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The Development and Incorporation of International Norms in the Formation of Copyright Law

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The Development and Incorporation of International Norms in the Formation of Copyright Law

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The means by which international norms are developed and incorporated in the formation of copyright law have changed dramatically in recent years. In this article, Professor Dinwoodie explores the nature of those changes. The classical model of international copyright law afforded countries significant latitude to implement international standards in ways tailored to their own economic and cultural priorities. The lack of an effective method of enforcing international standards consolidated that deference to national autonomy. And international treaties tended merely to codify existing commonly accepted national standards. This model has undergone changes of late, most notably (but not exclusively) in the context of the TRIPS Agreement, which subsumed the principal international copyright obligations within the WTO Dispute Settlement system. This change to the classical model is potentially significant in many ways. Most directly, failure to fulfill international copyright obligations may be met by the imposition of trade sanctions. More broadly, however, the interpretation of international copyright obligations by WTO panels may alter the degree of national autonomy afforded member states and may make international copyright law more forward looking in nature. International copyright lawmaking by activist WTO panels thus may generate costs as well as gains. Professor Dinwoodie considers these issues through an analysis of the first (and, thus far, the only) report of a WTO dispute settlement panel regarding violation of a copyright provision contained in the TRIPS Agreement. This report, handed down in June 2000, found that an exemption introduced into section 110(5) of the U.S. Copyright Act in 1998 violated the rights of owners of copyright in musical works guaranteed by the Berne Convention and incorporated within the TRIPS Agreement. Professor Dinwoodie concludes that the panel report is a good beginning to the new era of international copyright. The panel report is a strong and appropriate endorsement of the need to protect the rights of copyright owners and to hold WTO members to agreed-upon minimum

* Professor of Law, Chicago-Kent College of Law. This article is based upon a presentation made to the inaugural Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property, at The Ohio State University College of Law in February 2000. I am very grateful to Sheldon Halpern for the invitation to participate in what was a fascinating conference. The ideas developed in the article benefited greatly from constructive critiques by other conference participants; I am especially indebted in this regard to Jerry Reichman and Marshall Leaffer. Thanks also to various colleagues who offered suggestions on my views on this and related topics in other fora, including the Ad Hoc Faculty Workshop at the University of Pennsylvania Law School and the Colloquium on Innovation Policy: Remapping Intellectual Property Law For a Changing Business Environment, at New York University School of Law. Brian Havel, as always, offered helpful comments on an earlier draft, as did Larry Helfer and Shira Perlmutter. Finally, I am very grateful to Alicia Hickok and Michelle Paninopoulos for invaluable research assistance. Copyright 2000, Graeme B. Dinwoodie.

standards. In addition, the report contains hints that WTO panels will accord some continuing respect to the value of national autonomy, will seek to interpret the TRIPS Agreement in a dynamic fashion responsive to changing social and economic conditions, will examine contentious issues of copyright law through other than a pure trade lens, will move cautiously before finding violations of international obligations, and will encourage the involvement of interested third parties in the resolution of WTO disputes. Despite this balanced beginning, the article concludes that private international lawmaking might further forward-looking international copyright lawmaking in ways that do not incur the costs associated with activist WTO lawmaking. To facilitate this process, Professor Dinwoodie suggests that national courts consider resolving international copyright litigation by formulating substantive rules rather than localizing such disputes in a single country through traditional choice of law rules. Such a substantive law approach to choice of law fits well with the objectives of private international law. But this broader approach will also establish a means of incorporating international norms in the formation of copyright law without jeopardizing values appropriately furthered by the classical method of public international copyright lawmaking.

INTRODUCTION

International copyright law is suddenly very real. In June 2000, a panel of the Dispute Settlement Body (DSB) of the World Trade Organization (WTO)¹ issued the first opinion (nominally, a report)² on an alleged violation of the copyright provisions contained in the Agreement on Trade Related Aspects of Intellectual Property (the TRIPS Agreement).³ Although substantial international copyright

¹ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, [hereinafter WTO Agreement] 33 I.L.M. 1125 (1994).

² The panel report is circulated to all the Members of the WTO (after a preliminary review by the disputant parties) for adoption by the full Dispute Settlement Body, which is comprised of representatives from all member states. The panel report will be adopted unless there is a consensus not to do so. See Understanding on the Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 1, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU or Dispute Settlement Understanding] art. 16(4). This reverses the parallel procedure under the prior GATT, whereby reports required consensus before being adopted. The effect is to change from a system where the losing party could block adoption of the report to a system where adoption of the report is all but automatic. For a fuller discussion of the process, see David Palmeter, *National Sovereignty and the World Trade Organization*, 2 J. WORLD INTELL. PROP. 77, 78–81 (1999).

³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPS or the TRIPS Agreement]. The TRIPS Agreement is one component of the trade agreement establishing the World Trade Organization emanating from the Uruguay Round revision of the General Agreement on Tariffs and Trade (GATT). It includes provisions on all aspects of intellectual property, including patent, trademark, design protection, trade secrets, and geographical indications of origin, as well as copyright. See generally J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under*

agreements have been in place for more than a century,⁴ no dispute regarding member state compliance had ever been submitted to a formal dispute settlement process,⁵ much less one supported by effective enforcement mechanisms. Yet, after the adoption by the full DSB of the panel's report⁶ finding a recent amendment of section 110(5) of the U.S. Copyright Act⁷ to be in violation of the United States' obligations under the TRIPS Agreement, the United States is now obliged to amend its copyright law or face damages or trade sanctions for its violation of TRIPS.⁸

This development represents a significant milestone in the transformation of international copyright law. As the adoption of the panel report emphatically brings home, the means by which international norms are developed and incorporated in the making of copyright law have changed dramatically over the last fifteen years. The process of national legislative implementation of international norms is now supplemented by an enforceable autonomous body of international standards. But where will, and should, international copyright go from here? In this article, I argue that while the panel report in *United States—Section 110(5)* is indeed a watershed event for international copyright law, the internationalization of copyright law can best be achieved by adopting a broader vision of the component parts, and the institutional actors, that will contribute to that process. In particular, I suggest an enhanced role for private parties and private litigation in the development of international copyright norms. To facilitate such a role, I urge reconsideration of the current approach of U.S. courts to multinational copyright disputes, including the adoption of a revised choice of law methodology that would permit U.S. courts to consider international norms in the development of U.S. copyright law.⁹

To explore the future of international copyright law, in Part I of this article I first trace the evolution of international copyright law and analyze several of the ways in which international copyright law has changed of late. I conclude that although recent developments, and in particular the incorporation of international copyright

the TRIPS Component of the WTO Agreement, 29 INT'L. LAW. 345 (1995) (providing an overview of the TRIPS agreement).

⁴ See *infra* text accompanying notes 13–33 (discussing evolution of the Berne Convention).

⁵ See *infra* text accompanying notes 30–31 (discussing article 33 of the Berne Convention).

⁶ See United States—Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R (June 15, 2000), at <http://www.wto.org> (finding the U.S. Fairness in Music Licensing Act to be in violation of TRIPS) [hereinafter Panel Report]. See generally Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of The Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000) (analyzing possible conflicts between the Fairness in Music Licensing Act and the TRIPS Agreement and the Berne Convention).

⁷ See Fairness in Music Licensing Act, Pub. L. No. 105-298, 112 Stat. 2830–31 (1998) (codified in principal part at 17 U.S.C. § 110(5)(B) and at §§ 101, 504, 513 (1994 & Supp. IV 1998)).

⁸ See *infra* text accompanying notes 138–47 (discussing U.S. response to the panel report).

⁹ The arguments that I make for the adoption of a substantive law method to choice of law in international copyright cases are developed at greater length in Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000).

obligations within the dispute settlement mechanism of the WTO, are important and welcome, these same developments pose some risk to long-standing and worthy international copyright values. In particular, if WTO panels adopt too activist an approach to TRIPS interpretation, the fruits of cultural and economic diversity may be threatened,¹⁰ the copyright norms that are generated may be insufficiently reflective of the assorted philosophical underpinnings of copyright,¹¹ and the role of national legal systems as laboratories in the international lawmaking process may prematurely be curtailed.¹²

In Part II, I discuss the panel report in *United States—Section 110(5)* in light of these conclusions. Although this single report does not, and could not of itself, assuage the concerns identified in Part I, it does contain language respectful of national idiosyncrasies while warning against substantial intrusions upon the internationally guaranteed rights of authors. It is a good beginning for a new era of international copyright law. In Part III, I suggest the ways in which private law mechanisms (i.e., methodologies used in private litigation before national courts) might also contribute toward the development and incorporation of international norms in the formation of copyright law. I conclude that such mechanisms might fill some of the gaps that are (best) left unfilled by public international lawmaking and better provide the dynamism essential to the optimal development of copyright law in an age of rapid technological change.

I. THE ROAD TO TRIPS

A. *The Basic Structure of the Berne Convention*

International copyright relations began in earnest in 1886 with the conclusion of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).¹³ Countries participating in the discussions that led to the Convention sought to establish copyright protection internationally for the works of their nationals. That objective could be achieved in a number of ways. A comprehensive universal copyright law, establishing uniform standards to be applied in all adherent countries, was advocated by several countries (most notably, Germany).¹⁴

¹⁰ See *infra* text accompanying notes 32–33 (discussing the importance of national systems tailored to distinctive economic and cultural conditions).

¹¹ See *infra* text accompanying notes 56–57 (discussing the possibly trade-centric nature of TRIPS).

¹² See *infra* text accompanying notes 55–56 (discussing the dangers of activist interpretation by WTO panels).

¹³ See Berne Convention for the Protection of Literary and Artistic Works, 1161 U.N.T.S., July 24, 1971, 3. See generally SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986* (1987).

¹⁴ See Jane C. Ginsburg, *The Role of National Copyright in an Era of International Copyright*, in *THE ROLE OF NATIONAL LEGISLATION IN COPYRIGHT LAW* 211, 213 (Deitz, ed. 2000) (discussing 1883 intergovernmental conference and the resolutions adopted by the three

Agreement on a comprehensive code would, however, have required substantial compromise on the part of most nations; even in the late nineteenth century, the copyright laws of several European countries were sufficiently developed that clear differences existed between them.¹⁵ As more recent efforts at intellectual property harmonization in the European Union (the EU) have demonstrated, achieving comprehensive unification of laws is extremely difficult in areas where divergent national jurisprudence has already taken root.¹⁶ And if unprincipled compromise is forced, either through political log-rolling or language consciously susceptible of all meanings to all parties, national courts steeped in different traditions may re-effect the historical divergence.¹⁷ Moreover, a code promulgating stiff standards that

Congresses of Authors and Artists that preceded the intergovernmental conference).

¹⁵ See RICKETSON, *supra* note 13, at 8–17 (summarizing national laws that existed prior to the Berne Convention).

¹⁶ International agreement is easier to forge in areas of new social (and hence legislative) activity, such as the allocation of domain names, that arise first in an inherently non-national setting. But difficulties arise even in that context when non-national concepts collide with territorial rights such as those provided by national trademark laws. See Graeme B. Dinwoodie, *(National) Trademark Laws and the (Non-National) Domain Name System*, 21 U. PA. J. INT'L ECON. L. 495 (2000). Moreover, while it is easier to develop a unitary international approach in the context of new problems, attending to issues first at the international level may suffer from the lack of national experimentation with different solutions. See *infra* text accompanying notes 55–56.

¹⁷ For example, the EU has sought to achieve substantial harmonization of the trademark laws of its member states. See First Council Directive 89/104 of 21 December, 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1 [the Trademark Directive]. Yet, the U.K. courts in particular have appeared reluctant in early cases to depart from some of the pre-directive British attitudes to trademark protection. See, e.g., *Philips Elec. NV v. Remington Consumer Prods.* [1998] R.P.C. 283 (Ch. 1997) (UK) (displaying resistance to trademark protection of product shapes notwithstanding language in directive defining trademarks in terms including product design), *aff'd* 1999 E.T.M.R. 816 (C.A. 1999) (UK). Benelux and U.K. courts and scholars appeared similarly entrenched in their pre-directive attitudes toward the scope of protection afforded trademark holders. The compromise language of article 5 of the Trademark Directive permitted each member state to find support for its pre-directive laws. See, e.g., *Wagamama Ltd. v. City Centre Restaurants Plc.*, [1995] F.S.R. 713 (Ch.) (UK); see also *Marca Mode v. Adidas A.G.*, [1999] E.T.M.R. 791, 796–97 (Sup. Ct.) (Neth.) (finding some room for advancement of a modified Benelux interpretation in the language of the initial decision of the European Court of Justice in *Sabel BV v. Puma AG*, 1997 E.T.M.R. 283 (E.C.J. 1997)); Anselm Kamperman Sanders, *The Wagamama Decision: Back to the Dark Ages of Trade Mark Law*, 18 EUR. INTELL. PROP. REV. 3 (1996) (endorsing Benelux interpretation before any ECJ decision); Peter Prescott, *Think before You Waga Finger*, 18 EUR. INTELL. PROP. REV. 317 (1996) (rejecting Benelux interpretation); Anselm Kamperman Sanders, *The Return to Wagamama*, 18 EUR. INTELL. PROP. REV. 521 (1996) (replying to Prescott); Peter Prescott, *Has the Benelux Trade Mark Law Been Written into the Directive*, 19 EUR. INTELL. PROP. REV. 99 (1997) (replying to Kamperman Sanders). As these examples show, the harmonization efforts of the EU thus rely heavily on the centralizing force of the European Court of Justice. See *Sabel BV v. Puma AG*, 1997 E.T.M.R. 283 (E.C.J. 1997) (supporting the *Wagamama* interpretation of the term “likelihood of association” and rejecting Benelux interpretation); *Adidas AG v. Marca Mode CV*, [2000] E.T.M.R. 723 (E.C.J. 2000) (same); *Philips Elec. BV v. Remington Consumer Prods.*, 1999 E.T.M.R. 816 (C.A. 1999) (UK) (referring question of product design trademark protection to the European Court of Justice).

reflected the state of copyright law in the copyright-respecting nations might be an impediment to the growth in membership of the union¹⁸ established by the Berne Convention.

