guidelines, considering that even WIPO officials admit "that there would be huge technical problems in enforcing copyright legislation" because national liability standards differ.¹⁸⁸ As a result, in order for the TRIPs Agreement's enforcement guidelines to apply, the WTO must integrate the WIPO Copyright Treaty within the substantive provisions of the TRIPs Agreement.

d. Excluded Provisions

In addition to the various modifications made during the negotiation process, two key articles failed to survive to the final text. Proposed article 3 attempted to standardize the notion of place of

182. *WIPO Basic Proposal—Copyright*, *supra* note 94, n.16.01.

183. *Id.* art. 16.

184. *Id.*

185. See Seth Greenstein, *News From WIPO: Day Eight—Enforcement, Framework Issues and Framing the Issues* (visited Jan. 2, 1998) <http://www.hrrc.org/wr_12-11.html> [hereinafter Greenstein I].

186. See WIPO Copyright Treaty, *supra* note 1, art. 14.

187. *Id.*

188. *Cyberspace Piracy*, *supra* note 96.

publication for works transmitted by wire or wireless means.¹⁸⁹ Electronic transmission would have been deemed a form of publication under article 3(3) of the Berne Convention, in so far as the public could access and copy works at their convenience.¹⁹⁰ The place of publication would have been considered where the necessary arrangements for public access were completed, such as where the source data file was established.¹⁹¹

Instead, the delegates could not agree on the necessity of the article and elected to leave it for further consultations.¹⁹² This decision was made in spite of the Expert Committee's argument that the definition of "published works" and "country of origin" were central to protection of works and that uniform interpretation of terms would be important.¹⁹³ The full effect of the WIPO Copyright Treaty's failure to define these basic principles cannot be predicted, although the potential for significant conflict between national standards exists.

A second major omission involves the right of reproduction, which was deleted as a result of a last-minute campaign by American and European corporate interests.¹⁹⁴ Proposed article 7 would have included, in its exclusive right of reproduction, all forms of temporary reproduction, including intermediate copies on network

189. *WIPO Basic Proposal—Copyright*, *supra* note 94, at n.3.01-3.14.

190. *See id.* art. 3(1).

191. *See id.* at n.3.12. For example, the place of publication for a web page would be wherever the computer files which make up the page are stored.

192. *See* Seth Greenstein, *News from WIPO: Day Six—Tackling the Tough Issues* (visited Oct. 19, 1997) <http://www.hrrc.org/wr_12-9.html> [hereinafter Greenstein II].

193. The Proposal states that the definitions are:

central to the question of whether and how the Berne Convention can continue to protect works in the new digital environment. To the extent that any nations may now have different opinions on the meaning of these [terms] there are certainly well-founded reasons to require that all Contracting Parties interpret and apply these provisions in a uniform manner.

WIPO Basic Proposal—Copyright, *supra* note 94, at n.3.07.

194. *See generally* John Parry & Carol Oberdorfer, *WIPO Delegates Agree on Two Copyright Treaties*, 14 Int'l Trade Rep. (BNA) No. 1, at 11 (Jan. 1, 1997) (describing the agreements arrived at by the WIPO delegates); *Consolidated Recommendation of International Non-governmental Organizations and Associations* (visited Jan. 2, 1998) <http://www.hrrc.org/pp_12-16.html> (including a list of corporate and nongovernmental organizations opposing draft language) [hereinafter *Consolidated Recommendation*].

servers and in computer memories.¹⁹⁵ This definition displeased ISPs and telecom companies who feared it would stifle Internet growth and subject them to infringement liability because such copies are natural by-products of communication via the Internet.

Several American ISPs and telecom companies joined nongovernmental organizations in formulating a consolidated recommendation to the Diplomatic Conference expressing their concerns.¹⁹⁶ This lobbying campaign also extended to President Clinton, who received a similar letter from domestic corporations asking the government to change its position.¹⁹⁷ Eventually the delegates relented and eliminated the article while agreeing in a declaration of intent to return to the issue later.¹⁹⁸

The ability of private corporate interests to shape significantly the outcome of an intellectual property treaty indicates the importance of both copyright and the Internet to the future of world trade. Despite this, the retention of a minimum standards-type regime¹⁹⁹ in the WIPO Copyright Treaty may actually inhibit the development of a global marketplace, due to the intrinsic difficulties caused by applying different national standards to a technology which confounds physical and geographic borders.

3. The Phonogram Treaty

The Phonogram Treaty provides protection for performers and producers, while considering the need to improve international rules in light of changes in technology. Thus, the Phonogram Treaty establishes crucial rights, which are a result of balancing the rights of the general public. Nevertheless, the Phonogram Treaty—like the WIPO Copyright Treaty—requires national legislation to remove many uncertainties presently in the law.

