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## International Copyright: An Unorthodox Analysis

Hugh C. Hansen  
*Fordham University School of Law*

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## International Copyright: An Unorthodox Analysis

### Cover Page Footnote

Associate Professor of Law, Fordham University School of Law. I wish to thank Sheila J. Levine, Frederick J. Hamble, and Luke Connelly for their assistance on this Article.

# International Copyright: An Unorthodox Analysis\*

Hugh C. Hansen\*\*

## ABSTRACT

*Professor Hansen reviews the development of copyright from its traditional domestic orientation to the modern emphasis on globalization and harmonization. His commentary analogizes modern trends in international copyright to religious equivalents. He notes that the current players include a “secular priesthood” (the traditional copyright bar and academics), “agnostics and atheists” (newer academics and lawyers, particularly those concerned with technology and the culture of the public domain) and “missionaries” (whose task it is to increase copyright protection around the world and who are primarily driven by trade considerations). The copyright “crusade” has been driven by this last group.*

*The author compares the task of increasing copyright protection in newly industrialized and developing countries to the conversion of any group to a new religion. The missionaries, primarily from the United States and the European Union, have the choice of seeking voluntary or involuntary conversions. He augurs that the prospects for voluntary conversion are slim and that coercion*

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\*\* Associate Professor of Law, Fordham University School of Law. I wish to thank Sheila J. Levine, Frederick J. Hamble, and Luke Connelly for their assistance on this Article.

*will continue to be used against newly industrialized and developing nations when copyright protection is at stake.*

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## I. INTRODUCTION

Until recently, copyright laws throughout the world were domestically-oriented. Copyright law is “territorial.” Each nation determines the scope of protection and rights subject only to bilateral and multilateral agreements, which, before the Uruguay Round of the GATT negotiations and the adoption of the agreement on Trade-Related Aspects of Intellectual Property (TRIPS) were essentially unenforceable.<sup>1</sup>

Overall there were two systems: (1) the Anglo-American so-called “economic” system and (2) the French and Continental “author’s rights” system with its concomitant fascination with “moral rights.” Within each system, countries established regimes of protection that were economically and philosophically compatible with their cultures. The broader differences and even the differences within each system were of mostly academic interest, as there was little transnational interaction among those subject to the various laws.

This situation changed dramatically when copyright industries, such as motion pictures, music, and computer software and hardware, began to export their products around the world massively and successfully. The change was given additional impetus by the growth of exports in patent industries, such as pharmaceuticals, and the accompanying need for trademark protection

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<sup>1</sup> See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

abroad. Intellectual property became very important to the balance of trade and jobs. Government leaders, CEOs, and corporate boards in the United States and abroad took notice of the importance of intellectual property laws.

Government initiatives took two forms: a push by the United States to include protection for intellectual property in the Uruguay Round of GATT negotiations (TRIPS),<sup>2</sup> and initiatives in Europe to increase patent<sup>3</sup> and copyright protection.<sup>4</sup> One of the purposes of the directives was to improve European competitiveness.<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *See, e.g.*, Common Position (EC) 4/94 adopted by the Council on 7 February 1994 with a view to adopting European Parliament and Council Directive on the legal protection of biotechnological inventions, 1994 O.J. (C101) 65 [hereinafter Biotech Directive]; Council Regulation 1768/92 of 18 June 1992 on the creation of a supplementary protection certificate of medicinal products, 1992 O.J. (L182) 1 [hereinafter Supplementary Patent Protection Regulation].

The proposed Biotech Directive was originally published in October 1988. A Common Position was reached in February 1994. After a second reading by Parliament and a reconciliation proceeding, it was unexpectedly defeated at the last moment by the European Parliament in March 1995. The process to adopt a biotech directive was started again in December 1995, when a new proposal was adopted by the Commission and sent to the Council. The Supplementary Protection Regulation was first proposed by the Commission in 1990 and became effective on January 2, 1993.