The text of the 1886 Convention therefore pursued the objective of broader international copyright protection through a different device, namely, the principle of national treatment. The national treatment provision in the Berne Convention is in essence the equal protection clause of international copyright law.¹⁹ It requires that member countries provide nationals from, or works first published in, other member countries with as much copyright protection as offered to their own nationals and works.²⁰ In addition, while recalcitrant about a comprehensive universal copyright code, the parties agreed to a set of minimum standards of copyright protection that were not nearly as extensive as those proposed by the universalists. These minimum standards established a floor beneath which adherent countries agreed not to let copyright protection fall, but did not prevent countries from providing greater protection. The Berne Convention was revised five times over the next century,²¹ but this basic structure—national treatment plus minimum standards—was preserved.

Three aspects of the Berne model are worth particular mention. First, these dual

It is not surprising therefore that the European Commission recently argued that actions for infringement of its proposed EU wide patent be heard even at first instance by centralized EU courts sitting in Luxembourg. See COMMUNICATION FROM THE EUROPEAN COMMISSION, THE FOLLOW-UP TO THE GREEN PAPER ON THE COMMUNITY PATENT AND THE PATENT SYSTEM IN EUROPE (Feb. 12, 1999), at http://europa.eu.int/en/comm/dg23/commerce/1_blanc/1ben.pdf. The German government has already indicated its opposition to trials occurring before centralized courts. See German Reactions on Community Patent (Aug. 17, 2000), at http://www.ipr-helpdesk.org/t_en/n_006_title_en.asp?mon=8yea=2000&nex=10.

¹⁸ Most of the major multinational intellectual property agreements establish unions. The unions, which consist of all states that have adhered to the treaty in question, assist in the review and revision of existing multilateral agreements. Although unions typically are governed by an assembly of adherent countries, day to day administration is conducted (in most cases) by the World Intellectual Property Organization (WIPO). See GRAEME B. DINWOODIE, WILLIAM HENNESSEY & SHIRA PERLMUTTER, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 699–700 (2001) (forthcoming) (Aug. 2000 manuscript).

¹⁹ The principle of national treatment fails in two principal ways to ensure full equality of protection. First, the national treatment principle requires that member states accord *as much* protection to foreign nationals and works as is granted domestic authors and works, but member states may provide greater protection to foreign authors. See Ginsburg, *supra* note 14, at 214–15 (discussing Article 5 of the Berne Convention). Second, the national treatment principle does not guarantee equal treatment among nationals of different foreign countries. That objective is pursued through so-called “most favored nation” obligations, first introduced into (multinational) international copyright law from international trade law by the TRIPS Agreement in 1994. See TRIPS Agreement, *supra* note 3, art. 4; Ricketson, *supra* note 13, at 36–37 (noting most favored nation clauses in earlier bilateral copyright agreements).

²⁰ See Berne Convention, *supra* note 13, art. 5(1).

²¹ See H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 11-13 (1988) (summarizing revisions and completions of the Berne Convention). The Berne Convention was revised in Berlin in 1908, in Rome in 1925, in Brussels in 1948, in Stockholm in 1967, and in Paris in 1971. *Id.*

components of copyright internationalization were effectuated through national law.²² That is, although international copyright law required member states to enact laws meeting certain minimum standards, the existence and scope of protection in any copyright infringement action would be determined by the content of national law. There was (and is) no such thing as an international copyright. The author of a novel owns the copyright to that work in France to the extent permitted by the terms of French copyright law, and owns the copyright in the United Kingdom according to the provisions of U.K. law. International copyright law operates only to obligate that such provisions, of French and U.K. law, include certain minimum levels of protection, and that each country makes such protections available equally to nationals from either country. Accordingly, international law was given effect only through national implementation of international obligations.

Second, the minimum standards were in large part declaratory of existing national laws.²³ International agreements tended to operate behind the curve of social and technological developments, in part because of the accepted need for consensus in the revision of treaties. Consensus is sometimes difficult to reach even in a domestic context; when the circle of interests is expanded to encompass nations of widely divergent economies and traditions, consensus could prove impossible. This became especially problematic as the number of member countries increased.²⁴ International copyright law thus was backward-looking; national laws were elevated

²² The extent to which international standards are directly effective in a particular country is itself a question of national law. A treaty may be self-executing in some countries but not in others. And even within one country some treaties may be self-executing while others are not. In the United States, for example, Congress made clear in the Berne Convention Implementation Act 1988 (BCIA) that it did not regard the Berne Convention as self-executing and thus litigants in U.S. courts could not rely on its provisions. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853. In contrast, the status of the leading international patent and trademark treaty, the Paris Convention, is not so clear. *Compare* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1299 (3d Cir. 1979), *and* *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427, 438 (1903) (not self-executing), *with* *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 640-44 (2d Cir. 1956) (suggesting that the Paris Convention is self-executing, but finding no enlargement of substantive rights under U.S. trademark law) *and* *Laboratorios Roldan v. Tex Int'l*, 902 F. Supp. 1555, 1568 (S.D. Fla. 1995) (recognizing claim under article 10bis of the Paris Convention), *and* *Benard Indus. v. Bayer*, 38 U.S.P.Q.2d 1422, 1426 (S.D. Fla. 1996) (permitting claim under Paris Convention to proceed); *see generally* John B. Pegram, *Trademark Law Revision: Section 44*, 78 TRADEMARK REP. 141, 158-162 (1988) (suggesting that the arguments in favor of self-execution are stronger with respect to some revisions of the Paris Convention than others).

²³ Over the years, there have been exceptions to this general statement. *See* STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* ¶ 1.16 (2d ed. 1989) (noting compromises between civil law states adhering to a system of *droit d'auteur* and common law countries following a copyright approach to authors' rights). The most significant advances requiring changes in national legislation occurred at the Berlin revision conference of 1908. *See* RICKETSON, *supra* note 13, at 96.

²⁴ The ability to reach consensus is also made more difficult by the increased range of interests affected by copyright legislation. *See* Dinwoodie, *supra* note 9, at 486-88.

to international norms as they came to reflect widespread national practice. International norms were derivative of national positions, frequently embodying only the lowest common denominator from which member states would deviate upwards in differing ways and degrees.²⁵

Third, despite minimum standards, member states retained significant license to implement those standards in ways that were tailored to their own social, cultural, or economic priorities. This held true even as the content of the minimum standards became more significant during successive revisions of the Berne Convention. The license for national autonomy flowed in part from the decision to employ truly minimum standards, allowing different states to provide varying levels of higher protection. But it was also reflected in the deference shown member states' own interpretation of what was required to comply with the Convention. Thus, the United States adhered to the Berne Convention in 1988 without offering any moral rights protection as such (although this was required by article 6*bis* of the Convention).²⁶ Moral rights did not fit well with the historically instrumentalist approach of the United States to copyright law,²⁷ and a commitment to moral rights as such would have provoked domestic opposition to U.S. adherence. The United States claimed compliance based upon a collection of related state and federal causes of action that coincidentally offered authors protection in circumstances similar to those in which a moral rights claim might lie.²⁸ But that argument rested as much on the deferential

²⁵ This was seen not only in the context of the Berne Convention. In the years preceding U.S. adherence to the Berne Convention, the same dynamic is evident in international copyright law generally. Because of the insistence on formalities (in particular, copyright notice) in U.S. copyright law, the United States could not join the Berne Convention. Instead, the United States engineered the Universal Copyright Convention, which permitted the copyright notice requirement, and indeed did so in a way that accommodated U.S. law perfectly. *See* Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1060–63 (1968) (outlining the terms of and motivations behind the Universal Copyright Convention). Thus, here too, the United States (and other signatories of the UCC) brought to the international level what was already commonplace at the national.

²⁶ Article 6*bis* requires that:

independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and 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.

Berne Convention, *supra* note 13, art. 6*bis*

²⁷ Protection akin to moral rights can, however, be justified under the prevailing philosophy of American copyright protection. *See* Gilliam v. Am. Broad. Co., 538 F.2d 14, 24 (2d Cir. 1976) (noting that the theory of economic instrumentalism upon which American copyright law is premised cannot be reconciled with the mutilation or misrepresentation of an artist's work that is actionable in other countries as a violation of moral rights).

²⁸ *See* H.R. REP. NO. 100-609, at 34 (1988) (reciting the different causes of action upon which the argument of compliance rested). The claim gained credence from statements made by some WIPO officials:

attitudes shown toward member state compliance with Berne obligations as on the substance of the U.S. law.²⁹ Indeed, although article 33 of the Berne Convention permitted the referral of disputes regarding compliance with the Convention to the International Court of Justice,³⁰ this mechanism was never used.³¹

These characteristics of the Berne system comprised important strands in the fabric of international copyright law. Copyright law is an instrument of cultural and information policy.³² As such, it embodies a nation's priorities in establishing its cultural environment, and those priorities vary widely among countries of different social and cultural traditions. These differences contribute to a richer diversity of cultural products, and the Berne system thus accommodated national deviation in order not to frustrate that diversity. And copyright law also reflects a country's economic priorities and capacities. Although the United States joined the Berne Convention only in 1988, it has recently sought to strengthen international copyright law with a zealotry displayed only by converts. But the conversion has been fostered by economic rather than philosophical considerations; the United States has gone

In my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes.

Letter from Dr. Arpad Bogsch, Director-General of WIPO, to Irwin Karp, Esq. (June 16, 1987), reprinted in pertinent part in H.R. REP. NO. 100-609, at 37 (1988).

²⁹ See Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 655 (1986) (“[I]t is the lack of effective compliance among Berne countries, rather than the protection given moral rights in American law, that removes Article 6bis as an obstacle to U.S. adherence.”).

³⁰ See Berne Convention, *supra* note 13, art. 33.

³¹ Moreover, no “state . . . invoke[d] the doctrine of retaliation and retorsion theoretically available under international law for violation of international minimum standards of intellectual property protection.” J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 339 n.17 (1997).

³² See Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code*, 47 J. COPR. SOC’Y 265, 267 (2000) (“National copyright laws are a component of local cultural and information policies. As such, they express each sovereign nation’s aspirations for its citizens’ exposure to works of authorship, for their participation in their country’s cultural patrimony.”). Former Register of Copyrights, Barbara Ringer, expressed this sentiment eloquently:

Though their true influence is dimly understood at best, a nation’s copyright laws lie at the roots of its culture and intellectual climate. Copyright provides the inducement for creation and dissemination of the works that shape our society and, in an imperfect and almost accidental way, represents one of the foundations upon which freedom of expression rests.

Ringer, *supra* note 25, at 1050.

from a net importer of copyrighted works to the world's largest net exporter.³³ Respect for national heterogeneity found in the Berne system acknowledged both the historical and economic contingencies that drive national copyright policy and affirmatively encouraged the cultural diversity that enriches the environment for all. The Berne Convention thus sought to balance two (sometimes) competing objectives: providing copyright protection on an international scale, and a respect for cultural and economic diversity.

B. *Conventional Incorporation of International Norms in U.S. Copyright Law*

The international norms articulated in the Berne Convention were incorporated into U.S. copyright law through the domestic legislative process. This occurred even before the United States joined the Berne Convention; several of the reforms effected by the Copyright Revision Act of 1976 were motivated by the goal of ensuring,³⁴ or coming closer to,³⁵ compliance with Berne standards. Adherence to Berne itself precipitated further reforms, most notably with respect to the use of mandatory copyright notice.³⁶ But congressional embrace of international copyright principles was still lukewarm in 1988, even at this moment of apparent internationalist triumph. At that time, the United States consciously adopted a minimalist approach to the question of Berne implementation,³⁷ spawning complaint from elsewhere about the extent of its compliance with its international obligations under the Convention.³⁸ In particular, the argument suggesting U.S. compliance with the obligation under article 6bis of the Berne Convention to provide protection of the moral rights of authors was weak, constructed from a wide assortment of related state and federal causes of

³³ See J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 U. DAYTON L. REV. 809, 811–12 (1995).

³⁴ For example, the term of copyright in the United States was changed from an initial term of twenty-eight years from publication plus a renewal term of equal length to a single term that expired fifty years after the death of the author. See 17 U.S.C. § 302 (1994), now amended by the Sonny Bono Copyright Term Extension Act, Pub. L. No 105-298, 112 Stat. 2827 (1998) (extending basic term of protection to seventy years *post mortem auctoris*).

³⁵ For example, section 405 of the 1976 Act mitigated the harsh consequences of publication without copyright notice that had prevailed under the 1909 Act. See 17 U.S.C. § 405 (1994). Copyright protection was still dependent upon formalities, and thus not in full compliance with the Berne Convention. But section 405 of the 1976 Revision Act can clearly be seen as a stepping stone to the eventual revision of the notice requirement in the Berne Convention Implementation Act of 1988.

³⁶ See BCIA, *supra* note 22, § 7.

³⁷ See H.R. REP. NO. 100-609, at 7 (1988) (noting that Congress was “making only those changes to American copyright law that [were] clearly required under the treaty’s provisions”).