195. *WIPO Basic Proposal—Copyright*, *supra* note 94, art. 7; *WIPO Official*, *supra* note 132. This includes copies in a computer's RAM.

196. *Consolidated Recommendation*, *supra* note 194.

197. See Joint Letter from Chief Executive Officers to President William J. Clinton (Dec. 10, 1996), available in WESTLAW, West Legal News, 12-16-96 WLN 13352.

198. See Parry & Oberdorfer, *supra* note 194.

199. See discussion *supra* notes 58-61 and accompanying text.

a. The Scope of the Phonogram Treaty

Like its sister treaty, the Phonogram Treaty bears the mark of the public debate which surrounded the Diplomatic Conference.²⁰⁰ The preamble expresses the delegates' desire to promote the effective and uniform development of performers' and producers' rights in phonograms, while acknowledging the need for new international rules to cope with the changing times and technologies.²⁰¹ It also contains an analog to the WIPO Copyright Treaty's provision on balancing the rights of intellectual property holders along with those of the general public.²⁰²

Unlike its counterpart, the Phonogram Treaty has no special agreement relationship with its progenitor, the Rome Convention. It does, however, imitate the Rome Convention's language, distinguishing between protected intellectual property rights in phonograms and the copyright applicable to works which are embodied in phonograms.²⁰³ Put simply, the Phonogram Treaty only covers the various rights of performers and producers in a recorded work, while leaving copyright issues, such as a composer's interest in his song, to the Berne Convention.²⁰⁴ Nonetheless, the Phonogram Treaty "intend[s] to be a comprehensive instrument rather than [one] that clarifies existing norms."²⁰⁵ The reason for this intention is that, until the conclusion of the Phonogram Treaty, no major international agreement existed protecting phonographic rights beyond that of reproduction.

200. Phonogram Treaty, *supra* note 7.

201. *Id.* pmb1.

202. *Id.*

203. See *Agreed Statements Concerning the WIPO Performances and Phonograms Treaty*, art. 1, WIPO Doc. CRNR/DC/97 (Dec. 23, 1996). Compare Rome Convention, *supra* note 25, art. 1 (distinguishing between copyrighted works embedded in phonograms and intellectual property rights in phonograms), with Phonogram Treaty, *supra* note 7, art. 1(1)-(2) (same).

204. Phonogram Treaty, *supra* note 7.

205. *Basic Proposal for the Substantive Provisions of the Treaty For the Protection of the Rights of Performers and Producers of Phonograms to be Considered by the Diplomatic Conference*, at n.0.06, WIPO Doc. CRNR/DC/5 (Aug. 30, 1996) [hereinafter *Basic Proposal—Phonogram*].

b. Substantive Provisions

Article 2 redefines many of the basic concepts originally contained in the Rome Convention, and adds several new ones.²⁰⁶ For example, while the Rome Convention described a “phonogram” as “any exclusively aural fixation of sounds of a performance or of other sounds,”²⁰⁷ the Phonogram Treaty broadly integrates some of the many technological changes which have occurred in the past thirty years, such as digital sound, while excluding other media like video recordings.²⁰⁸ It reads, “the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.”²⁰⁹ Similarly, the new definition of “broadcasting” includes satellite transmissions and encrypted signals.²¹⁰ Among the terms added in the Phonogram Treaty are “fixation” and “communication to the public,”²¹¹ all of which indicate the need for broader definitions and protections for performances and phonograms, considering the numerous technological means by which they can be transmitted.

Articles 3 and 4 of the Phonogram Treaty establish the conditions for protection by setting up “points of attachment” for national treatment in a manner similar to the approach used in the TRIPs Agreement.²¹² National treatment must be accorded to nationals of other contracting parties for all of the exclusive rights granted in the Phonogram Treaty, including the right to equitable remuneration.²¹³ The Rome Convention’s eligibility criteria are incorporated by reference, including the power to exclude certain

206. *Id.* at n.2.01-2.27.

207. Rome Convention, *supra* note 25, art. 3(b).

208. Phonogram Treaty, *supra* note 7, art. 2(b).

209. *Id.*

210. *Id.* art. 2(f).

211. *Id.* art. 2(c), (g). Other definitions were eliminated in an attempt to preserve clarity. Examples include “reproduction” and “rebroadcasting.” See Rome Convention, *supra* note 25, art. 3(e), (g); *Basic Proposal—Phonogram*, *supra* note 205, at n.2.10, 2.23.