<sup>4</sup> *See* Council Directive 91/250 of 14 May 1991 on the legal protection of computer programs, 1991 O.J. (L122) 42 [hereinafter Software Directive]; Common Position (EC) No. 20/95 adopted by the Council on 10 July 1995 with a view to adopting Directive 95/EC of the European Parliament and of the Council on the legal protection of databases, 1995 O.J. (C288) 14, 21. The European Parliament completed its second reading on December 14th, 1995, with nonsubstantive amendments recommended, A4-0290/95. The Commission then passed the proposed database directive as amended on to the Council, which adopted it on February 26, 1996. The European Parliament then gave final approval on March 11, 1996. European Parliament and Council Directive 96-9-EC of Mar. 11, 1996 [hereinafter Database Directive].

These two directives were intended to provide protection for expanded industries and, thus, revenue for the EU countries. *See infra* notes 5, 13. The EU has also adopted other copyright directives on the rental and lending right, satellite broadcasting and retransmission, and term of protection. The motivation for the adoption of these directives had more to do with harmonization and internal market efficiency matters than with international copyright or the creation of jobs.

<sup>5</sup> “[I]t is particularly important to ensure that appropriate legal protection is available to computer programs and software generally, which will contribute to an environment favourable to investment and innovation by Community firms, thus permitting the Community industry to catch up with its competitors.” Commission Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action, COM (88) 172 final, at 175.

The nations of the world can be divided broadly into three groups based upon their relationship to the production and consumption of intellectual property products: (1) net sellers-exporters; (2) those with the resources and industries to become net sellers-exporters; and (3) net users-importers. The first group, whose main member was the United States, wanted broad protection worldwide. The second group, which included some members of the European Community, also wanted broad protection worldwide and, in addition, wanted to increase protection domestically to give more incentives to their industries to create and compete domestically and abroad.<sup>6</sup> The third group, mainly developing and newly industrialized nations, sought to limit protection at least within their borders.

While those in groups one and two may have had disputes and concerns among themselves,<sup>7</sup> they were for the most part united on the position that they wanted much greater protection in the countries in group three. Obtaining this protection would require the conversion of those who were not true believers in the value of copyright or other forms of intellectual property.

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The EC Biotech Directive, *supra* note 3, was meant to establish a level of protection that would induce investment in research and development to compete with that in the United States and Japan. See ANNA BOOY & AUDREY HORTON, SWEET & MAXWELL'S E.C. INTELLECTUAL PROPERTY MATERIALS 96 (1994) ("Different levels of patent protection available in Member states could make the E.C. a less attractive place to invest in biotechnological research when compared with the United States and Japan."); Biotech Directive, *supra* note 3, at recital 3 ("[P]rotection of biotechnological inventions will definitely be of fundamental importance for the Community's industrial development."). Similarly, "the impetus [for the Supplementary Patent Protection Regulation] came from the enactment of similar legislation in the United States and Japan, to ensure the competitive position of the E.C.'s pharmaceutical industry...." BOOY & HORTON, *supra*, at 147.

<sup>6</sup> See *supra* notes 4, 5; *infra* note 13.

<sup>7</sup> The EU Database Directive and the Duration of Term Directives have reciprocity provisions that limit the ability of United States companies and nationals to take advantage of increased protection given to EU companies and nationals. See Database Directive, *supra* note 4, art. 11 (sui generis unauthorized-extraction right restricted to EU nationals, companies with habitual residence in the EU, or companies with a registered office in a member state with a continuous link with economy of a member state, §§ 1-2; nationals of other states may get protection when similar protection is granted in their country, §3); Council Directive 93/98 of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 7(2), 1993 O.J. (L290) 9 (The "rule of shorter term" provision precludes life-plus-70-year term to works of U.S. companies and nationals.).

This commentary attempts to address some of the problems that the United States and others faced in bringing about that conversion. The first question was who would be on the front line of the proselytizing efforts.

## II. THE COPYRIGHT PLAYERS

*The Secular Priesthood.* Until approximately fifteen to twenty years ago, copyright law was the province of a small bar and an even smaller cadre of law professors. The numbers were small because of the complexity of the law, the limited amount of copyright work, and the relatively few schools that taught it on a continuous and serious basis. These lawyers and professors practiced and wrote about copyright law in the context of traditional copyright industries: publishing, theater, motion pictures, music, and art. The lawyers related emotionally to the creators. No doubt many at one time may have had aspirations to be writers or other types of creators themselves. Regardless of what the doctrine stated,<sup>8</sup> and without necessarily articulating this view in terms of natural law, they nonetheless believed that creators were entitled to copyright in their works.<sup>9</sup>