³⁸ See Adolf Deitz, *The United States and Moral Rights: Idiosyncrasy or Approximation? Observations on a Problematical Relationship Underlying United States Adherence to the Berne Convention*, 142 REV. INT’L DU DROIT D’AUTEUR 222, 238 (1989).

action.³⁹ This was acknowledged by U.S. scholars,⁴⁰ and (implicitly)⁴¹ by U.S. negotiators six years later when the TRIPS Agreement incorporated all of the substantive copyright obligations of the Berne Convention except for article 6*bis*.⁴²

Those who argued for a minimalist approach to Berne adherence as a means of invigorating U.S. attention to international copyright have in part been vindicated by developments since 1988. Bringing the United States within the international copyright family (by appeasing in 1988 the opposition that a warmer endorsement of Berne might have precipitated) has raised the international dimension as a defining element of the national copyright lawmaking agenda. To be sure, the dominance of the U.S. copyright industries would likely have compelled U.S. leadership on international copyright matters by sheer economic self-interest. Expansion in global trade and the digital environment makes international protection essential for the world's leading exporter of copyrighted products.⁴³ But U.S. participation in the Berne Convention made U.S. leadership more powerful and expressed an important policy commitment to the international arena. Absent such participation, it would have been impossible for the United States to advance the international copyright agenda it has pursued over the last twelve years (at least not without substantial chutzpah).

The first fruits of the intensified U.S. attention to international commitments came in the form of minor revisions to the Copyright Act in 1990 to provide a limited scope of moral rights protection and copyright protection for works of architecture *per se*.⁴⁴ Since then, the influence of international pressure has deepened. The international copyright philosophy of protection without formalities was extended by the Copyright Renewal Act of 1992.⁴⁵ International copyright treaty obligations, whether under the TRIPS Agreement,⁴⁶ or the recent WIPO

³⁹ See *supra* text accompanying notes 26–29.

⁴⁰ See, e.g., Damich, *supra* note 29 at 655 (“When the language of Article 6*bis* is compared with the evidence that has been offered to suggest that moral rights are substantially protected in the United States, it is clear that, aside from some recently-passed [state] statutes . . . moral rights are not protected in any meaningful sense.”); John M. Kernochan, *Comments of John M. Kernochan*, 10 COLUM.-VLA J. L. & ARTS 685, 686 (1986).

⁴¹ The rationale tendered by the United States for excluding article 6*bis* from the TRIPS Agreement was that it did not involve trade issues. See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT* 72 (1998).

⁴² See TRIPS Agreement, *supra* note 3, art. 9(1).

⁴³ See *supra* text accompanying note 33.

⁴⁴ See Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat., 5133; Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128.

⁴⁵ See Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (providing automatic renewal of pre-1978 works in their first term of copyright).

⁴⁶ See Uruguay Round Agreements Act 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (implementing, *inter alia*, the TRIPS Agreement). The TRIPS Agreement required only a few changes in U.S. copyright law, including the enactment of protection for unfixed musical performances against unauthorized fixation. See 17 U.S.C. § 1101(1994); TRIPS Agreement, *supra*

Copyright Treaty,⁴⁷ have been implemented promptly by Congress. And, trade interests of the U.S. copyright industries have been defended by the enactment of legislation in order to prevent disadvantage to U.S. producers internationally under reciprocity-conditioned foreign laws.⁴⁸

note 3, art. 14 (requiring protection for performers against unauthorized fixation of performances); *see also* 17 U.S.C. § 104A (reviving copyright protection for certain works that had fallen into the public domain because of stricter U.S. copyright requirements). The constitutionality of the criminal equivalent of section 1101, which was aimed at preventing the sale of bootleg recordings of musical performances, has been challenged unsuccessfully in the courts. *See* *United States v. Moghadam*, 175 F.3d 1269, 1271 (11th Cir. 1999). Indeed, the possible tension between domestic constitutional limitations and international copyright pressures has been felt in several areas. In addition to the challenge to the bootleg provision in *Moghadam*, the copyright term extension legislation (which was enacted partly in response to reciprocity conditions in the EU Term Directive) is the subject of a pending constitutional challenge, *see* *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (upholding the constitutionality of the statute), and a challenge to proposed U.S. database legislation (prompted in part by the EU Database Directive) is likely should the legislation be enacted. *See* Memorandum from William Michael Treanor, Deputy Ass't. Att. Gen., Office of Legal Counsel, Dept. of Justice, to William P. Marshall, Associate White House Counsel (July 28, 1998) (copy on file with author); *see also* William F. Patry, *The Enumerated Powers Doctrine and Intellectual Property*, 67 GEO. WASH. L. REV. 359, 360 (1999) (arguing that proposed database legislation is unconstitutional).

⁴⁷ *See* Digital Millennium Copyright Act 1998, (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.). Title I of the DMCA implemented the treaty obligations of the United States to offer protection to copyright management information and to provide protection against circumvention of technological protection measures designed to regulate access to, or protect copyright in, works. *See* 17 U.S.C. § 1201-02 (Supp. IV 1998); *see also* World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, [hereinafter WIPO Copyright Treaty or WCT] arts. 11-12.

⁴⁸ *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 302-304); *see also* Council Directive 98/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright And Other Related Rights, 1993 O.J. (L 290) art. 7(1) (conditioning full protection of foreign works for complete terms on reciprocal protection); Berne Convention, *supra* note 13, art. 7(8) (permitting signatory nations to apply the rule of the shorter term, that is, to limit foreign works to the term of protection offered in their country of origin). The pending database legislation also reflects these motivations. *See* Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Directive 96/9/EC of The European Parliament and of The Council of 11 March, 1996, on the Legal Protection of Databases, 1996 O.J. (L 77) art. 11 (authorizing the extension of protection to certain foreign rightholders). The TRIPS Agreement elevates national treatment as the guiding principle of international intellectual property relations not only with respect to copyright issues covered by the Berne Convention, but with respect to intellectual property rights generally (as that term is defined in the TRIPS Agreement). This should limit the ability of WTO countries to incorporate reciprocity conditions in new intellectual property legislation. *See* Reichman, *supra* note 3, at 347-50 (discussing the national treatment provision of TRIPS); *cf.* J.H. Reichman, *Statement Concerning H.R. 2652 before the Subcommittee on the Judiciary, House of Representatives*, 105th Cong. 15-16 (Oct. 23, 1997), available at <http://www.house.gov/judiciary/41121.htm> (arguing that the reciprocity condition included by the EU in its database directive is a violation of the EU's national treatment obligations).

C. Changes to the Berne Model

Having given internationalization a more prominent role in domestic copyright lawmaking, the United States turned to the international stage itself. The classical Berne-inspired model of international copyright lawmaking has come under substantial pressure. Technological advances made copyright-rich countries more skeptical of claims for national variation. The ease with which works can be digitally reproduced, and digitally delivered to any location in the world, means that international protection is required by producers merely to sustain their domestic market. Respect for national autonomy and cultural diversity has given way to a pervasive concern about offshore pirates operating in countries offering less protection.⁴⁹ Absent broad-based compliance with agreed-upon standards, producers from developed countries would be unable to exploit their comparative advantage in intellectual goods, and a single rogue nation could become a haven for copyright pirates and flood the international market with unauthorized copies. And the increased trade significance of the copyright industries to the developed world has merely heightened this concern. Beyond these arguments grounded in economic self-interest, cultural convergence across countries may have weakened the link between nationally distinct copyright laws and national cultural policy.

As a consequence, the developed world (in particular) sought to alter the balance between international protection and deference to national autonomy found in the Berne model. The United States decided that these changes could be pursued through, in addition to the traditional WIPO-based processes, the trade mechanisms of the GATT Uruguay Round negotiations and unilateral trade sanctions under the amended Trade Act of 1974. These additional venues, allied to increased attention to intellectual property protection in developing the internal market of the European Union,⁵⁰ precipitated changes in the international copyright system. These changes took several forms. First, issues raised by new technological developments have been addressed at the international level simultaneously with (or soon after) their treatment at the national level. International copyright law had to be ahead of the curve, tackling new technological issues rather than codifying developed national consensus. Second, the institutional structure of the fora in which issues are brought to the international stage has enabled speedier development of international norms.⁵¹

⁴⁹ The development of “offshore” copyright havens may, in fact, soon be quite literally true. See Steven Chase, *Napster Clone May Set Up Shop Offshore*, [TORONTO GLOBE AND MAIL](#), Mar. 5, 2001 (reporting that a Canadian “entrepreneur” was looking to operate Napster’s music-sharing system, found to violate U.S. copyright law, from Sealand, a converted oil platform off the U.K. coast). The corporation that operates from Sealand does so under the eponymous name of Haven Co., Ltd. See *id.*

⁵⁰ See generally Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?*, 16 B.U. INT’L L. J. 165, 209–22 (1998) (discussing copyright law in the European Community).

⁵¹ In the WTO context, for example, the cross-sectoral nature of GATT negotiations enabled concessions on matters of copyright law to be matched by accommodations on any number of other

And, third, as already noted, international copyright standards have been brought within an effective enforcement mechanism in the form of the WTO Dispute settlement system.

These changes are most evident in the context of the WTO, but they are apparent elsewhere. For example, the European Union has over the past decade mandated substantial reform of the copyright laws of its constituent states, addressing many new issues not fully developed at the national level.⁵² And it has done so at a rapid pace facilitated by lawmaking procedures that can operate without consensus, and within the context of an effective judicial mechanism that ensures compliance with those standards. Similarly, the WIPO has reformed its institutional structure to enable it to respond more quickly (principally through the creation of soft law) to the demands of lawmaking in a more fast-changing environment.⁵³ And, the most recent copyright treaties agreed through the offices of WIPO addressed issues still unsettled in most national laws, namely the enactment of prohibitions on the circumvention of technological measures restricting access to a copyrighted work.⁵⁴

Clearly, these changes burnish international copyright law in several important ways. Most particularly, international copyright law is less backwards-looking and has greater potential to deal with new problems in a timely fashion. Copyright lawmaking must be adaptive to constant technological and social change; it must be dynamic. But if copyright lawmaking also demands internationalism, then our internationalizing instruments must likewise be dynamic. One of the weaknesses of the classical model was its consolidating character, suited well to the era where international copyright law was a matter of incremental state-to-state diplomacy rather than an integral part of copyright law formation.

The TRIPS Agreement in itself is hardly dynamic; it remains difficult to

(non-intellectual property) issues, facilitating compromise on international copyright standards.

⁵² In addition to the five directives adopted between 1991 and 1996, *see Caviedes, supra* note 50, at 211–18, which tackled topics such as satellite broadcasting, database protection, and computer software, the EU has in the past year adopted its E-Commerce Directive, which includes provisions limiting the liability of internet service providers for (among other things) copyright infringement. *See Council Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular, Electronic Commerce, in the Internal Market, 2000 O.J. (L 178), arts. 12–14.* The EU is also close to adoption of a further directive addressing issues raised by the internet environment in which copyrighted works now flow; in particular, this directive will implement the WIPO Copyright Treaty. *See COMMON POSITION ADOPTED BY THE COUNCIL WITH A VIEW TO THE ADOPTION OF A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY, (Sept. 14, 2000), at <http://register.consilium.eu.int/pdf/en/00/st09/09512en0.pdf>; COMMISSIONER BOLKESTEIN WELCOMES EUROPEAN PARLIAMENT VOTE ON COPYRIGHT DIRECTIVE, Feb. 14, 2001, at http://www.europa.eu.int/comm/internal_market/en/intprop/intprop/news/01-210.htm (commenting on the European Parliament vote endorsing compromise amendments to the Information Society Directive).*

⁵³ *See Report of the Director General of WIPO, WO/GA/23/1 (Sept. 4, 1998) (discussing the proposal to establish standing committees on a range of topics).*

⁵⁴ *See WIPO Copyright Treaty, supra* note 47.

amend.⁵⁵ But the incorporation of TRIPS within the WTO dispute settlement mechanism could change the nature of international copyright law. WTO panels could, if they wished, adopt a dynamic interpretive methodology designed to ensure that the copyright standards in the TRIPS Agreement stay current with, and adapt to, the new social and technological realities that domestic copyright law confronts on a daily basis. And any such decisions would be backed by effective enforcement mechanisms.

If panels were to adopt an activist approach to TRIPS interpretation, however, this might also produce costs for the international copyright system. The content of copyright law is historically contingent. Premature and excessive internationalization of copyright standards—the flip-side of dynamic international lawmaking—might ignore such contingencies and shape a copyright law to fit all that ends up fitting none particularly well. And it would do so without the benefit of the different national “experiments” that tolerance of variation classically facilitated. Moreover, the institutional surroundings in which the dynamic development would occur, namely WTO panels interpreting a trade agreement, might distort the content of international copyright law. Putting aside the broader debate regarding the legitimacy of the WTO as a lawmaking body,⁵⁶ there is a danger that a trade body might adopt a less well-rounded vision of copyright law. Copyright law is about more than trade. It is central to questions of cultural policy, free expression, and the pursuit of liberal democratic values.⁵⁷ Yet, panelists will be mandated to develop international copyright law in a narrow trade context and it is not clear what effect that would have on the content of international copyright law.

II. UNITED STATES—SECTION 110(5)

A. *The Panel Report*

The United States has been the most frequent complainant in TRIPS cases to date.⁵⁸ But the first copyright case to produce a panel report was brought against the United States by the European Union. There is, of course, a further irony in this. While the United States and the European Union were on the opposite sides of many issues in the GATT negotiations, intellectual property protection was one area where their views were largely congruent.⁵⁹

⁵⁵ See Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT’L & COMP. L. REV. 661, 667–68 (1997) (discussing amendment process).

⁵⁶ See John O. McGinnis & Mark L. Movsessian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 512–13 (2000) (noting critiques of the WTO).

⁵⁷ See *Harper & Row v. The Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright as “the engine of free expression”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (describing the ways in which copyright supports a democratic civil society).