212. Phonogram Treaty, *supra* note 7, arts. 3, 4; TRIPs Agreement, *supra* note 2, art. 1(3).

213. Phonogram Treaty, *supra* note 7, art. 4. Equitable remuneration includes licensing mechanisms like ASCAP.

criteria.²¹⁴ Because of the familiarity of this “points of attachment” approach, WIPO hoped it would facilitate not only the treaty negotiations, but also integration into the contracting parties’ domestic legal systems.²¹⁵

c. Rights of Performers

Performers secure six exclusive rights under the Phonogram Treaty: moral rights,²¹⁶ economic rights in their unfixed performances,²¹⁷ the right to make fixed performances available,²¹⁸ reproduction,²¹⁹ distribution,²²⁰ and rental.²²¹ Moral rights are the most controversial form of protection under copyright; the United States refuses to recognize them and they are excluded from the TRIPs Agreement’s incorporation of Berne’s substantive provisions.²²² Moral rights allow an author “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”²²³ The Phonogram Treaty grants performers this privilege for the first time, with respect to live aural and other fixed performances.²²⁴

Depending on the type of performance involved, performers possess varying means of exploiting their efforts. For unfixed performances, they may authorize the broadcast or communication of their performances, or choose to fix them in any form.²²⁵ These options expand similar rights already available under the Rome

214. *See id.* art. 3(2)-(3); Rome Convention, *supra* note 25, arts. 4-7.

215. *See Basic Proposal—Phonogram*, *supra* note 205, at n.3.08.

216. Phonogram Treaty, *supra* note 7, art. 5.

217. *Id.* art. 6.

218. *Id.* art. 10.

219. *Id.* art. 7.

220. *Id.* art. 8.

221. Phonogram Treaty, *supra* note 7, art. 9.

222. Berne Convention, *supra* note 17, art. 6^{bis}; TRIPs Agreement, *supra* note 2, art. 9(1).

223. Berne Convention, *supra* note 17, art. 6^{bis} (1).

224. Phonogram Treaty, *supra* note 7, art. 5(1). As of yet, the United States has not established its official position on this provision.

225. *See id.* art. 6. The right to broadcast or communicate an unfixed performance does not extend to those which have already been broadcast. *See id.* art. 6(i).

Convention and the TRIPs Agreement.²²⁶ Once a performance has been fixed, the performer can choose to make it available to the public “by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”²²⁷ This option allows performances to be transmitted via satellite or over the Internet.²²⁸

For performances fixed in phonographic form, performers gain a significantly broader right of reproduction than that existing under the Rome Convention—unconditional and exclusive authority over direct or indirect reproduction in any form or manner.²²⁹ In addition, performers achieve for the first time the power to authorize the distribution and rental of performances fixed in phonograms.²³⁰ The contracting parties, however, retain the ability to define significant aspects of these rights in their domestic laws, such as the exhaustion of the right of distribution and the extent of the right of rental.²³¹

d. Rights of Producers

Producers benefit from four exclusive rights concerning their phonograms: reproduction,²³² distribution,²³³ rental,²³⁴ and authorization of public availability.²³⁵ Each of these rights mirrors its counterpart with regard to performers, except for *mutatis mutandis* changes. Of the four, only the rights of distribution and making phonograms available to the public are new. Article 11 on

226. The Rome Convention gives performers the right to prevent the broadcast or communication of their unfixed performances without their consent. *See* Rome Convention, *supra* note 25, art. 7(1)(a). The TRIPs Agreement extends to performers the right of fixation in phonographic form only. *See* TRIPs Agreement, *supra* note 2, art. 14(1).

227. Phonogram Treaty, *supra* note 7, art. 10.

228. *See id.*

229. *See id.* art. 7. The Rome Convention previously granted “the possibility of preventing” reproduction without their consent. Rome Convention, *supra* note 25, art. 7(1)(c).

230. *See* Phonogram Treaty, *supra* note 7, arts. 8, 9.

231. *See id.* A grandfather clause also exists for equitable remuneration systems dealing with the right of rental. *See id.* art. 9(2).

232. *See id.* art. 11.

233. *See id.* art. 12.

234. *See id.* art. 13.

235. *See id.* art. 14.

reproduction broadens the authority already granted to producers in the Rome Convention by including the language “in any manner or form.”²³⁶ This phrase encapsulates all technological means of reproduction, including digitization and downloading from computers.²³⁷ Article 13, concerning rental, provides a similar right to that under TRIPs Agreement article 14(4), including an exemption for pre-existing equitable remuneration systems.²³⁸ The cumulative effect of these provisions is to raise producers up to the same level of protection as authors under the Berne Convention.

e. Common Provisions

Several provisions apply to performers and producers alike, including some which duplicate features of the WIPO Copyright Treaty.²³⁹ The articles dealing with limitations and exceptions, obligations concerning technological measures and rights management information, application in time, and enforcement all imitate their WIPO Copyright Treaty counterparts.²⁴⁰ Some common provisions, however, are unique to the Phonogram Treaty. For example, article 15 gives performers and producers the right to a single equitable remuneration for the direct or indirect use of commercial phonograms broadcast or communicated to the public.²⁴¹ Although the contracting parties retain the power to detail this right’s scope in national legislation, the delegates agreed to include within it phonograms made publicly available by wire or wireless means.²⁴² Another difference in the Phonogram Treaty involves an

236. Phonogram Treaty, *supra* note 7, art. 11. The Rome Convention allows for “the right to authorise or prohibit the direct or indirect reproduction of their phonograms.” Rome Convention, *supra* note 25, art. 10.