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<sup>8</sup> Copyright doctrine for the most part rejects the view that authors are entitled to protection from the very fact of creation. Rather, the doctrine states that copyright laws are designed to primarily benefit the public by providing incentives to creation. Under this view, the benefits authors receive from the copyright laws are a means to an end and not the end in itself. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[M]onopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“[C]opyright law ... makes reward to the owner a secondary consideration.”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“[S]ole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

<sup>9</sup> In John Locke’s view of natural law, a person’s individual effort or labor created an individual property interest. Natural law did not require balancing the laborer’s property right against anyone else’s needs as long as there was enough raw material left for others:

The labor of his body and the work of his hands ... are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.... For this labor being the unquestionable property of the laborer, no [person] but he can

These lawyers and professors, who were primarily based in New York (with the later addition of Los Angeles) formed what amounted to a secular priesthood protecting the esoteric secrets of idea/expression, conceptual separability, and originality.<sup>10</sup> Copyright work was attractive because it presented the opportunity to work in one of the most, if not the most, intellectually challenging and interesting areas of the law.<sup>11</sup> Copyright also provided the opportunity to work with interesting, sometimes very gifted, people and with creative and engaging works.

International law and international trade were not of interest to most of these lawyers or their clients. To a large extent, they have remained outside of the international battles.

*The Agnostics and Atheists.* Many newcomers to copyright in the last ten to fifteen years, especially those in academia, do not accept the basic assumptions about creation and ownership long shared by the copyright community. Many do not identify with creators but rather with users: Internet (net) users, developing nations, consumers, small competitors, and creators of derivative works. These newcomers to copyright came of age in a time when protection was broadly applied to utilitarian works, such as computer programs, and international copyright became trade oriented. They sensed that something was wrong with the current system. Copyright owners were not the Oscar Hammersteins but the Time Warners, Sonys, and MCAs. Whereas the secular priests were and are technically challenged, this new breed not only feels

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have a right to what that is once joined to, at least where there is enough and as good left in common for others.

JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 17 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1690). For analyses of John Locke's natural-law theory in the context of intellectual property see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517 (1990).

<sup>10</sup> Concerning this analogy, the author refers to priesthoods in ancient Greek and Roman times and not ones as found today.

<sup>11</sup> In addition to teaching copyright law, this author has taught constitutional law, constitutional criminal law, antitrust, federal courts, EU intellectual property law, and trademark law. The author finds copyright law to be the most intellectually challenging.



at home on the net but is creating web sites, home pages, and teaching cyberspace law.

If this group ever had a high-protection faith in copyright, they lost it. Today they are imbued with the culture of the public domain—a “living and vibrant” public domain. This group believes that the public domain will protect those on the net, increase competition, allow cultural self-determination, and make multinational corporations atone for their sins. This is an unlikely group to enlist in the foreign copyright crusades.

*The Missionaries.* The copyright crusade in large part has been driven by trade considerations. It is not surprising to find people with backgrounds in this area (both inside and outside of government) at the forefront of the conversion effort. Joining them are lawyers for multinational corporations and trade associations, some of whom were in the secular priesthood. In addition, those entrusted with the protection of intellectual property in the European Union (EU) and in the United States government have played key roles. The effort has attracted people with considerable skill and ability and, to date, has been remarkably successful. Still, much work remains to be done before it can be assured that all souls have been saved.

### III. THE RELIGION

Wholesale conversion needs the tools of religion, and fundamentalist religion at that. Certain truths are revealed and meant to be learned, not debated. The intellectually complex points of copyright law are for seminary discussion over wine. Here, high protection is the key. The public domain is not a place where you will find Robin Hood in Sherwood Forest righting economic wrongs. Rather, the public domain is a place where bandits replenish supplies so they may cross the border to loot and plunder copyrighted works. For long forays into copyrighted lands, these public domain bandits are hidden and fed by consumers who want something for nothing and who have an apparently insatiable appetite for unprotected works.