⁵⁸ See Matthijs Geuze & Hannu Wager, *WTO Dispute Settlement Practice Relating to the TRIPS Agreement*, 2 J. INT’L ECON. L. 347, 348–49 (1999). A continually updated summary of the

The EU complaint arose out of a 1998 amendment to the U.S. Copyright Act. Section 110 of the Act provides a series of exemptions from the exclusive right of the author to make public performances of her work. Since the Copyright Revision Act of 1976, section 110(5) has exempted public performances of works, typically by bars, restaurants, and retail stores, that occur by the use of audio and video receiving apparatus of a type commonly found in private homes.⁶⁰ In short, this so-called “homestyle” exemption enabled bars and restaurants to turn on televisions and radios in their establishments without having to make payment to the copyright owners⁶¹ of works that were thereby publicly performed.⁶²

The version of section 110(5) originally enacted in 1976 had long been viewed by some other countries as a potential violation of the Berne Convention.⁶³ But in the pre-TRIPS days of deferential attitudes and lack of enforcement mechanisms, the United States went unchallenged. The prospect of dispute settlement under the WTO system changed that dynamic. In 1998, moreover, Congress broadened the scope of section 110(5) by enacting the Fairness in Music Licensing Act (FIMLA). In addition to modifying the original homestyle exemption (which became section 110(5)(A)), FIMLA created two additional sets of exemptions (which the WTO panel later referred to, collectively, as the “business exemption”).⁶⁴ First, it granted

status of WTO proceedings generally (not limited to TRIPS matters) can be found at <http://www.wto.org/wto/dispute/bulletin.htm> (last visited Aug. 30, 2000). The United States has brought (but settled) copyright complaints. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, RESULTS OF SPECIAL 301 ANNUAL REVIEW (April 30, 1999) (reporting progress of previously-filed WTO TRIPS cases, including case against Greece for failure to protect televisual works).

⁵⁹ See Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT’L L. 275, 276 (1997).

⁶⁰ Section 110(5) does not apply to the use of recorded music, such as CDs or cassette tapes, or to live performances of music. It is restricted to performances that occur by the communication of transmissions. 17 U.S.C. § 110(5) (Supp. IV 1998).

⁶¹ Composers and lyricists who own the copyright in musical works typically entrust the licensing of nondramatic public performance of their works to performing rights organizations, such as (in the United States) ASCAP, and Broadcast Music, Inc. (BMI). These organizations license the performance of works on behalf of the copyright owners, collect and distribute the revenue thus generated, and enforce the rights of the copyright owner against infringing establishments. See generally John M. Kernochan, *Music Performing Rights Organizations in the United States of America: Special Characteristics, Restraints, and Public Attitudes*, 10 COLUM.-VLA J.L. & ARTS 333 (1986).

⁶² In addition to the requirement that the receiving apparatus has to be “of a kind commonly used in private homes,” section 110(5) only applie[d] if the establishment did not impose a “direct charge . . . to see or hear the transmission [and the] transmission thus received was [not] further transmitted to the public.” 17 U.S.C. § 110(5) (1994).

⁶³ See Helfer, *supra* note 6, at 135 n. 179 (noting pre-FIMLA objections).

⁶⁴ See 17 U.S.C. § 110(5)(B) (Supp. IV 1998). The original homestyle exemption applied to public performances of all types of works. However, the language of the additional exemptions introduced by the FIMLA was understood by both the United States and the EU to have altered the

an absolute exemption (regardless of the nature of the equipment used) for establishments under defined sizes, the particular size varying as between “retail establishments” and “food service and drinking establishments.”⁶⁵ Second, an exemption was available to establishments of either type exceeding those limits if the establishment complied with express limits on the number, size, and location of the equipment.⁶⁶

Article 11*bis*(1)(iii) of the Berne Convention provides that authors of musical works⁶⁷ “shall enjoy the exclusive right of authorizing . . . the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.” Article 11(1)(ii) additionally provides that “authors of dramatic, dramatic-musical and musical works shall enjoy the exclusive right of authorizing . . . any communication to the public of the performance of their works.”⁶⁸ The EU argued that the homestyle and business exemptions were inconsistent with these provisions of the Berne Convention, as incorporated within the TRIPS Agreement by article 9(1).⁶⁹ The United States defended the exemptions under article 13 of TRIPS, which provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a

scope of the homestyle exemption. Because the introductory phrase “except as provided in subparagraph (B)” was added to the text of the homestyle provision, and the new subparagraph (B) applied to “a performance or display of a nondramatic musical work,” the parties and the panel accepted that the scope of the homestyle exemption was narrowed to works other than nondramatic musical works. *See* Panel Report, *supra* note 6, ¶ 2.8. Under this reading, the revised homestyle exemption is limited to such musical works as are not covered by subparagraph (B), and thus applies only to such activities as a communication of a broadcast of a dramatic rendition of the music written for an opera. *See id.* This interpretation of the revised homestyle provision has not been tested in the U.S. courts, and nothing in the legislative history of the FIMLA suggests that Congress intended this change. *See* Helfer, *supra* note 6, at 97 n.7 (explaining why such an interpretation lacks support either in the statutory language or the legislative history).

⁶⁵ The size limits are 2,000 gross square feet (186 m²) for retail establishments and 3,750 gross square feet (348 m²) for restaurants. *See* 17 U.S.C. § 110(5)(B)(i)–(ii) (Supp. IV 1998).

⁶⁶ The limits on equipment relate to screen size and to the number and location of loudspeakers. *See id.* Although the equipment limits varied as between audio and audio-visual performances, the same limits apply to both retail establishments and restaurants above the respective size limits. *See id.* Regardless of the size or nature of the establishment, the business exemption applies only if no direct charge was made to see or hear the transmission and if the transmission was not further transmitted to the public. 17 U.S.C. § 110(5)(B)(iii)–(iv) (Supp. IV 1998).

⁶⁷ The language of the provision is cast in terms of “literary and artistic works,” but this includes musical works. *See* Berne Convention, *supra* note 13, art. 2(1) (defining “literary and artistic works”).

⁶⁸ Article 11*bis*(1)(iii) covers the activities of the exempted establishments in so far as the communication was made to the public of a broadcast which has been transmitted at some point by hertzian waves; article 11(1)(ii) applies to the extent that the entire transmission has been by wire. *See* Panel Report, *supra* note 6, ¶ 6.26.

⁶⁹ *See* TRIPS Agreement, *supra* note 3, art. 9(1) (obliging WTO Members to comply with articles 1–21 of the Berne Convention, with the exception of article 6*bis* on moral rights).

normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”⁷⁰

The first of the cumulative requirements of article 13’s so-called “three step test” for permissible exceptions is that any exceptions are limited to “certain special cases.”⁷¹ As one might expect in almost all TRIPS copyright disputes, the parties’ arguments reflected the competing demands of universalism and national autonomy first reconciled over a century ago in the Berne Convention. The EU argued that any exemption should serve a “special purpose,”⁷² thus requiring the WTO panel to engage in an independent assessment of the merits of the underlying objectives of the national law. The panel declined to do so, accepting the U.S. position that the phrase “special cases” at the most required that any exemption had some specific policy objective,⁷³ thereby apparently exhibiting the deference to national autonomy emblematic of pre-TRIPS attitudes to international copyright law.⁷⁴ The panel’s conclusion was, however, largely premised upon a literal analysis of the language of article 13, rather than any fidelity to pre-TRIPS attitudes. It was from an examination of the dictionary meanings of “certain,” “special,” and “cases” that the panel

⁷⁰ TRIPS Agreement, *supra* note 3, art. 13. The term “exception” is commonly understood as permitting a wholly uncompensated use of the work, while “limitation” ordinarily refers to a reduction in the right from an exclusive right to a right to receive compensation or some other benefit that falls short of an exclusive right.

⁷¹ *See id.*

⁷² Panel Report, *supra* note 6, ¶ 6.105.

⁷³ The United States claimed that the specific policy objective underlying the business exemption was the “fostering [of] small businesses and preventing abusive tactics by [collective management organizations].” *Id.* at ¶ 6.115. As to the homestyle exemption, the United States identified the “protection of small ‘mom and pop’ businesses which ‘play an important role in the American social fabric’ because they ‘offer economic opportunities for women, minorities, immigrants and welfare recipients for entering the economic and social mainstream’” as the primary purpose. *See id.* at ¶ 6.156; *see also* Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976) (noting that the original homestyle exemption was intended “to exempt a small commercial establishment ‘which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service’”). The panel did not consider whether these stated objectives were in any way furthered by the legislative means chosen, let alone whether FIMLA was a rational means, or a particularly appropriate, or a well-tailored means, or the least burdensome means, of pursuing these objectives, to mention but some of the standards that a more intrusive analysis might have applied.

⁷⁴ Although the panel accepted that an exception might be permissible under this step of the test even if the legitimacy of its purpose “in a normative sense cannot be discerned,” it also noted that the stated legislative purposes might assist in inferring whether the exception was well-defined or sufficiently narrow to satisfy the requirement of being applicable to “certain special cases.” The panel’s opinion thus makes extensive reference not only to the language of Section 110(5) in both its original and revised form but also to congressional explication thereof. The panel used the stated purpose of the homestyle exemption to support its conclusion that Congress intended to establish a narrow exemption. *See* Panel Report, *supra* note 6, ¶¶ 6.112, 6.157.

deduced that any exception must simply be clearly defined⁷⁵ to “guarantee [] a sufficient degree of legal certainty,” and also “limited in its field of application or exceptional in its scope,” so that the case to which the exception applied was not the rule.⁷⁶

Even under this interpretation of the first condition of article 13, however, the panel found that the business exemption applied to more than certain special cases. Although the business exemption was well-defined, it was not limited in reach because of the large percentage of establishments that could potentially benefit from it. A range of studies⁷⁷ suggested that 70% of eating and drinking establishments and 45% of retail establishments⁷⁸ were potentially covered by the business exemption.⁷⁹

⁷⁵ *Id.* at ¶ 6.108. However, the panel found it unnecessary that national legislation “identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised.” *Id.* This bodes well for the United States where the doctrine of fair use is to be challenged, a possibility that several commentators have raised. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANS. L. 75, 78 n.5 (2000) (noting suggestions by Professor Reichman, and by Professors Dreyfuss and Lowenfeld, that there might be a conflict between the fair use doctrine and article 13 of TRIPS); see also Tyler G. Newby, *What’s Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law*, 51 STAN. L. REV. 1633 (1999) (concluding that the fair use defense is consistent with international copyright law). After conducting an analysis of the *Section 110(5)* opinion, Professor Okediji remains unassured. See Okediji, *supra*, at 114–36.

⁷⁶ See Panel Report, *supra* note 6, ¶¶ 6.107–110. The panel elaborated thus:

In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition (‘no conflict with a normal exploitation’), an exception or limitation should be the opposite of a non-special, i.e., a normal case.

Id. at ¶ 6.109.

⁷⁷ These percentages were derived from studies conducted by the U.S. Congressional Research Service in 1995 (in connection with legislative debate regarding FIMLA), by the National Restaurant Association (at the request of the United States) in 1998, and by Dun & Bradstreet (at the request of ASCAP) in 1999. *Id.* at ¶¶ 6.121–122. Rather than seriously contest those numbers, the United States argued that several categories of establishment should be subtracted from the calculation for the purposes of analysis, such as those that did not play music, that would not do so if they became liable to pay fees, or that played music from sources other than radio or television. *Id.* at ¶ 6.126. The panel agreed with the European Union, however, that it was the scope of potential users that was relevant; in particular, the panel was conscious of the impact that the exemption might have on other substitutable sources of music. *Id.* at ¶ 6.127. The United States also sought to reduce the number of potentially covered establishments by noting that the business exemption was conditioned upon the establishment not charging direct admission fees to hear the music nor further transmitting the performance. The EU disputed the effect of these conditions, but in any event the panel was not presented with information regarding whether these conditions would significantly reduce the number of potentially covered establishments, thus preventing any weight being given to the argument. See *id.* at ¶ 6.130.

⁷⁸ In setting the baseline premises for this calculation, the panel explicitly referred to the preparatory works that led to article 11*bis*(1)(iii) of the Berne Convention, which indicated that article 11*bis*(1)(iii) was intended to provide right holders with a right to authorize the use of their

The panel held that a provision exempting a major part of the users that were specifically intended to be covered by article 11*bis*(1)(iii) could not be considered a special case.

The panel applied the same considerations to the homestyle exemption and found that it was restricted to certain special cases as evidenced both by the lesser number of establishments to which it applied and by its limitation to dramatic musical works (such as operas or musicals).⁸⁰ Here, the methodological commitment to national autonomy appeared even stronger. The EU argued that the concept of “a single receiving apparatus of a kind commonly used in private homes” was not well-defined because technology continually altered the meaning of that phrase and because U.S. courts had applied a variety of approaches⁸¹ and factors in applying the original exemption.⁸² The panel found that while any exemption must be restricted to cases that are “known and particularised,” they need not be “explicitly identified,”

works in the types of establishments covered by the business exemption. *Id.* at ¶ 6.131.

⁷⁹ Indeed, these numbers may have been conservative, as they reflected the percentage of establishments who could avail themselves of the exemption without regard to equipment limitations. Many larger establishments could additionally be covered by the exemption if they complied with the equipment limitations found in FIMLA. *See* 17 U.S.C. § 110(5)(B).