237. *See Basic Proposal—Phonogram*, *supra* note 205, at n.14.06.

238. *Compare* Phonogram Treaty, *supra* note 7, art. 13 (providing an exemption for pre-existing remuneration systems), *with* TRIPs Agreement, *supra* note 2, art. 14(4) (same).

239. *See* WIPO Copyright Treaty, *supra* note 1.

240. *Compare* Phonogram Treaty, *supra* note 7, arts. 16, 18, 19, 22, 23 (imitating the provisions found in the WIPO Copyright Treaty), *with* WIPO Copyright Treaty, *supra* note 1, arts. 10, 11, 12, 13, 14 (serving as the basis for many provisions in the Phonogram Treaty).

241. Phonogram Treaty, *supra* note 7, art. 15.

242. *See id.* art. 15(2), (4). The contracting parties may also choose to limit, or not apply at all, the right of remuneration. This is the only means by which a party may

acknowledgment of the change in the term of protection from twenty years under the Rome Convention to fifty years under the TRIPs Agreement.²⁴³ Finally, the delegates agreed to prohibit the imposition of any formalities in conjunction with the enjoyment or exercise of rights garnered under the Phonogram Treaty.²⁴⁴

III. PROBLEMS AND POSSIBILITIES

Even though negotiations have ended, the real debate over WIPO's Internet Treaties is about to commence, as the signatories begin to ratify the treaties. This part examines the major domestic obstacles to implementation in the United States. Apart from domestic concerns, significant questions linger with respect to the Internet Treaties themselves. Accordingly, this part examines the application of a minimum standards-type agreement to the Internet. Related concerns involve the substantial disability caused by the lack of any effective enforcement or dispute resolution provisions in the treaties and whether the WTO can integrate these treaties into the TRIPs Agreement.

A. *United States Ratification*

The Internet Treaties possess an integral place in the Clinton Administration's "Framework for Global Electronic Commerce," based on the hope that they "will greatly facilitate the commercial applications of on-line digital communications."²⁴⁵ Despite this enthusiasm for the treaties, ratification in the United States is not proving to be as easy as the Clinton Administration would like. Many members of Congress, including Senator Hatch, have expressed concern "that the final language of these agreements may reflect decisions on . . . unresolved [domestic] issues that may jeopardize Senate ratification."²⁴⁶ In fact, very few changes are

make a reservation to the Phonogram Treaty. *See id.* arts. 15(3), 21.

243. *Id.* art. 17; Rome Convention, *supra* note 25, art. 14; TRIPs Agreement, *supra* note 2, art. 14(5).

244. Phonogram Treaty, *supra* note 7, art. 20.

245. Mark Felsenthal & Angela Drolte, *Administration Outlines Objectives for Global Internet Copyright Policy*, 14 Int'l Trade Rep. (BNA) No. 28, at 1179 (July 9, 1997).

246. *Hatch Urges PTO Not to Lock U.S. in Berne Pact to Terms Still Disputed at*

required in order to make the treaties operative because copyright enjoys a broad interpretation under United States law. Instead, three main issues have taken center stage during Congressional hearings, only one of which deals with a change explicitly mandated by the treaties: (1) circumvention technology, (2) infringement liability, and (3) fair use.

1. Circumvention Technology

Current United States law fails to address the issue of circumvention technologies, which are used to “prevent unauthorized access to copyrighted works and to provide copyright information about the work.”²⁴⁷ Two competing approaches have been introduced, one by Representative Coble in House Bill 2281 (“Coble bill” or “Coble approach”),²⁴⁸ and another by Senator Hatch in Senate Bill 2037 (“Hatch bill” or “Hatch approach”).²⁴⁹

The Coble bill proposes the addition of a new Chapter 12, “Copyright Protection and Management Systems,” to Title 17 of the United States Code. The new chapter would prohibit the circumvention of copyright protection systems as well as the destruction of any copyright information.²⁵⁰ This amendment, which contains civil and criminal penalties for violations, would make it illegal to manufacture, import, sell, or use any device “primarily designed or produced for the purpose of circumvent[ion]” and any device that possesses “only [a] limited commercially significant

Home, 13 Int’l Trade Rep. (BNA) No. 37, at 1449 (Sept. 18, 1996).