As with all fundamentalist religions, this one has fundamental truths. One truth is that computer programs must be protected as

literary works.<sup>12</sup> The words “sui generis protection” would produce gasps from the faithful. Another truth is that a high level of protection for intellectual property would lead to more investment and jobs.<sup>13</sup> A third truth is that so called “national treatment” is the way to increase protection for all and that “reciprocity” is the nationalistic work of the devil.<sup>14</sup>

The faith in national treatment, which required action as well as belief, was harder for the righteous to adhere to fully. The United States inserted a reciprocity provision in its sui generis legisla-

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<sup>12</sup> The reasons for protecting computer programs as literary works had much to do with the fact that this was the regime in the United States and all countries adhering to the Berne Convention already had protection for literary works in place. This tradition of protection worked well in the early judicial protection of computer programs. See *Whelan Assoc. v. Jaslow Dental Lab. Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). *But see* *Computer Assoc. Int'l v. Altai Inc.*, 928 F.2d 693 (2d Cir. 1992). A sui generis regime, on the other hand, would require adoption of a new law by every country in the world. This would follow endless debate on the multilateral level on what and how much to protect. The result would be an uncertain future as to what, if anything, would make it into the national laws, without much hope of uniformity. Even a world of relatively low protection such as that advanced in *Altai* would be preferable.

<sup>13</sup> See *supra* note 5. The Database Directive is also intended to provide protection for expanded industries and, thus, revenue for the EU countries. Recently, a member of the European Parliament's Legal Affairs Committee, Ana Palacio Vallelersundi (Spain), stated that she hoped that “the level of protection afforded by the [directive] and its application throughout the [EU] internal market will help to strengthen investment in this key sector and to create jobs.” *Euro Parliament Approves Legislation on Copyright Protection of Databases*, 10 *World Intell. Prop. Rep. (BNA)* 43 (Feb. 1996).

The Group of Seven ministerial conference, organized by the European Commission last February, concluded that “high levels of legal and technical protection of creative content” will be essential to ensure the “necessary climate for the investment needed for the development of the information society.”

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The [United States] has always had strong copyright laws, allowing producers to enjoy full control over the exploitation of films. The alliance [of European film producers] argues this has been a significant factor in the strength of the [United States] in the global entertainment market.

Robert Rice, *Gunning for the Pirates: The Film Industry Faces New Concerns over Copyright*, *FIN. TIMES*, Feb. 6, 1996, at 11.

<sup>14</sup> “National treatment” is a phrase which means that in country X a work originating in a foreign country will be given the same protection as works created in country X. “Reciprocity” means that in country X a work of foreign origin will only be given the protection to which that work is entitled in its country of origin.

tion to protect semiconductor computer chips.<sup>15</sup> The EU inserted reciprocity provisions in the proposed Database Directive and the term directive.<sup>16</sup> Even the Berne Convention allows for reciprocity in some circumstances.<sup>17</sup> However, the slips and falls of our leaders do not mean that religious truths are false, only that the flesh is weak. The TRIPS Agreement, recognizing this, requires national treatment.<sup>18</sup>

#### IV. THE CONVERSION OF THE UNINITIATED

Once you have a religion and missionaries, how do you convert the uninitiated? There are two broad approaches to conversion: voluntary and involuntary.

*Voluntary conversion.* Voluntary conversion is obviously the ideal. How does one achieve this? One way is by example. People see how you live your life and are impressed. They want to have the inner glow that they see in you. This way is somewhat problematic for the United States. If there is an inner glow, it has not been strong enough to be seen from abroad.

The United States did not provide protection for foreign works for over 100 years. When the United States finally did begin to provide protection, it imposed a requirement that books be manufactured in the United States in order to protect the domestic printing industry. The United States imposed a system of formalities, the main purpose of which seemed to be to throw works into the public domain, including many famous foreign works. It just recently joined the Berne Convention, and did so only because other nations told it repeatedly, "If you are going to preach the religion, you must join the Church."

The U.S. consumer views intellectual property as a hindrance to immediate gratification and home-taping as something guaranteed by the Bill of Rights. United States corporations believe the French view of moral rights is sentimental slop. The proposed leg-

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<sup>15</sup> Semiconductor Chip Act, 17 U.S.C.A. s 901, s 902(a) (1), s 914 (1995).

<sup>16</sup> See *supra* note 7.

<sup>17</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, art. 7(8), 828 U.N.T.S. 221.