⁸⁰ *See* Panel Report, *supra* note 6, ¶¶ 6.142, 6.148. The panel found that, from a quantitative perspective, the reach of the original homestyle exemption was limited to a comparably small percentage (between 13 and 18%) of relevant establishments. Panel Report, *supra* note 6, ¶ 6.142. This calculation was premised upon the argument, supported by the legislative history to the 1976 Act, *see* H.R. Rep. No. 1476, 94th Cong. 2d Sess. 86–87 (1976), that the outer space limits of establishments covered by the exemption approximated those at issue in the Supreme Court case of *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

⁸¹ The United States noted that this phenomenon was a typical feature of a common-law system and that the concept had been proven sufficiently clear for U.S. courts to reasonably and consistently apply in a number of cases. *See* Panel Report, *supra* note 6, ¶ 6.136. Any conclusion to the contrary by the panel, essentially indicting the common law form of adjudication, might have run counter to the purportedly targeted spirit of TRIPS by requiring the United States to implement a system of judging copyright cases distinct from that which it operates generally. *Cf.* TRIPS, *supra* note 3, art. 41(5) (the obligations in TRIPS requiring adequate procedures for the enforcement of intellectual property rights do not create an obligation “to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general”). Beneath the surface, however, many commentators have touted the long-term, and more broad-based, effects that compliance with WTO obligations might have on the judicial systems prevailing in certain member countries, most notably China. *See China Opens Up*, *ECONOMIST*, Nov. 20, 1999 at 17.

⁸² The panel summarized the leading factors considered by U.S. courts as (i) the physical size of an establishment in terms of square footage (in comparison to the size of the *Aiken* restaurant); (ii) the extent to which the receiving apparatus was to be considered as one commonly used in private homes; (iii) the distance between the receiver and the speakers; (iv) the number of speakers; (v) whether the speakers were free-standing or built into the ceiling; (vi) whether, depending on its revenue, the establishment was of a type that would normally subscribe to a background music service; (vii) the noise level of the areas within the establishment where the transmissions were made audible or visible; and (viii) the configuration of the installation. Panel Report, *supra* note 6, ¶ 6.139.

and that the concept of “homestyle” equipment was sufficiently clear to satisfy this requirement.⁸³ Although the panel rested its determination on factual findings regarding what is currently perceived as homestyle equipment in the United States, it was apparently untroubled by the possibility that the notion of homestyle equipment “might vary between different countries, is subject to changing consumer preferences in a given country, and may evolve as a result of technological development.”⁸⁴ This is important both in recognizing the technological and social differences among member states and in acknowledging the heightened need for copyright to embody dynamic concepts.⁸⁵

Although the panel’s conclusion on the first condition was sufficient to find the business exemption in violation of TRIPS, it also considered the second and third conditions of the three-step test (which the homestyle exemption had to satisfy to be in compliance with TRIPS).⁸⁶ The second condition requires that the exemption must not conflict with a normal exploitation of the work.⁸⁷ Again, the panel resorted to dictionary definitions of “normal” and “exploitation” to inject content into this provision, and to identify those means employed by copyright owners to extract economic value from their rights with which the exemption could not permissibly interfere.⁸⁸

This literal analysis of the word “normal” revealed two connotations by which the panel could assess the means of exploitation.⁸⁹ The first connotation suggested that the panel engage in an empirical analysis of what was typical or usual.⁹⁰ “Normal” could not mean full exploitation of the rights of the copyright owner, or article 13 would be of no scope.⁹¹ The United States suggested that in determining what lesser scope of exploitation would be considered normal, the panel should consider not only the means by which a copyright owner might reasonably be expected to exploit his work, but also the *most important* means by which he did so. (The United States argued that the exemptions at issue affected only secondary uses of broadcasts.)⁹² The panel accepted the relevance of the copyright owner’s

⁸³ See *id.* at ¶ 6.145 (“In our view, a Member is not required to identify homestyle equipment in terms of exceedingly detailed technical specifications in order to meet the standard of clarity set by the first condition.”).

⁸⁴ *Id.*

⁸⁵ See Dinwoodie, *supra* note 9, at 483–85.

⁸⁶ Panel Report, *supra* note 6, ¶¶ 6.160–161.

⁸⁷ See TRIPS Agreement, *supra* note 3, art. 13.

⁸⁸ Panel Report, *supra* note 6, ¶ 6.165 n.150, ¶ 6.166 n.151.

⁸⁹ See *id.* at ¶ 6.166 (“The first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a somewhat more normative, if not dynamic, approach, i.e., conforming to a type or standard.”).

⁹⁰ *Id.* at ¶ 1.66.

⁹¹ *Id.* at ¶ 1.167.

⁹² See *id.* at ¶ 6.168. Rights holders also receive royalties from broadcasting stations who transmit the performance of the musical works. The United States viewed these as the most

“reasonable” means of exploitation, but was reluctant to attach much weight to whether the activity involved was “an important” means of exploitation. The copyright owner should be able to engage in normal exploitation of all of the exclusive rights guaranteed by international copyright law. The U.S. argument would enable one of these rights to be wholly undermined by remunerative exploitation of the other rights.⁹³ Again, the panel sought (and found) support in the text of the Berne Convention, under which the different rights of the copyright owner are separately delineated.⁹⁴

The second connotation of normalcy required the panel to adopt a “normative approach to defining normal exploitation, . . . includ[ing], *inter alia*, a dynamic element capable of taking into account technological and market developments.”⁹⁵ This normative component was, however, apparently understood by the panel in purely economic terms: An exception would not rise “to the level of a conflict with a normal exploitation of the work . . . if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work . . . and thereby deprive them of significant or tangible commercial gains.”⁹⁶ In contrast, “exceptions or limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that

important means of exploitation of the work.

⁹³ *See id.* at ¶ 6.172.

A possible conflict with a normal exploitation of a particular exclusive right cannot be counter-balanced or justified by the mere fact of the absence of a conflict with a normal exploitation of another exclusive right (or the absence of any exception altogether with respect to that right), even if the exploitation of the latter right would generate more income.

Id. The panel’s analysis of this argument thus rejects the “double-dipping” criticism that bar owners used to justify the homestyle and similar exemptions. *See Helfer, supra* note 6, at 116–17 (explaining double-dipping argument).

⁹⁴ *See id.* at ¶ 6.171. This issue arises also in the context of a larger debate that is under way regarding the conception of copyright as a bundle of separate (defined) rights. *See Shira Perlmutter, Convergence and the Future of Copyright, Paper Presented to ALAI Study Days 10–11 (Stockholm, June 18–20, 2000) (copy on file with the Ohio State Law Journal) (predicting that a single right to “exploit or disseminate” a work is “likely to replace the current ‘bundle’ of separate economic rights,” the latter approach reflecting nothing more than serial responses to new technological uses).*

⁹⁵ Panel Report, *supra* note 6, ¶ 6.178. The panel assessed normalcy primarily by reference to the U.S. market, and did not need to address the EU contention that “comparative references to other countries with a similar level of socio-economic development could be relevant to corroborate or contradict data from the country primarily concerned.” *See id.* at ¶ 6.189. The panel noted cryptically that “while the WTO Members are free to choose the method of implementation, the minimum standards of protection are the same for all of them.” *Id.* This does not appear to rule out the possibility of accommodating distinct national markets in any analysis of the content of international copyright law.

⁹⁶ *Id.* at ¶ 6.183.

does not enter into economic competition with non-exempted uses.”⁹⁷ This economic focus offers a somewhat narrow normative vision, although one that may have been forced on the panel by the nature of the dispute before it.⁹⁸ And, as Jane Ginsburg has noted, the panel did preface its articulation of this standard by noting that this was “one way of measuring” the normalcy of an exploitation.⁹⁹

The United States argued that under this standard the business exemption did not conflict with a normal exploitation of the work because (i) it applied to many establishments that had never been licensed¹⁰⁰ by collective management organizations because of administrative difficulties¹⁰¹ (and thus it merely codified normal licensing practices), and (ii) many other establishments would either have been exempt under the homestyle exemption or covered by an almost identical exemption under the group licensing agreement between the National Licensed Beverage Association and collective management organizations.¹⁰² Thus, FIMLA exempted only a small number of users from whom copyright holders could reasonably expect to have received license fees.¹⁰³

The panel found both of these arguments irrelevant. It acknowledged that, according to a variety of studies, a relatively low number of restaurants likely to play music were licensed.¹⁰⁴ But whether or not the rights holders fully exercise their rights could not, in the panel’s view, be “fully ‘indicative of normal

⁹⁷ *Id.* at ¶ 6.181.

⁹⁸ Even accepting the confines within which the panel was operating, it is difficult to see how analysis of “those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire economic significance” – which the panel suggested might infuse the second step with normative meaning, *id.* at ¶ 6.180 – is anything other than a forward looking version of the empirical analysis. See Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three Step Test’ for Copyright Exceptions*, *REVUE INT’L DU DROIT D’AUTEUR* (2001) (manuscript at 14-15) (forthcoming) (copy on file with author) (suggesting that this standard appears to “anticipate what the empirical situation will be, [rather] than [provide] an explanation of what the right holder’s markets *should* cover” and offering a more developed suggestion of what a normative analysis might involve).

⁹⁹ *Id.* at 7 (citing Panel Report, at ¶ 6.180).

¹⁰⁰ The legislative history to the 1976 Act suggested that part of the motivation of the original homestyle exemption was to embody in legislation the scope of licensing that was occurring in practice. See Conference Report, *supra* note 73, at 75.

¹⁰¹ The EU took issue with the claim of administrative difficulties, pointing to the existence of parallel licensing arrangement in the EU and to the lack of an equivalent exemption for recorded music. See Panel Report, *supra* note 6, ¶ 6.191.

¹⁰² *Id.* at ¶ 6.190.

¹⁰³ The panel emphasized again that it was the potential rather than merely actual impact of an exception that was relevant. *Id.* at ¶ 6.184, see also *supra* note 77. Cf. 17 U.S.C. § 107(4) (1994) (effect on potential market for copyrighted work to be considered as part of fair use analysis). As applied to the dispute before it, this meant that the panel would consider the effect of the exemption not only on those who actually make unauthorized use of the musical works, but also by those who may be induced to do so by the possibility of free use. See Panel Report, *supra* note 6, ¶ 6.186.

¹⁰⁴ Panel Report, *supra* note 6, ¶ 6.196.

exploitation.”¹⁰⁵ And although the panel did not elaborate why the allegedly minimal extent to which the business exemption expanded the homestyle exemption was not relevant, on its face this argument operates from the wrong baseline and would permit serial expansions of independently minimal exceptions to effect a substantial intrusion upon rights. In the same vein, the panel was unconvinced that codification of existing (non-)licensing practices warranted a presumption that such codification did not conflict with normal exploitation.¹⁰⁶ The panel correctly noted that:

this would equate “normal exploitation” with “normal remuneration” practices existing at a certain point in time in a given market or jurisdiction. If such exceptions were permissible *per se*, any current state and degree of exercise of an exclusive right by right holders could effectively be “frozen.” . . . [T]he licensing practices of the CMOs in a given market at a given time do not define the minimum standards of protection under the TRIPS Agreement that have to be provided under national legislation.¹⁰⁷

This part of the panel’s opinion implicates the role of social and commercial practices in shaping the meaning of article 13 of TRIPS. By declining to derive presumptions or conclusions merely from the codification of present or past exploitation practice—here, a presumption that the non-licensed practices were not normal means of exploitation—the panel freed international copyright law from potential stagnation. The feasibility of licensing certain uses of works may change as technology develops and social practices evolve (not unrelated factors, to be sure). What once was economically inefficient or otherwise impractical may become simple to effect in different times.¹⁰⁸ Digital delivery of works, for example, may permit the efficient licensing of works in circumstances where transaction costs formerly discouraged copyright owners from seeking compensation.¹⁰⁹ Thus, immunizing exemptions created for uses currently uncontrolled by the copyright owner would freeze international copyright law according to outdated social contexts.

The panel’s rejection of the reliance by the United States upon existing

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶ 6.198.

¹⁰⁷ *Id.*

¹⁰⁸ Of course, technological and social developments may also reduce the feasibility of controlling certain forms of exploitation, perhaps causing national legislators to consider a revision of exemptions or limitations in the other direction. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp.2d 896, 911 (N.D. Cal. 2000) (noting, with disapproval, the “emerging sense of entitlement to free music” caused by the availability of the Napster software), *aff’d*, 239 F.3d 1004 (9th Cir. 2001); see also *Different Tunes*, BUS. WK. Mar. 5, 2001, at 51 (noting the possibility of compulsory licensing of online music in light of the *Napster* case).

¹⁰⁹ See Bruce A. Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 58–59 (1995) (touting the effect of the internet on the ability of copyright owners to extract payment for uses over which they presently have no effective control).

practices—if extended to an analysis of licensing (as opposed to non-licensing) practices—would also ensure that the content of international copyright law would not become unduly subservient to the effects of market power. Use of the concept of “reasonably expected markets” to set the parameters of permissible exceptions inevitably involves some bootstrapping. This has been recognized by U.S. courts interpreting a similar concept under the fair use doctrine of U.S. law.¹¹⁰ Just as the underenforcement of rights, whether due to generous national exceptions or practical difficulties, should not *of itself* validate (as “not in conflict with normal exploitation”) an exemption that codifies those practices, so too the mere fact that a rights holder has been able (perhaps through commercial leverage, or perhaps through threat of litigation) to extract licensing fees should not be the *sole* determinant in setting the parameters of normal exploitation.¹¹¹

This analysis highlights the need to avoid *per se* rules that would enable isolated commercial practices to determine the content of international standards. But any weight (even if properly not dispositive weight) that is attached to market exploitation also requires consideration of the markets to which a panel should look. Just as international copyright law should recognize that technological possibilities and social practices will vary over time, so too those possibilities and practices may vary from one country and culture to another. The panel recognized that international copyright standards should not be frozen in a single time. Should they be frozen in a single place? Efficiency arguments which are strong in one country may have little (or more) force in other countries with different social or economic structures or where rights holders are organized or compensated in different ways. This is significant if the inability to enforce rights through efficient market mechanisms may permissibly be considered by a state in crafting exceptions (which may hold true, notwithstanding that the panel opinion disallows *per se* reliance upon practices partly reflecting such concerns). This question implicates once again the age-old dilemma

¹¹⁰ See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1407 (6th Cir. 1996) (en banc) (Ryan C.J., dissenting) (discussing the analysis of “traditional, reasonable, or likely to be developed markets” in assessing the market harm factor in fair use determinations); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2d Cir. 1995) (same).