247. *Coble Introduces Measure to Implement WIPO Copyright Pacts*, 14 Int’l Trade Rep. (BNA) No. 32, at 1366 (Aug. 6, 1997).

248. H.R. 2281, 105th Cong. (1998). A companion bill introduced by Representative Goodlatte, H.R. 3209, 105th Cong. (1998), was amended and added to the original version of H.R. 2281. Although H.R. 2281 initially dealt only with the implementation of the Internet Treaties, its amendment to include the key provisions of H.R. 3209 linked the U.S. ratification of the treaties to the resolution of internet service provider (“ISP”) liability issues.

249. S. 2037, 105th Cong. (1998). Another bill offered by Senator Ashcroft, S. 1146, 105th Cong. (1997), was referred to the Senate Judiciary Committee, which conducted hearings in September 1997. Debate in the Senate, however, focused on Senator Hatch’s proposal, which originally was presented as S. 1121, 105th Cong. (1997).

250. WIPO Copyright Treaties Implementation Act, H.R. 2281, 105th Cong., tit. I (1998).

purpose or use other than . . . circumvent[ion].”²⁵¹ Not unexpectedly, copyright holders support the Coble approach as a means of inhibiting piracy. Many critics, however, object to its apparent conflict with the Supreme Court’s ruling in *Sony Corporation of America v. Universal City Studios, Inc.*²⁵² that manufacturing devices capable of being used for copyright infringement is not itself an infringement.²⁵³

While largely similar in form to its counterpart in the House of Representatives, Senator Hatch’s bill contains one important distinction with respect to circumvention technology. It expressly exempts reverse engineering “necessary to achieve interoperability of an independently created computer program with other programs,” provided, however, that (1) the necessary elements of such computer program are not otherwise readily available and (2) the study and analysis of the computer programming does not constitute an act of copyright infringement.²⁵⁴ The ultimate choice of anti-circumvention language undoubtedly will have a profound economic impact on the computer and electronics industries.

2. Infringement Liability

Another significant economic and political issue centers around the liability of ISPs for the infringing acts of their customers. ISP groups have lobbied vociferously for either a complete exemption or, at most, liability for their failure to remove infringing materials of which they are aware. Copyright holders fear that without greater ISP responsibility, piracy of digitized materials transmitted over the Internet will explode. The software industry alone already loses twelve million dollars per year due to pirates.²⁵⁵

251. *Id.*

252. 464 U.S. 417 (1984).

253. *See id.*; *Anti-Circumvention Prohibitions in Copyright Treaty Bill Draw Fire*, 14 Int’l Trade Rep. (BNA) No. 38, at 1610 (Sept. 24, 1997) [hereinafter *Anti-Circumvention*].

254. WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, S. 2037, 105th Cong., tit. I § 103.

255. *See Senate Judiciary Panel Considers S 1146, Liability in Online Copyright Infringement*, 14 Int’l Trade Rep. (BNA) No. 36, at 1506 (Sept. 10, 1997) [hereinafter *Senate Judiciary Panel*].

Both the Coble and Hatch bills strike a balance between the two camps. Coble's On-Line Copyright Infringement Liability Limitation Act²⁵⁶ would largely exempt ISPs from direct and contributory infringement, as well as from vicarious liability for others, for the intermediate storage and transmission of material through the ISP's network under certain conditions.²⁵⁷ Senator Hatch varies his approach by requiring a qualifying ISP with knowledge or an awareness of infringing material to "expeditiously . . . remove or disable access to the material" which is stored on the ISP's system.²⁵⁸

The issue of liability, although not addressed in the Internet Treaties, has nevertheless become inextricably intertwined in the United States implementation debate. Given the enormous finan-

256. H.R. 2281, 105th Cong., tit. II (1998).

257. Under Coble's On-Line Copyright Infringement Liability Limitation Act, ISPs are exempt from liability for direct infringement, and from monetary relief from contributory infringement and vicarious liability, for the intermediate storage and transmission of material through their systems or networks if:

- (A) the transmission was initiated by another person;
- (B) the storage and transmission is carried out through an automatic technological process, without any selection of that material by the provider; and
- (C) no copy of the material thereby made by the provider is maintained on the provider's system or network in a manner ordinarily accessible to anyone other than the recipients anticipated by the person who initiated the transmission, and no such copy is maintained on the system or network in a manner ordinarily accessible to such recipients for a longer period than is necessary for the transmission.

Id. § 202(a). An ISP also would be exempt from monetary relief for contributory infringement or vicarious liability, based solely on the transmission or provision of access to material over its system or network, if the ISP:

- (A) does not have actual knowledge that the material is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; and
- (B) does not receive a financial benefit directly attributable to the infringing activity, if the provider has the right and ability to control such activity.

Id.