<sup>18</sup> See TRIPS, *supra* note 1, art. 3, 33 I.L.M. at 1199.

islation in the U.S. Congress for a copyright term of life plus seventy years<sup>19</sup> stands a chance only in the event money flows from Europe to the United States, which is not a copyright concern but a balance of trade concern. Thus, conversion by example is a tough row to hoe.

A second traditional conversion argument focuses on the existence of an afterlife and one's place in it. While the copyright faithful might believe that the "free access" or "pro-user" people will have some explaining to do, even they will concede that one's chances for salvation are not at stake.

A third argument for conversion is to show how the person will benefit. The consuming public, however, benefits in the short run from free access to intellectual property much as it does when a truck is hijacked and the goods are sold below cost. Moreover, some livelihoods in developing countries may be based upon "pirate" industries. Jobs will be lost, and it may not be apparent or obvious how protection of intellectual property will produce new jobs in those countries, if in fact it will. It may well be that the globalization of intellectual property is going to produce economic winners and losers, with little hope in the short run for the losers to change their status.

The benefit argument is that the protection of intellectual property will produce investment in new or current industries that, in the long run, will produce income and jobs. It has been said that "[i]n the long run, we are all dead,"<sup>20</sup> and it is usually short-run arguments that the "person in the street" cares about.

A fourth argument is that although in the short run it will cost money to pay for intellectual property, this cost is as morally appropriate and necessary as paying for food, transportation, and consumer goods. In short, it is simply wrong to take someone else's intellectual property. While this principle is undoubtedly correct, there are obstacles to winning converts on these grounds. First, the consuming public wants goods at lower prices and shows little concern for how it gets them. If a consumer is told that the expensive product being sold at a low price was stolen

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<sup>19</sup> S. 483, 104th Cong., 2d Sess. (1995); H.R. 989, 104th Cong., 2d Sess. (1995).

<sup>20</sup> JOHN M. KEYNES, *A TRACT ON MONETARY POLICY* 88 (1924).

from a truck, the consumer's main concern may be the validity of the warranty.

Second, even if consumers were concerned with the morality of theft, they generally do not treat or value intellectual property in the same way that they do tangible property. For example, if a videotape of a movie costs forty-nine dollars, only a few dollars of that amount represents the costs of manufacturing and delivering the tangible property—the cassette. At least forty dollars, and probably more, of the cost is for the intangible property—the movie. Everybody thinks it wrong to shoplift the videocassette from a store. On the other hand, almost everybody considers it appropriate to videotape that same forty dollar movie from a television set. Thus, it appears that the inexpensive but tangible videocassette is valued more than the expensive but intangible intellectual property.<sup>21</sup>

If the short-run self-interest of the people is an obstacle to conversion, the next step is converting the intellectual and power elites who may appreciate long-run benefits. In time, the religion can be passed on, imposed on, or trickled-down to the people. The problem is that intellectual and power elites are used to imposing

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<sup>21</sup> It is no response to this illustration, as a speaker said at a recent conference at the New York University School of Law, that the Supreme Court held that home-taping is legal in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Engelberg Center on Innovation Law and Policy, *The Culture and Economics of Participation in an International Intellectual Property Regime* (March 12, 1996) (unpublished Roundtable discussion).

First, the Supreme Court in a 5-4 decision only held that "time-shifting" is a fair use; it did not reach the issue of whether "librarying" is a fair use, which is the home-taping practice analogous to buying or shoplifting a videocassette. Moreover, there were not five votes for holding that librarying was a fair use. See Jonathan Band & Andrew J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal*, 7 COLUM.-VLA J.L. & ARTS 427 (1993) (key to Justices Brennan and O'Connor's concurrence was lack of harm in time-shifting).

Second, consumers were home-taping long before Sony was decided in the Supreme Court and after the Ninth Circuit in Sony had held that home-taping was a violation of copyright law. Home-taping, therefore, was not the result of the Supreme Court's decision, however construed by the public.

Third, even if the Court had ruled that home-taping for all purposes was a fair use, this would only have shown that a majority of the Court shared the same relative valuation of tangible and intellectual property as the consuming public. It would reinforce the point in the text, not refute it.

their views on others, not vice versa. An idea, whatever its merits, may be resisted because of its origin, particularly if it originates abroad. Autonomy, while not appropriate for the masses, becomes a mantra for the elites.