¹¹¹ See *American Geophysical Union*, 60 F.3d at 931 (noting that “the vice of such circular reasoning arises only if the availability of payment is conclusive against fair use”). There is, of course, a difference between allowing practices to affect, on the one hand, interpretation of national law on fair use, and, on the other, international standards on permissible exceptions. How states in practice interpret and implement their international obligations may affect the interpretation and content of international laws. See *Vienna Convention on the Law of Treaties* (Vienna Convention), art. 31(3)(b) (in interpreting a treaty, there shall be taken into account “any subsequent practice in the application of the treaty which establishes the agreements of the parties regarding its interpretation), opened for signature May 23, 1969, 1155 U.N.T.S. 331; *cf.* *Thomas v. Washington Light Co.*, 448 U.S. 261 (1980) (disapproving of existing case law interpreting the Full Faith and Credit Clause of the U.S. Constitution because it allowed the meaning of that clause to be affected by the language of state legislation). But there is also a difference between state practice, which may reveal one treaty party’s understanding of international obligations, and practices pursued by private rightholders. *Cf. infra* note 128 (noting panel discussion of whether private agreements are relevant in assessing compliance of national law with international standards).

of universality versus national tailoring, a dichotomy that still comprises the subtext of most of the debates in international copyright law.

In reaching its conclusion on this second condition of the three-step test (lack of conflict with normal exploitation), the panel was significantly influenced (as it had been in interpreting the first condition) by the large percentage of establishments that are eligible to benefit from the business exemption. This suggested that the exemption interfered with a major potential source of royalties for the exercise of the exclusive rights contained in articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention.¹¹²

Although the panel thus concluded that the business exemption conflicted with a normal exploitation of the work within the meaning of the second condition of article 13,¹¹³ once again it reached a different conclusion with respect to the homestyle exemption.¹¹⁴ The panel hinted, but did not decide, that the original homestyle exemption would be treated favorably under this second condition (based upon its “confinement to a comparatively small percentage of all eating, drinking, and retail establishments in the United States”).¹¹⁵ The amended homestyle exemption clearly did not conflict with a normal exploitation of the work.¹¹⁶ There is no collective licensing mechanism for dramatic musical works—the subject of the amended homestyle exemption—and there is little direct licensing of retail or food and drinking establishments by individual owners of rights in such works.¹¹⁷ Thus, an exemption limited to such works was unlikely to acquire substantial economic or practical importance to right holders,¹¹⁸ and thus did not conflict with a normal exploitation of works within the meaning of the second condition of article 13.¹¹⁹

In tackling the third condition of article 13’s three-step test, the panel again

¹¹² Panel Report, *supra* note 6, ¶ 6.206. The panel also noted that only historical reasons had been tendered by the United States for the different treatment of the playing of musical works from CDs and tapes or by live music (all of which are not exempt) and broadcast music (covered by section 110(5)). Payment for public performance of these works by only slightly different means thus seemed to confirm that the business exemption constituted an interference with normal exploitation. Indeed, the panel noted that:

the differentiation between different types of media may induce operators of establishments covered by subparagraph (B) to switch from recorded or live music, which is subject to the payment of a fee, to music played on the radio or television, which is free of charge. This may also create an incentive to reduce the licensing fees for recorded music so that users would not switch to broadcast music.

Id. at ¶ 6.209.

¹¹³ *Id.* at ¶ 6.211.

¹¹⁴ *Id.* at ¶ 6.219.

¹¹⁵ *Id.* at ¶ 6.212 (discussing the original homestyle exemption); ¶ 6.215 (discussing pre-amendment data).

¹¹⁶ *Id.* at ¶ 6.219.

¹¹⁷ *Id.* at ¶ 6.216.

¹¹⁸ *Id.* at ¶ 6.218.

¹¹⁹ *Id.* at ¶ 6.219.

started with the dictionary definition of the component terms:¹²⁰ the exemption must not “unreasonably prejudice the legitimate interests of the right holder.”¹²¹ Importantly, this analysis of the “ordinary meaning” of these terms in itself persuaded the panel that “the notion of ‘interests’ is not necessarily limited to actual or potential economic advantage or detriment.”¹²² Although the parties did not contest the legitimacy of the rights at issue here, the panel afforded similar breadth to the term “legitimate” as involving both a positivistic and normative perspective and “calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.”¹²³ Indeed, the panel expressly noted that while one way of looking at legitimate interests—which it pursued in the particular matter before it—was to consider the economic value of copyrights, this was “incomplete and conservative” and the panel’s focus on economic interests in the case at hand was “not to say that legitimate interests are necessarily limited to this economic value.”¹²⁴

The central question in analyzing the third condition of the three step test, however, was the level of prejudice that may be considered unreasonable.¹²⁵ Because of the panel’s focus on economic interests, the panel concluded that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”¹²⁶ The panel’s cautionary language in focusing on economic interests should, however, ensure that this formulation does not represent the limit of unacceptable prejudice to authors.¹²⁷

In this context, however, it was sufficient to doom the business exemption. The United States argued that the economic impact of the exemption could be determined only by recognizing that many covered establishments would not in any event provide licensing fees to the rights holders because they do not play music, “rely on music from some source other than radio or TV (such as tapes, CDs, commercial background music services, jukeboxes, or live music), “would take advantage of the NLBA agreement if . . . the statutory exemption were not available,”¹²⁸ or would

¹²⁰ See *id.* at ¶ 6.223.

¹²¹ See TRIPS Agreement, *supra* note 3, art. 13.

¹²² Panel Report, *supra* note 6, ¶ 6.223.

¹²³ *Id.* at ¶ 6.224.

¹²⁴ *Id.* at ¶ 6.227.

¹²⁵ *Id.* at ¶ 6.229.

¹²⁶ *Id.*

¹²⁷ Indeed, in a footnote, the panel sought interpretative assistance from commentary on the meaning of article 9(2) of the Berne Convention, which reaffirms the willingness seen elsewhere in the opinion to view copyright as something more than a trade issue. See *id.* at ¶ 6.229 n.205.

¹²⁸ The panel noted that “a private agreement constitutes a form of exercising exclusive rights and is by no means determinative for assessing the compliance of an exemption provided for in national law pursuant to international treaty obligations.” *Id.* at ¶ 6.250. Cf. *supra* text accompanying notes 106–111 (discussing reliance on licensing practices in determining the scope

prefer to simply turn off the music rather than pay the fees demanded by the rights holders.¹²⁹ The panel was unconvinced that these considerations reduce the economic prejudice.¹³⁰ While some establishments might stop playing broadcast music if required to pay a fee, other establishments that currently play recorded music may decide to play music transmitted by broadcast or cable in order to avoid paying licensing fees.¹³¹ Those that do not play any music at present may decide to do so, given the free use permitted by the business exemption.¹³² Moreover:

an exemption that makes the use of music from one source free of charge is likely to affect, not only the number of establishments that opt for sources of music that require the payment of a licensing fee, but also the price for which the protected sources of music can be licensed.¹³³

This would heighten the economic prejudice suffered by right holders.¹³⁴ In light of all this, the panel found the degree of prejudice unreasonable.¹³⁵

But again, the panel found the level of prejudice caused by the homestyle exemption to be reasonable.¹³⁶ The same characteristics differentiated the business exemption from the homestyle exemption: the different percentages of establishments estimated to be covered by the exemption; the limitation to homestyle equipment; the limitation (since 1998) to the public communication of transmissions

of permissible exceptions).

¹²⁹ *Id.* at ¶ 6.238.

¹³⁰ *See id.* at ¶ 6.251.

¹³¹ *Id.* at ¶ 6.240.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Again, the United States tried to place weight on the fact the business exemption applied to many establishments from whom the CMOs received no license fees under the prior regime because of lack of an effective or efficient enforcement structure. The panel stressed that both actual and potential effects of the exception were relevant to the analysis under the third step of article 13:

While under such circumstances the introduction of a new exception might not cause immediate additional loss of income to the right holder, he or she could never build up expectations to earn income from the exercise of the right in question. We believe that such an interpretation, if it became the norm, could undermine the scope and binding effect of the minimum standards of intellectual property rights protection embodied in the TRIPS Agreement.

Id. at ¶ 6.247.

¹³⁵ *See id.* at ¶ 6.265. This third condition threw up an argument that the EU had advanced throughout its case, namely that the interests of right holders from all WTO countries (not just EU countries) had to be considered in assessing the effect of Section 110(5) under article 13. From a textual reading of article 13 the panel concluded that its assessment of whether the prejudice caused by an exception is of an unreasonable level should not be limited to the right holders of the complainant country. *See id.* at ¶ 6.231.

¹³⁶ *Id.* at ¶ 6.272.

embodying dramatic renditions of dramatic musical works, upon which no licensing evidence was submitted; and small establishments covered by the homestyle exemption have never been a significant source of revenue collection for CMOs.¹³⁷

B. *Analysis and Implications*

1. *The Response of the United States*

In July 2000, Deputy U.S. Trade Representative Rita Hayes informed the WTO Dispute Settlement Body that the United States would not appeal the panel finding that the business exemption violated TRIPS.¹³⁸ But this raises the question of what the United States must do to bring itself into compliance with TRIPS. If it does not do so, the United States may at the option of the EU¹³⁹ be subject to trade sanctions (or, if the parties agree, pay compensation to the EU).¹⁴⁰ Clearly, a repeal of the business exemption, leaving the revised homestyle exemption in place, would ensure compliance and obviate any such penalties. But the scope of the revised homestyle exemption, as interpreted by the parties and the panel, is much narrower than the original exemption.¹⁴¹ If the response of the United States to the panel decision is simply to repeal subsection (B), the upshot of this battle of legislative and international developments may be a contraction of section 110(5) rather than the expansion sought by small business organizations. Thus, one possible legislative response might be to repeal the 1998 amendments in toto and return to the original homestyle exemption. It is not clear, however, that a simple return to the pre-1998 exemption would pass muster. The panel report occasionally supports the validity of the homestyle exemption by reference to the pre-1998 case law and to the intended scope of the original homestyle exemption.¹⁴² At other times, however, the language

¹³⁷ *Id.* at ¶¶ 6.269-6.271

¹³⁸ Panel decisions are appealable to a standing Appellate Body of the DSB. DSU, *supra* note 2, at art. 17.

¹³⁹ The sanctions that the EU wishes to impose would need to be approved by the Dispute Settlement Body. *See* DSU, *supra* note 2, arts. 21–22. It is likely that any sanctions approved by the DSB would involve the suspension of obligations owed the United States under the TRIPS Agreement, and thus would ironically harm the copyright industries that have already suffered from the restriction of their rights in violation of international law. *See* European Communities–Regime for the Importation, Sale and Distribution of Bananas–Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (Decision by the Arbitrators, March 24, 2000) (discussing the principle that suspension of obligations should occur first with respect to the same sector and the same agreement in respect of which a violation was found).

¹⁴⁰ *See* DSU, *supra* note 2, arts. 21–22; *see* Dreyfuss & Lowenfeld, *supra* note 59, at 328–29 (discussing enforcement options).

¹⁴¹ *See supra* note 64.

¹⁴² In considering whether the homestyle exception was a “special case,” the panel noted the similar language in the original and revised versions of the exemption and commented that it would “consider . . . the practice as reflected in the judgements rendered by U.S. courts after 1976

of the report makes clear that the amended exemption is the subject of analysis,¹⁴³ or that the panel is relying on the reduced scope of application of the revised exemption.

An arbitrator appointed under article 21 of the Dispute Settlement Understanding has given the United States until July 27, 2001, to bring its law into compliance with TRIPS, rejecting U.S. claims that it would take fifteen months (i.e., until October 27) to complete the deliberation and legislative process necessary to ensure implementation of the panel's ruling.¹⁴⁴ The United States Trade Representative has accordingly issued a Request for Comment, seeking input on the steps that the United States should take in response to the panel ruling.¹⁴⁵

While the nature of the legislative response in the United States will no doubt be very important for the owners of copyright in musical works, and for the owners of bars, restaurants, and small businesses, the context of the debate regarding how to respond is much more important. The debate will unfold in the shadow of the panel decision and under threat of trade sanctions. International copyright obligations, it is now evident, are no longer cost-free. They are not to be lightly assumed because they will not be enforced lightly. Tenuous arguments of compliance will be scrutinized not just by copyright scholars, but by adjudicative panels with jurisdictional heft.

To be sure, the United States formally retains the sovereignty necessary to maintain its existing copyright law. Thus, it is not only unclear *how* Congress will act—it is still an open question *whether* it will act.¹⁴⁶ While the decision not to appeal the panel's conclusion was taken by the executive branch (and a prior administration at that), the measures necessary for compliance cannot be implemented without the involvement of the legislative branch. Yet, since the early stages of the legislation that ultimately became the FIMLA, Congress has been more

concerning the original homestyle exemption . . . as factually indicative of the reach of the homestyle exemption even after the 1998 Amendment.” *Id.* at ¶ 6.138.

¹⁴³ See Panel Report, *supra* note 6, ¶ 6.135. (“We examine now whether the homestyle exemption in subparagraph (A), *in the form in which it is currently in force in the United States*, is a “certain special case” within the meaning of the first condition of article 13 of the TRIPS Agreement.”) (emphasis added).