258. Internet Copyright Infringement Liability Clarification Act of 1998, S. 2037, 105th Cong., tit. II § 202. This provision exempts ISPs from liability for monetary damages and, in certain circumstances, from injunctive and other equitable relief if (1) it did not have knowledge or an awareness of infringing materials or activities or (2) after obtaining such knowledge or awareness it acted expeditiously to remove or disable access to the materials. *See id.* This exemption also is premised upon the ISP not receiving a financial benefit directly attributable to the infringing activity, where the ISP had the right and ability to control such activity. *See id.*

cial stake of ISPs in the world's leading technology market, this is hardly surprising. Certainly some limitation of liability needs to be adopted. All that remains to be seen is whether a "notice and takedown" requirement will appear in the final draft.²⁵⁹

3. Fair Use

Congress also is discussing the explicit language expanding the existing fair use exemption. Fair use is a defense to infringement for "purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research."²⁶⁰ Educators, other scholars, and technology manufacturers believe this principle needs to be updated in light of the anti-circumvention provisions contained in both the House and Senate bills.²⁶¹ Copyright holders, wishing to protect their property, object to any such language out of a fear that infringers might manipulate it to their advantage. Both the Coble and Hatch bills have contemplated various forms of fair use language, making its inclusion very likely in the bills' final drafts. The significant debate over this issue in both the Senate and the House of Representatives relates back to some of the criticisms leveled at the treaties during the Diplomatic Conference for their failure to address this issue.²⁶² Indeed, in countries without a broad exemption resembling that of the United States, ratification of the treaties without any corresponding legislation ensuring fair use could stifle innovative and educational applications of the Internet.

Despite these controversial matters, which have occupied much of Congress's time and lobbyists' money, implementing legislation for the Internet Treaties eventually will win the approval of the legislative bodies and become part of United States law.²⁶³ For other countries, particularly code-based and developing countries

259. *Rep. Coble Urged to Drop Online Copyright Liability Issue*, COMM. DAILY, Sept. 17, 1997.

260. 17 U.S.C. § 107 (1994).

261. *See Anti-Circumvention*, *supra* note 253.

262. *See Basic Proposal—Phonogram*, *supra* note 205.

263. At the time of this Article's publication, the House Commerce Committee was attempting to obtain jurisdiction over H.R. 2281, making the future of the Coble bill unclear.

with a minimalist approach to copyright protection, ratification will prove a much more daunting task. It is this wide variation in national standards which raises another potential problem with the treaties and their practical application around the world.

B. *Minimum Standards and the Internet*

According to some observers, the Internet Treaties fell short of expectations based upon their very nature—a minimum standards, or minimum protections, type of agreement.²⁶⁴ Minimum standards treaties lay down the basic rights and duties of the contracting parties without detailing how each state defines them in its domestic law. International intellectual property conventions, including the TRIPs Agreement, have always been minimum standards agreements, in large part because they represented the lowest common denominator between the disparate levels of protection in the contracting parties. They set minimum standards by establishing a bar under which no party may fall.

This formula directly contrasts with other international regimes, which attempt to create minimum standards through harmonization and mutual recognition. For example, in the WTO, the Phytosanitary Measures Agreement and the Technical Barriers Agreement employ vague language to scrutinize national measures.²⁶⁵ Where international standards exist, they are used to evaluate the validity of the measure, but are not binding.²⁶⁶ These agreements try to build a minimum standard of protection from the ground up.

In the case of the Internet Treaties, parts of both these approaches have been employed. While the treaties set very definite rights, they serve as a bar to which most countries must reach up, rather than one which they cannot fall below. This is because no consensus exists in dealing with protection of material transmitted

264. See discussion *supra* notes 58-61 and accompanying text (describing the nature of a minimum standards agreement).

265. See Technical Barriers Agreement, *supra* note 59, arts. 2.2, 3; Phytosanitary Measures Agreement, *supra* note 60, arts. 2.1, 5.6. Examples include such language as “legitimate,” “necessary,” and “not more trade-restrictive than necessary.”

266. See Technical Barriers Agreement, *supra* note 59, arts. 2.2, 3; Phytosanitary Measures Agreement, *supra* note 60, arts. 2.1, 5.6.

over the Internet and captured in other digital technologies. Intellectual property purists, like PTO Commissioner Bruce Lehman, would dispute this observation by saying that traditional copyright principles automatically subsume this new medium, requiring only minor modifications in doctrine to accommodate its technological peculiarities.²⁶⁷

Although this may be true in the United States, many code-based legal systems have much more specific intellectual property laws, and will be forced to amend them in order to comply with the treaties. Furthermore, the differences in both legal and functional standards between nations, which will exist under these treaties, inherently conflict with the sweeping, monolithic nature of the Internet. The reality is that inequalities in domestic legislation could not only make enforcement of these treaties difficult, but also stifle the growth of the Internet as a means of commerce.