This is true for developed as well as developing nations. There are two recent examples. The first example is in the United States. Both the secular priests and agnostics are upset with the changes in U.S. law mandated by TRIPS.<sup>22</sup> Repeatedly one hears concerns that changes in copyright law that derive from international obligations do not give due regard to the Copyright and Patent Clause in the U.S. Constitution.<sup>23</sup> Moreover, there is fear that limitations on copyright set forth by the Supreme Court (for instance, in *Feist*<sup>24</sup>), will not be respected.

Whatever the merits of these arguments, disregard of the Constitution or Supreme Court opinions is not a recent phenomenon. Despite the fact that Professor Melville Nimmer raised the constitutional problems with various aspects of copyright law in his original treatise on the 1909 Copyright Act,<sup>25</sup> few litigants<sup>26</sup> or academics have sought to develop those points even after many years. Moreover, a number of Supreme Court opinions have been ignored or not followed by lower courts.<sup>27</sup> Similarly, the Court it-

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<sup>22</sup> See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter URAA].

<sup>23</sup> U.S. CONST. art. I., § 8, cl. 8.

<sup>24</sup> *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>25</sup> MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* ch. 1 (1975). It appears from examining a 1975 version of the treatise that the constitutional problems in copyright law were discussed in the treatise at least as of 1972, and may have been discussed as early as when it was first published in 1963. *Id.*

<sup>26</sup> For instance, no litigant, amicus curiae, or commentator raised, or discussed with regard to *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the issue that the work-made-for-hire doctrine, which bypasses the creator and calls the employer or hiring party the “author,” is a legal fiction that violates the “author” requirement of U.S. CONST. art. I., § 8, cl. 8. See NIMMER, *supra* note 25, § 6.3.

<sup>27</sup> For example, in broadly worded opinions, the Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964), seemed to preempt much of the law of unfair competition and bar protection for three-dimensional trademarks. In *Compco* the Court stated:

That an article copied from an unpatented article could be made in some other way, that the design is “nonfunctional” and not essential to the use of either article, that the configuration of the article copied

self has sometimes ignored, manipulated, or distorted its own precedents.<sup>28</sup> Even the exalted Feist opinion has been given lip service by some lower courts, including one on which retired Justice Powell was a member of the panel.<sup>29</sup>

While the recent changes in copyright law raise legitimate concerns, the concerns are no greater than those that existed before

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may have a “secondary meaning” which identifies the maker to the trade, or that there may be “confusion” among purchasers as to which article is which or as to who is the maker, may be relevant evidence in applying a State’s law requiring such precautions as labeling; however, and regardless of the copier’s motives, neither these facts nor any others can furnish a basis for imposing liability for or prohibiting the actual acts of copying and selling.

376 U.S. at 238. Lower courts largely ignored these two cases and, twelve years later, the Eighth Circuit held, in effect, that both Supreme Court opinions consisted entirely of dicta. *See* *Truck Equip. Service Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1214 (8th Cir. 1976). Of course, the Supreme Court also ignored the above language and the policies espoused in *Sears* and *Compco* when it held not only that three-dimensional trade dress could be protected with secondary meaning but that such trade dress could be protected without secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S.Ct. 2753, 2758 (1992). While *Two Pesos* was decided under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1994), there was no indication by the Court that state unfair competition or trademark law, which first protected trade dress, could not continue to do so.

<sup>28</sup> In *Mazer v. Stein*, 347 U.S. 201, 217 (1954), the Court interpreted (manipulated) the “explanation/use” holding of *Baker v. Selden*, 101 U.S. 99, 104 (1879), which would have prevented the protection for applied art, to merely state that the “protection is given only to the expression of the idea -- not the idea itself.” In *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994), the Court took the statement in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984), that if the allegedly infringing device “were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair,” to stand only for the proposition that commercial use “is a factor that tends to weigh against a finding of fair use.” *See also* the discussion of *Sears* and *Compco* and *Two Pesos*, *supra* note 27. Perhaps the Court applied a better policy in the later cases, but it is clear that deference was not given to its earlier pronouncements.