¹⁴⁴ See United States—Section 110(5) of the U.S. Copyright Act, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Doc. No. WT/DS160/12 (Jan. 15, 2001) [Arbitration Report]. The United States rested its claim for an extended compliance period, among other things, on the domestic controversy likely to surround any amending legislation. But the arbitrator, consistent with prior arbitration opinions, found domestic controversy irrelevant to the time needed to ensure compliance with international obligations. *See id.* at ¶¶ 41–42.

¹⁴⁵ See Office of the United States Trade Representative, Request for Comment on WTO Dispute Settlement Proceeding Regarding Section 110(5) of the U.S. Copyright Act, 66 Fed. Reg. 8838 (Feb. 2, 2001).

¹⁴⁶ The United States has repeatedly indicated to WTO members that it intends to comply with the panel report and make the necessary amendments to U.S. law. *See* Arbitration Report, *supra* note 144, at ¶ 1 (citing official communication from the United States).

enthusiastic about the expansion of the homestyle exemption than was the administration or the Copyright Office (which, though strictly part of the legislative branch, reflected administration thinking on the issue).¹⁴⁷ Notwithstanding the changes in the nature of the public international lawmaking process, international standards continue to be enforced on the ground through the vehicle of national laws that may—or may not—be fully compliant with those standards.¹⁴⁸ The potential imposition of trade sanctions, however, makes the option of resistance far less likely or palatable.

2. *Continuing Deference to National Autonomy*

The mere existence of the panel report illustrates the transformed nature of international copyright law. The balance between international standards and national autonomy has been irrevocably altered. The report is the first authoritative finding of a violation of international copyright law. And the United States stands to be sanctioned if it does not amend its law. However, that shift is one largely effected by the TRIPS negotiators in 1994 when the TRIPS Agreement was made part of the WTO dispute settlement system. The panel in *United States—Section 110(5)* did not further recalibrate the balance.

Moreover, the *outcome* of the *Section 110(5)* dispute might create a slightly misleading impression regarding the extent to which panels in later cases might defer to national policy choices in enforcing international copyright law. The *approach* of the panel speaks less radically to any transformation in this regard. The report contains several passages apparently exhibiting substantial deference to national autonomy. Indeed, in many respects, the panel's level of deference contains an echo of pre-TRIPS attitudes to compliance. For example, in interpreting “certain special cases” the panel resisted efforts by the EU to impose normative judgments about the legitimate public policy purposes that each country could pursue.¹⁴⁹ The panel accepted the U.S. argument that it should “not impose any requirement as to the legitimacy of the policy objectives that a particular country might consider special in the light of its own history and national priorities.”¹⁵⁰

The nature of the issue before the panel may have affected this disposition.

¹⁴⁷ See *Music Licensing in Restaurants and Retail and Other Establishments, Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 16–19 (1997) (statement of Marybeth Peters, Register of Copyrights) (discussing the difference between the homestyle and business exemption); Letter from Marybeth Peters, Register of Copyrights to William J. Hughes, Chair, House Subcomm. on Intellectual Property and Judicial Administration, Sept. 28, 1994, *reprinted in* 56 PAT. TRADEMARK & COPYRIGHT. J. (BNA) 741 (Oct. 15, 1998) (suggesting that legislation might precipitate a challenge under international law). For a discussion of the development of the legislation, see generally Helfer, *supra* note 6.

¹⁴⁸ See Ginsburg, *supra* note 98, at 2 (discussing the variables relevant to the creation of supranational copyright standards).

¹⁴⁹ Panel Report, *supra* note 6, ¶ 6.112.

¹⁵⁰ *Id.* at ¶ 6.106.

Although the scope of exceptions to copyright may become a significant issue in the digital environment,¹⁵¹ the Berne Convention afforded countries generous scope to create exceptions to copyright that promoted national attitudes to free speech or other countervailing social policies.¹⁵² Reflecting that latitude, state practice on exceptions is so varied that national autonomy may pervade analysis of article 13 largely because of the role of state practice as a source of law under the Vienna Convention.¹⁵³

Yet, it also needs to be emphasized that the panel's deferential pose sometimes emanated from sources other than the traditional Berne-based philosophical commitment to national autonomy. For example, in deciding not to require the United States to defend the objective legitimacy of the purpose underlying the exceptions in order to establish that the exception was a "special case," the panel's decision rested, in fact, upon a purely textual analysis of article 13.¹⁵⁴ And review of the normative basis for the exception, which the panel declined to conduct under the rubric of this first step of the test, was part of the panel's analytical model for the other two steps of the test.¹⁵⁵ In short, the extent to which deference to national autonomy will be endorsed by later panels remains somewhat unclear.¹⁵⁶

3. *The Influence of the Trade Context in Copyright Law*

The text of an agreement necessarily draws meaning from the context in which it is developed and interpreted. The Berne Convention has, from the outset, been a bridge between the common law copyright systems and the civil law *droit d'auteur* systems.¹⁵⁷ As such, deliberations regarding the content and revision of the

¹⁵¹ See Dinwoodie, *supra* note 9, at 516–18 (explaining that exceptions are likely to become a contested issue because "[t]he predominant national approach to digital copyright issues throughout the world has been to classify most acts by users as within the prima facie exclusive control of the copyright owner, and then to create a proper balance by enacting exceptions and limitations to that general principle").

¹⁵² See Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties*, 1999 INTEL. PROP. Q. 56, 93 (1999) (noting the flexibility given to national legislators by international treaty provisions on exceptions and limitations).

¹⁵³ See Shira Perlmutter, *Future Directions in International Copyright*, 16 CARDOZO ARTS & ENT. L.J. 369, 370 (1998) (noting that "[m]ore variety exists in delineating the precise scope of rights through exceptions and limitations, although certain general categories are common").

¹⁵⁴ See Panel Report, at ¶ 6.111 ("It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article.").

¹⁵⁵ See *id.* at ¶¶ 6.166, 6.224.

¹⁵⁶ The extent to which Appellate Body opinions, let alone panel reports, will be treated as persuasive by later panels remains unsettled, see Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANS'L L. & POL. 1, 4 (1999), which further confuses the question.

¹⁵⁷ See Gillian Davies, *The Convergence of Copyright and Authors' Rights—Reality or Chimera?*, 26 INT'L REV. INDUS. PROP. & COPYRIGHT L. 964, 965 (1995) (noting that the Berne

Convention benefited from exposure to a wide variety of views of copyright law and its purposes and values. The incorporation of Berne into TRIPS and thus its integration within the broader institutional infrastructure of the World Trade Organization might thus imbue copyright questions with a trade hue.¹⁵⁸ Yet copyright law is about more than trade. It reflects values of personality and authorial integrity, and a balance of private rights and public access, that a trade equation might obscure. Although the nature of the issue before the panel gives the report an economic focus, it does contain some reassuring language in this regard. For example, in articulating the meaning of the third step in the three step test, the panel suggested that confining the notion of “legitimate interests” to the economic value of copyrights was “incomplete and conservative,” even though the dispute before it largely implicated purely economic interests.¹⁵⁹

The panel’s fullest exploration of the relationship between the Berne Convention and the Berne Convention as incorporated in the TRIPS Agreement does not come in the heart of the report.¹⁶⁰ Although the bulk of the panel’s opinion focuses on an interpretation of article 13 of TRIPS, the EU had raised a preliminary argument that would might have prevented the panel from reaching that question. The EU suggested that article 13 applied only to new rights added by the TRIPS Agreement, and that the United States could justify an exception to rights guaranteed by the Berne Convention only under pre-existing provisions of the Berne Convention.¹⁶¹ The panel rejected that argument, but because the United States had responded to it in part with the suggestion that article 13 merely clarified the scope of the minor exceptions doctrine that previously existed under the Berne Convention,¹⁶² the panel addressed the interaction between the Berne Convention and the TRIPS Agreement.

More particularly, the panel had to decide whether, and to what extent, the minor exceptions doctrine of the Berne Convention applied when the Berne Convention was incorporated into TRIPS. The minor exceptions doctrine¹⁶³ had

Convention had “provided a bridge” between the systems of copyright found in common law countries and the *droit d’auteur* systems of civil law countries).

¹⁵⁸ See *supra* text accompanying notes 56–57.

¹⁵⁹ See Panel Report, *supra* note 6, ¶ 6.227.

¹⁶⁰ Neil Netanel has helpfully phrased the dilemma as whether there is a difference between “Berne qua Berne” and “Berne in TRIPS.” He concludes that “state practice under Berne should indeed be the fundamental starting point for interpreting Berne-in-TRIPS, although the Berne provisions that are incorporated into TRIPS will necessarily be colored by TRIPS’s state practice and overall object and purpose as well.” Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT’L L. 441, 447 (1997).

¹⁶¹ See Panel Report, *supra* note 6, ¶ 6.34. The EU based this argument on article 20 of the Berne Convention and article 2(2) of TRIPS, which prohibit Berne member countries from entering into agreements that restrict rights granted by Berne. *Id.*

¹⁶² *Id.* at ¶ 6.35. The panel agreed with the United States that article 13 is the applicable test for determining the scope of permissible minor exceptions to Berne rights. *Id.* at ¶ 6.81.

¹⁶³ The parties also disagreed on the scope of the minor exceptions doctrine. The panel rejected the argument that the doctrine should be restricted to non-commercial uses, relying in part upon the wide variation in exemptions found in national laws and also upon the fact that some of

never even been expressly incorporated into the text of the Berne Convention.¹⁶⁴ The panel concluded, however, that language in the General Reports of the Brussels revision conference reflected an agreement among the Berne signatories within the meaning of article 31(2)(a) of the Vienna Convention to permit minor exceptions in national law.¹⁶⁵ State practice under Berne confirmed the existence of the doctrine.¹⁶⁶

Article 9(1) of TRIPS incorporates the Berne Convention without express reference to the minor exceptions doctrine, even if that doctrine was—as the panel concluded—part of the Berne *acquis*. The panel concluded that if the incorporation was only of the text of articles 1–21 of the Berne Convention, but not of the entire Berne *acquis* relating to these articles, article 9(1) of the TRIPS Agreement would have explicitly so provided.¹⁶⁷ In grounding its incorporation of the entire Berne *acquis* within the TRIPS Agreement on the lack of any suggestion to the contrary in the text of TRIPS, the panel confirmed a general interpretive philosophy of broader significance:

In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. . . . [I]t is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases.¹⁶⁸

the illustrative uses mentioned by the different conference reports might not be non-commercial in nature. The panel was thus willing to permit some exemptions of commercial use (and noted that some non-commercial uses of works may in fact reach a level that has an impermissible major economic impact on the right holder) provided that the exception contained in national law is indeed minor. *See id.* at ¶ 6.56–6.59. The panel noted that:

the [minor exceptions] doctrine is primarily concerned with *de minimis* use, but that otherwise its application is not limited to the examples contained in the reports of the Berne Convention revision conferences held in Brussels and Stockholm, to exclusively non-commercial uses or to exceptions in national legislation that existed prior to 1967.

Id. at ¶ 6.93.

¹⁶⁴ The Berne Convention does expressly refer to a variety of permissible exceptions. *See, e.g.*, Berne Convention, *supra* note 13, arts. 9(2), 10.

¹⁶⁵ Panel Report, *supra* note 6, ¶ 6.53.

¹⁶⁶ *Id.* at ¶ 6.55. A variety of limitations can be found in different national laws from the time of the Brussels revision to the present. *Id.* The panel declined to consider whether these examples rose to the level of “subsequent practice” within the meaning of Article 31(3)(b) of the Vienna Convention. *See id.* at n.68.

¹⁶⁷ *Id.* at ¶ 6.62. In this regard, the panel pointed to the exclusion of article 6*bis* from the scope of TRIPS. *Id.* at n.79.

¹⁶⁸ *Id.* at ¶ 6.66. The panel also supported its conclusion, which effectively brought the minor

Thus, the minor exceptions doctrine under Berne was now encapsulated in article 13 of TRIPS. More importantly, if this interpretive approach is applied by later panels it should give some reassurance to those concerned that TRIPS interpretations may strip Berne of other than trade-oriented values.¹⁶⁹

This willingness to consider the meaning of the Berne Convention, as it was understood in its own context, is evident throughout the report. Of course, it would be hard to analyze article 13 of TRIPS without some regard for the Berne Convention because article 13 has its genesis in article 9(2) of the Berne Convention. Article 9(2) had provided that countries could “permit the reproduction of . . . works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”¹⁷⁰ This provision had applied only to the reproduction right under the Berne Convention; article 13 of TRIPS elevated it to a general test of permissible exceptions (including exceptions to performance rights). Thus, it is not wholly surprising that when the panel analyzed article 13 it noted that its intent to ensure a narrow or limited operation for the provision was reinforced by similar accepted interpretations of article 9(2) of the Berne Convention.

But the panel departed from automatically transposing to article 13 every accepted reading of article 9(2) of the Berne Convention, because of the different scope of the two provisions. For example, in interpreting the first step of the three step test, the panel declined to analogize the “special purpose” interpretation that had been afforded the term “special cases” in article 9(2) of the Berne Convention to similar language in article 13 of TRIPS.¹⁷¹ Instead, the panel conducted a textual analysis of article 13 to reach a different conclusion.¹⁷² Indeed, as if to emphasize that the incorporation of the agreement within TRIPS will have some effect on interpretative approach, the panel supported its exegesis on this point by referring to interpretative tests developed by the Appellate Body in other (non-intellectual

exceptions doctrine within TRIPS, by noting references to the doctrine in the negotiating documents of the Uruguay Round that led to TRIPS. *See id.* at ¶ 6.64. Article 32 of the Vienna Convention provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting for the application of Article 31.”