As mentioned above, several matters, including the exhaustion of rights, infringement liability, and enforcement, were left to national legislatures to flesh out. Other key concepts, like the place of publication and the definition of a "copy," were ignored entirely. Although compromises must always be made in treaty negotiations in order to achieve some level of agreement, the combination of these inadequacies with the technological realities of the Internet could prove deadly to these treaties. For example, copyright holders would have little incentive in placing protected materials on a web page if they had to constantly investigate the status of their rights under a hundred different legal systems.

Once protected material appears on the Internet, it can be accessed from anywhere in the world, including countries not party to these new treaties. In addition, the cost of litigating in numerous legal systems, with often widely different standards, would also deter many intellectual property holders from participating in an electronic marketplace. While different enforcement standards currently exist in dealing with traditional forms of intellectual property, tracing the infringement of intellectual property fixed in a good is comparatively simple, next to tracking down violators using the Internet. The reality of information technology precludes

267. See Lehman, *supra* note 82, at 13.

the ideological neatness of a minimum standards regime.

Although these inadequacies suggest that more work needs to be done in an effort to harmonize national laws dealing with intellectual property in a digital environment, this does not mean that these treaties do not represent an important first step along that path. Indeed, the Director General of WIPO acknowledged the need for progress in his closing speech to the Diplomatic Conference's delegates by saying, "[t]his Diplomatic Conference did not solve all the questions that await international norm making in the field of intellectual property WIPO is expected to deal in the near future . . . with the specific copyright and trademark problems of global information systems, like the Internet."²⁶⁸ WIPO must continue to act as an impetus to ensure that intellectual property protection adapts to rapid changes in technology in a way which promotes, rather than restricts, the development of an electronic marketplace.

C. *Dispute Resolution and Enforcement*

Another related concern with the WIPO Copyright and Phonogram Treaties involves their pointed rejection of the WTO's dispute settlement system and the TRIPs Agreement's enforcement procedures. At the time the TRIPs Agreement entered into force, it appeared that the seemingly endless "GATT v. WIPO" debate had resolved itself in a sort of marriage, with each institution complementing the other with its best qualities. The TRIPs Agreement intended to supplement the substance of existing intellectual property law with a strong, trade-based sanction system. As an analog, articles 41 through 61 were meant to provide guidance and a basic framework for enforcement on the national level.²⁶⁹ WIPO brought its intellectual property expertise and provided a convenient forum for discussion and development. Despite the best intentions, demonstrated by the 1996 bilateral cooperation agreement,²⁷⁰ the WTO-WIPO marriage is showing signs of strain.

268. *Closing Speech: Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, WIPO Doc. CRNR/DC/INF.9 (Dec. 23, 1996) (visited Jan. 2, 1998) <<http://www.wipo.org/eng/diplconf/distrib/inf9.htm>>.

269. See TRIPs Agreement, *supra* note 2.

270. See WIPO/WTO Agreement, *supra* note 50.

Since 1995, the WTO has proven itself to be an accessible and capable option for the settlement of intellectual property disputes. WIPO has also demonstrated resiliency through its renewed efforts to update international standards. A by-product of this resiliency, however, has been the renewal of discussions over a WIPO-based dispute resolution system. In this context, the choice of the Diplomatic Conference delegates to remain silent on dispute resolution and to reject the use of TRIPs-type enforcement provisions presents the WTO with a challenge: Lead, follow, or get out of the way.

Through its leadership of the coalition of nations, which blocked the adoption of the TRIPs Agreement's enforcement provisions, the United States stated its preference for domestic legislation or actual integration into the TRIPs Agreement.²⁷¹ Despite its recent displeasure with WTO dispute settlement over the Helms-Burton Act debate, the legal and economic benefits of intellectual property protection for the United States under this system cannot be denied. This is particularly true considering the expansive nature of the Internet, which effectively requires near-universal participation, such as under the WTO, for the application of these treaties to be meaningful. Should the WTO fail to assert itself, however, an opening would appear for WIPO to assume an independent leadership role in the settlement of intellectual property disputes. In sum, the success of the TRIPs Agreement's "trade-intellectual property" marriage depends on its adaptability and responsiveness.

Until now, the WTO's main interest in digital and information technology has come on the hardware side. As a part of the 1996 Ministerial Conference in Singapore, a discussion and eventual agreement on trade in information technology products comprised a significant part of the proceedings. Although the liberalization of trade in this area will certainly promote access to the digital environment, that environment's content is equally important to the development of an electronic marketplace. The WTO, through the TRIPs Council, must assume its responsibility as an equal partner along with WIPO, in the creation of rules and norms by lending its

271. See Greenstein I, *supra* note 185.

enforcement and dispute resolution facilities to new WIPO agreements. As a part of this initiative, the WTO should bring the WIPO Copyright and Phonogram Treaties under its auspices to help ensure universal application as soon as possible. While discussion regarding a potential WIPO dispute resolution system continues, plans remain too nebulous for immediate application to these treaties. But technological change will not be delayed by institutional inertia; the WTO should act now rather than later.