<sup>29</sup> *U.S. Payphone, Inc. v. Executives Unltd. of Durham, Inc.*, 18 U.S.P.Q. 2d 2049, 2050 (4th Cir. 1991) (per curiam) (Unpublished opinion not subject to citation in Fourth Circuit) (Reference guidebook that provided information for coin-operated telephone market including 51-page section on state tariffs infringed when defendants copied this section verbatim). The court stated,

The evidence suggests that the Tariff Section could have been organized in many different ways and that Payphone expended a great deal of time creating the single-page-per-view format. The Guide, according to Payphone, is the result of hundreds of hours of reviewing, analyzing, and interpreting state tariffs and regulations.

*Id.*

without much complaint. What might be particularly upsetting to both the secular priests and the agnostics is that these changes have been imposed from abroad, with little or no consideration of their views. Copyright is their area, and they are territorial about it. The message to the international set is: Mess around with tariffs, anti-dumping provisions and the like, but leave copyright to us.

The second example is in the United Kingdom. In the United Kingdom high protection is gospel and there are no known agnostics. Both television listings and government statutes have been protected under copyright law,<sup>30</sup> which the secular priests in the United States would consider grossly overprotective and in bad taste. But even in the land of high protection, increased-protection changes can cause resentment if imposed from abroad. Pursuant to the EU term directive, Kenneth Grahame's *Wind in the Willows* had come back into copyright. Alan Bennett had adapted it while it was in the public domain and produced an annual Christmas pageant. The new U.K. law allowed derivative works created while the work was in the public domain to remain free from new restraints. Thus Bennett would not have to seek permission from or pay the owner of the rights to Grahame's works, the Oxford University Library.

Oxford, however, had been looking forward to the revenue from licensing Bennett's production.<sup>31</sup> One might think that, in a high protection country, university students' sharing with Bennett the revenue for a derivative work for which Bennett never paid copyright fees would be warmly received. But this is how *The Times* (London) reported the facts:

Toad of Toad Hall and his friends from the river-bank have escaped the clutches of the lawmakers in Brussels and are able to continue delighting child-

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<sup>30</sup> See Copyrights, Designs and Patents Act of 1988, ch. 48, § 164 (U.K.) (copyright protection for acts of Parliament); *BBC v. Time Out*, 1984 F.S.R. 64 (copyright protection for television listings); Broadcasting Act of 1990, ch. 2, § 176 & sched. 17 (U.K.) (compulsory licenses for television listings).

<sup>31</sup> *The Times* (London) reported this along with the fact that the Bennett production was not subject to copyright restraints. Emma Wilkins, *Toad Escapes Clutches of Copyright Law*, *THE TIMES* (London), Dec. 26, 1995, at 5.



ren of all ages for the rest of the pantomime season  
in London.<sup>32</sup>

Of course, children of all ages would have continued to enjoy Toad of Toad Hall even with a licensing requirement. The slant of the story appears to derive from the fact that the law resulted from an EU directive. The bias against such directives appears to overshadow the potential benefit to Oxford and the under-financed educational system of Britain.<sup>33</sup>

A final problem with any conversion effort is the fact that the owners of the intellectual property are, for the most part, from the United States. This seems to upset people throughout the world. Fair-minded Europeans are comfortable with levy laws that do not fairly compensate U.S. producers for home-copying<sup>34</sup> and standardization policies apparently aimed at getting U.S. technology at low cost through compulsory licensing.<sup>35</sup> Newly industria-

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<sup>32</sup> *Id.*

<sup>33</sup> See John Authers, *Paying for Education: Government and Opposition Party Agree to Postpone Highly Contentious Issue*, FIN. TIMES, Feb. 20, 1996, at 8 (“acute crisis” in U.K. university funding).

<sup>34</sup> See, e.g., Law No. 85-660, 1985 J.O. 7495 (July 14, 1985) (Fr.) (U.S. producers and performers excluded from claiming on the producers’ and performances’ share by application of “first fixation in France requirement” -- claims must be on works or performances first fixed in a tangible form and edited in France).