D. Coverage by the TRIPs Agreement

Apart from deciding if the WTO should integrate the WIPO Copyright and Phonogram Treaties under the TRIPs Agreement is the question of whether it can accomplish this goal. Article 71(2) of the TRIPs Agreement governs the TRIPs Agreement's amendment procedures.²⁷² Several problems present themselves when trying to apply article 71(2) to these treaties. The first involves the language "merely serving the purpose of adjusting to higher levels of protection."²⁷³ An argument can be made that the WIPO Copyright Treaty does not "merely" raise the level of protection under Berne, but also broadens it by creating new rights and making some of Berne's principles applicable to a new subject matter.

Another article 71 problem concerns the fact that both new treaties create rights not previously in existence under current international agreements. For example, the right of public communication appears for the first time in both documents,²⁷⁴ and the Phonogram Treaty establishes moral rights and the power of distribution.²⁷⁵ None of these provisions constitute "rights achieved,

272. Article 71(2) provides in relevant part:

Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPs.

TRIPs Agreement, *supra* note 2.

273. *Id.*

274. See WIPO Copyright Treaty, *supra* note 1, art. 8; Phonogram Treaty, *supra* note 7, art. 14.

275. Phonogram Treaty, *supra* note 7, arts. 5, 12.

and in force, in other multilateral agreements and accepted under those agreements.”²⁷⁶

Finally, it is not clear what article 71 means by “all members of the WTO.”²⁷⁷ Questions remain whether this truly requires unanimity. Questions also remain about those WTO members not party to the Berne, Paris, and Rome Conventions—whether they truly can “accept” amendments to those agreements. This formula appears surprising considering the patchy success of the GATT amendment under article XXX, hobbled in large part by its unanimity and consensus requirements.²⁷⁸

Given these potential problems under article 71(2), the question is how could the WTO bring these treaties under the TRIPs Agreement. Article 71(1) might provide a potential answer. It requires the TRIPs Council to review the TRIPs Agreement every two years and empowers it to “undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.”²⁷⁹ Under article X(1) of the WTO Agreement, the TRIPs Council can submit a proposal to the Ministerial Conference to amend the TRIPs Agreement under article X(3).²⁸⁰ Although this amendment procedure carries with it more risk and difficulty than the abbreviated procedure under the TRIPs Agreement article 71(2), it may be a necessary step in order to achieve integration of the new treaties.

To facilitate future amendments, the TRIPs Council could propose a modification of the TRIPs Agreement to authorize simpler procedures for the assumption of WIPO treaties. Another route might be the conclusion of a multilateral agreement during a subsequent negotiating round, which would take up the issue of developing technologies and intellectual property. Although this too would prove a most difficult task, some step must be taken in order to ensure that the TRIPs Agreement and the WTO remain in stride with WIPO in the development and enforcement of international

276. TRIPs Agreement, *supra* note 2, art. 71(2).

277. *Id.*

278. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 51-52 (1991).

279. TRIPs Agreement, *supra* note 2, art. 71(1).

280. See *id.* art. 71(2).

intellectual property standards in the digital age.

CONCLUSION

Traditionally, governments have had the luxury of creating long-standing legal norms after careful deliberation. The rapidly changing pace of technology today confounds and challenges lawyers to keep pace. The Internet Treaties mark a promising and crucial turning point in the evolution of copyright law and the development of the WTO-WIPO alliance.

These treaties, however, are far from perfect. Their minimum-standards nature leaves several crucial matters unresolved: enforcement, dispute settlement, ISP liability, fair use, exhaustion of rights, place of publication, and the definition of a copy. Despite these inadequacies, the resulting Internet Treaties are not an exercise in futility. They establish an international consensus on the application of copyright and neighboring right principles to digital technologies which can serve as the foundation for further legal infrastructure down the line.

As one of the first steps toward shaping a legal framework for the electronic marketplace, these Internet Treaties require near universal acceptance and participation in order to be truly effective. The only viable means for ensuring this kind of participation is to integrate the treaties into the TRIPs Agreement so that they can benefit from the disciplines of the WTO and its Dispute Settlement Understanding. Once this integration is achieved, WIPO can proceed to further develop international norms with a mind to addressing the remaining deficiencies. For the future to reap the full commercial benefits of today's technological advances, the WTO and WIPO must continue the collaborative successes epitomized by the WIPO Copyright and Phonogram Treaties, thereby fulfilling the promise of the TRIPs Agreement.