<sup>35</sup> In 1988, at the urging of the European Commission (the Commission), the European Telecommunications Standards Institute (ETSI) was created to become the pan-European standard-setting body in the telecommunications field. In March 1993, ETSI determined that its members should agree, as a condition of membership, to license their intellectual property rights for all standards that ETSI approved. Such licensing would be governed by the terms of ETSI’s Intellectual Property Rights (IPR) Policy and Undertaking scheme (the IPR Undertaking or the Undertaking). Many IP owners viewed the Undertaking as a device to require the owners of valuable intellectual property to license at low costs and without cross-licensing to those with less valuable intellectual property. Most of those who would be required to license were U.S. corporations and most of those who would have received were Europeans. ETSI had adopted the IPR Undertaking despite a formal communication from the European Commission, which disapproved of involuntary use of IP in standard-makings proceedings. Communication from the Commission: Intellectual Property Rights and Standardization, COM (92) 445 final (Oct. 27, 1992).

In response to ETSI’s adoption of the Undertaking, the Computer and Business Equipment Manufacturers Association (CBEMA) filed an antitrust complaint against ETSI with the Commission, supported by the Business Software Alliance (BSA) and others. The Commission’s initial review found problems with the ETSI Undertaking and, on reconsideration, ETSI scrapped the Undertaking in August 1994 and determined to develop a new IPR policy. For a full discussion of the ETSI standardization debate and the

lized Asian nations that normally place a premium on being law-abiding are comfortable with their pirate industries that feed on U.S. products. The “Ugly American” today is the one who expects to be paid.

*Involuntary Conversion.* The prospects for voluntary conversion are not great. That leaves conversion by the sword. Apparently recognizing this early on, the United States favored proceeding through GATT and TRIPS, which had mechanisms for sanctions, rather than in the WIPO, which did not.<sup>36</sup>

The WTO, or TRIPS, regime provides mechanisms for both the United States and the European Union to enforce provisions that increase protection in newly industrialized and developing nations.<sup>37</sup> If these mechanisms fail, there is little doubt that bilateral trade restraints will be used in these religious wars, whether they be “Section 301”<sup>38</sup> or ad hoc efforts. When the United States and the European Union wanted to achieve increased protection in narrow areas of intellectual property between themselves, they each used reciprocity provisions, the mortars of religious wars.<sup>39</sup> This should remove any doubt that coercion will continue to be used against newly industrialized and developing nations when broad levels of protection are at stake.

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policies involved, see Alan N. Dixon, *The ETSI Complaint and the European Commission's Communication on Standardization*, in 1 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY ch. 39 (Hugh C. Hansen ed., forthcoming 1996).

<sup>36</sup> This is not to say that the United States considers proceedings in WIPO to be not worthwhile. It is actively seeking solutions for the interplay of intellectual property and the global information infrastructure through a protocol to the Berne Convention. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, COMMITTEE OF EXPERTS ON A POSSIBLE PROTOCOL TO THE BERNE CONVENTION, DRAFT REPORT (1996).

<sup>37</sup> See TRIPS, *supra* note 1; J. H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 382-88 (1995).

<sup>38</sup> See 19 U.S.C. §§ 2241-2242, 2411 (1994). The willingness of the United States to use § 301 is evidenced by the recent amendments under URAA, *supra* note 22, § 314(c) (1), which allow a § 301 proceeding to be brought “notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the [TRIPS] Agreement.” See Reichman, *supra* note 37, at 384.

<sup>39</sup> See *supra* note 7.

## V. CONCLUSION

Some parties might enjoy theological debates about the nuances and complexities of copyright law and the culture of the public domain. For developed nations, however, the trade stakes between them and the newly industrialized and developing nations with regard to international copyright protection are too high for such debates to occur. That is a luxury left for academics, the refined domestic practice of the secular priests and, possibly, the developed nations in disputes among themselves.

Religious wars can be just as deadly as nonreligious ones. Individuals of good conscience in the past have converted to avoid the sword or economic or other sanctions. Today, the copyright wars are still being fought. The soldiers are in the field and the developed nations have won most of the initial battles. The question remains whether the newly industrialized and developing nations will ever fully convert. Lip service can be a valuable defense,<sup>40</sup> and political leaders sometimes lose the stomach for war. Time will tell.

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<sup>40</sup> See, e.g., Seth Faison, *Copyright Pirates Prosper in China Despite Promises*, N.Y. TIMES, Feb. 20, 1996, at 1.