¹⁶⁹ Similarly, the panel’s willing reference to the later agreed WIPO Copyright Treaty—if repeated in other contexts—will help to provide a dynamism by keeping the TRIPS Agreement current, and also to ensure a broadening of any narrow trade perspective. *See supra* text accompanying notes 190–96 (discussing relevance of the WIPO Copyright Treaty).

¹⁷⁰ Berne Convention, *supra* note 13, art. 9(2).

¹⁷¹ Panel Report, *supra* note 6, ¶ 6.111. Here, the panel departed from the explanation provided by the leading contemporary commentator on the Berne Convention. The panel indicated a willingness generally, however, to consider “teachings of the most highly qualified publicists of the various nations” as a subsidiary source for the determination of law. *Id.* at ¶ 6.111 n.114.

¹⁷² *Id.* (“It is difficult to reconcile the wording of Article 13 with the proposition that an exception or limitation must be justified in terms of a legitimate public policy purpose in order to fulfill the first condition of the Article.”).

property) WTO contexts.¹⁷³ Indeed, throughout the report the panel periodically employed concepts and approaches developed in past GATT and current WTO dispute settlement practice.¹⁷⁴

4. *Initiation of Claims*

One of the ways in which the development of international copyright law through the WTO dispute settlement mechanism might have caused a degree of trade-centrism was the extent to which the initiation and conduct of proceedings would be controlled by the trade representatives of respective governments. Parties before the WTO are formally (and, indeed, exclusively) member states of the WTO, and thus the initiation of complaints will be driven by national trade officials. This screening process may alter the type of cases filed. But the selection of the types of cases to be filed may also be affected by what the panels will require as evidence of allegedly violative national law. Will a single decision of a trial court, for example, refusing to offer protection in circumstances mandated by TRIPS, warrant panel disapprobation?

The panel in *Section 110(5)* looked at the practices of the “vast majority” of U.S. courts as evidence of the meaning of the statutory provision.¹⁷⁵ The EU suggested that prior to the 1998 amendment there was a trend in U.S. case law toward broadening the homestyle exemption, and argued that the panel should consider this trend. The panel declined to enter this debate and noted that WTO panels are not in the business of predicting future developments in U.S. case law based upon previous trends.¹⁷⁶ To do so, as the EU urged, would miscomprehend the nature of common law lawmaking generally, and the fact-specific fine-tuning of balance that is the

¹⁷³ *Id.* (“[I]n interpreting other WTO rules, such as the national treatment clauses of the GATT and the GATS, the Appellate Body has rejected interpretative tests which were based on the subjective aim or objective pursued by national legislation.”).

¹⁷⁴ *See id.* at ¶ 6.185

We wish to express our caution in interpreting provisions of the TRIPS Agreement in light of concepts that have been developed in GATT dispute settlement practice. . . . [B]ut given that the agreements covered by the WTO form a single, integrated legal system, we deem it appropriate to develop interpretations of the legal protection conferred on intellectual property right holders under the TRIPS Agreement which are not incompatible with the treatment conferred to products under the GATT, or in respect of services and service suppliers under the GATS, in the light of pertinent dispute settlement practice.

¹⁷⁵ *Id.* at ¶ 6.138–144.

¹⁷⁶ The panel noted:

We cannot exclude the possibility that in the future U.S. courts could establish precedents that would lead to the expansion of the scope of the currently applicable homestyle exemption as regards covered establishment, but . . . [g]iven the sufficiently consistent and narrow application practice of the homestyle exemption of 1976, we see no need to hypothesise whether at some point in the future U.S. case law might lead to a de facto expansion of the homestyle exemption of 1998.

Id. at ¶ 6.144.

hallmark of copyright law. It appears that the panel would await reasonable development of approaches to issues in national systems before intruding. The panel's caution should add legitimacy to the WTO project and restrict TRIPS violations to circumstances where clearly adopted national positions reveal inadequate protection.¹⁷⁷

5. *Third Party Involvement*

A further aspect of WTO proceedings that might undermine the claim of panels to develop international copyright norms is the limited range of perspectives that would be presented to them. Not only are appearances limited to governments, but third countries can participate as a matter of right only where they have a substantial trade interest in the dispute in question.¹⁷⁸ But in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*,¹⁷⁹ the Appellate Body indicated a willingness to accept amicus briefs and written submissions by interested persons other than governments.¹⁸⁰ The relaxed attitude that later WTO panels (following that lead) have taken to third party submissions by nongovernmental organizations is also seen in the *Section 110(5)* report. The panel was clearly ready to consider an unsolicited letter from a law firm representing ASCAP, although the panel did not in fact rely on the letter because it added nothing new to the debate.¹⁸¹

The welcome amicus involvement of nongovernmental third parties in the conduct of WTO proceedings arises, however, in the context of a broader debate currently under way regarding the role of third parties in WTO proceedings. While panels have liberalized the rules permitting involvement of third parties, including non-governmental organizations (NGOs), in dispute settlement proceedings, the United States has insisted in recent months on excluding third party interested *states*

¹⁷⁷ The United States made much of the fact that only three U.S. courts had found the exemption applicable. This is somewhat misleading: once decisions are rendered, the collective management organizations ceased enforcement proceedings against similar establishments, so the relative paucity of decided cases is hardly powerful. Although the panel did not comment on this aspect of the U.S. argument it did note later in the report that “in certain circumstances, current licensing practices may not provide a sufficient guideline for assessing the potential impact of an exception or limitation on normal exploitation . . . [such as] where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights.” *Id.* at ¶ 6.188.

¹⁷⁸ See DSU, *supra* note 2, art. 4.11 (role of third party member states in consultations); art. 10.2 (role of third member states in proceedings before the panel); 17.4 (permitting participation of third party member states before the appellate body, but without a right of appeal to that body).

¹⁷⁹ Report of Appellate Body, Doc. No. WT/DS58/AB/R, ¶ 110 (Oct. 12, 1998), *available at* <http://www.wto.org> (interpreting article 13 of the DSU).

¹⁸⁰ See generally Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO*, 12 *TRANS'L L.* 427, 434–44 (1999).

¹⁸¹ See Panel Report, *supra* note 6, ¶ 6.8. The panel also made reference to submissions made by third party member countries. See, e.g., *id.* at ¶¶ 6.55, 6.85.

from its preliminary consultations (mandated by the WTO) with other states regarding alleged GATT violations.¹⁸² This has led some to level the ironic complaint that NGOs are being afforded greater access to the WTO system than member states.¹⁸³

This issue brings the conceptual ambiguities of the WTO dispute settlement procedures into sharp focus. Member states wishing to preserve remnants of the old GATT system would like to restrict discussions to those governments involved, thus reestablishing the former Metternichian character of GATT dispute settlements as government to government diplomacy. Other states, such as the EU and the United States, have argued for reform of the WTO procedures to make the dispute settlement mechanism more transparent and more adjudicatory in nature. The disconnect between liberal third party NGO involvement and restricted member state participation has, however, forced some countries (such as Australia) to call for guidelines on submission of briefs.¹⁸⁴ This should force countries to confront the conceptual ambiguities of the system and permit the development of procedures that ensure fair representation of a wide spectrum of countries and interests as panels develop international copyright law.¹⁸⁵

6. Injecting Dynamism into International Copyright Law

One of the criticisms leveled at the classical method of public international lawmaking was its backward-looking nature.¹⁸⁶ This prevented it from serving in the vanguard of norm development. The WTO dispute settlement mechanism holds the promise of making international copyright law more dynamic and more current, although, as noted above, there are costs to pursuing this potential too aggressively.¹⁸⁷ To balance the gains of dynamic development with the possible costs of premature and incorrect internationalization, panels will have to choose carefully the issues and circumstances in which they will move beyond the strict text of the TRIPS Agreement.

The *Section 110(5)* panel appeared to strike the right balance. As discussed below, the panel sought carefully to link its report to the text of the TRIPS

¹⁸² This issue has arisen in connection with the challenge by the EU to the United States' continuing use of trade retaliation procedures under the Trade Act. The United States has adopted a strict attitude to article 4.11 of the DSU, which permits third party involvement only by states with a "substantial trade interest" in the issue. See DSU, *supra* note 2, art. 4.11.

¹⁸³ See Daniel Pruzin, *WTO Members Make Unfriendly Noises on "Friends of the Court" Dispute Briefs*, 17 Int'l Trade Rep. (BNA) at 1283 (Aug. 17, 2000) (reporting June 7, 2000 and July 27, 2000 meetings of the Dispute Settlement Body).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* (predicting that the likely response is to liberalize the participation rights of member countries rather than restricting the submission of amici briefs).

¹⁸⁶ See Dinwoodie, *supra* note 9, at 490–94 (discussing the limits of the classical model of public international copyright lawmaking).

¹⁸⁷ See *supra* text accompanying notes 55–57.

Agreement and resisted the invitation of the EU to engage in activist predictions of future U.S. case law.¹⁸⁸ Yet, several aspects of the panel's analysis of the minor exceptions doctrine confirm the panel's determination to ensure that international copyright law will not fossilize. For example, its refusal to treat the list of examples of permissible exceptions in the reports of past revision conferences as exhaustive of the doctrine's scope guaranteed some room for interpretation consistent with changing times and technologies. Similarly, the rejection of the EU's argument that the coverage of that doctrine was frozen in 1967, justifying only those limitations that were in force in the national legislation prior to that year (when the Stockholm revision conference, records of which described the doctrine as a means to allow countries to "maintain" existing exceptions, was held), reflected a concern that international copyright law be responsive to current conditions. And the panel's acknowledgment in interpreting the first step of article 13 that the notion of homestyle equipment "may evolve as a result of technological development," also reflects an unstated desire to ensure that international copyright lawmaking does not entrench static rules that do not consider the current technological environment.¹⁸⁹

Finally, the panel's receptiveness to recent developments in other international copyright fora will facilitate a more forward-looking institution. In support of its interpretation of the legal status of the minor exceptions doctrine under the TRIPS Agreement, the panel considered subsequent developments, and in particular the WIPO Copyright Treaty (WCT), which contains provisions similar to the three-step test found in the Berne Convention and TRIPS.¹⁹⁰ The United States argued that the Agreed Statement concerning article 10 of the WCT made clear that signatory nations, including the EU, commonly recognized the minor exceptions doctrine to be part of international copyright law. Although the panel recognized that the WCT Agreed Statements did not constitute a subsequent treaty on the same subject-matter within the meaning of article 30 of the Vienna Convention, subsequent agreements on the interpretation of a treaty, or subsequent practice within the meaning of article 31(3) of the Vienna Convention, it did conclude that the Agreed Statement supported the existence of the minor exceptions doctrine. The panel explained that:

We discussed the need to interpret the Berne Convention and the TRIPS Agreement in a way that reconciles the texts of these two treaties and avoids a conflict between them, given that they form the overall framework for multilateral copyright protection. The same principle should also apply to the relationship between the TRIPS Agreement and

¹⁸⁸ One might regard the panel's decision to analyze the business exemption's compliance with the second and third steps of the article 13 test, notwithstanding its failure to satisfy the first step, as more aggressive than typical in international adjudication. But given the interpretive restraint otherwise shown by the panel, this is hardly a substantial criticism.

¹⁸⁹ See Panel Report, *supra* note 6, ¶ 6.145; *see also id.* at ¶ 6.187 (recognizing that "what is a normal exploitation in the market place may evolve as a result of technological developments or changing consumer preferences").

¹⁹⁰ Article 10(1) of the WCT applied the standard for permissible exceptions set forth in article 13 of TRIPS to the rights granted to authors under the WCT; Article 10(2) affirms the same standard as applicable to rights granted under the Berne Convention. See WCT, *supra* note 47.

the WCT. The WCT is designed to be compatible with this framework, incorporating or using much of the language of the Berne Convention and the TRIPS Agreement. The WCT was unanimously concluded at a diplomatic conference organized under the auspices of WIPO in December 1996, one year after the WTO Agreement entered into force, in which 127 countries participated. Most of these countries were also participants in the TRIPS negotiations and are Members of the WTO. For these reasons, it is relevant to seek contextual guidance also in the WCT when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations.¹⁹¹

It is probably uncontroversial to treat the WCT as at least relevant to an interpretation of the Berne Convention; the WCT is, after all, a special agreement under the Berne Convention.¹⁹² But article 1(1) of the WCT disclaims any connection to any treaty other than the Berne Convention.¹⁹³ If the WCT, concluded after the TRIPS Agreement, will be considered by panels (regardless of whether it is formally denominated as one of the relevant sources under the Vienna Convention), then the *Section 110(5)* panel has laid the groundwork for a means of keeping the TRIPS Agreement current¹⁹⁴ without amendment of TRIPS.¹⁹⁵ But, this interpretive

¹⁹¹ Panel Report, *supra* note 6, ¶ 6.70 (footnotes omitted).

¹⁹² See WCT, *supra* note 47, art. 1(1) (“This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention”); Berne Convention, *supra* note 13, art. 20 (authorizing Berne signatories to enter into special agreements among themselves, “in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention”).

¹⁹³ See WCT, *supra* note 47, art. 1(1) (“This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights or obligations under any other treaties.”). The Agreed Statements include no corresponding disclaimer, and indeed include references to their concordance with TRIPS. See, e.g., Agreed Statements Concerning the WIPO Copyright Treaty, Dec. 20, 1996, Statements Concerning Articles 4, 5, and 7. Neil Netanel argues therefore that the Agreed Statements may be relevant to the interpretation not only of the Berne Convention, see Netanel, *supra* note 160, at 463–70, but also of TRIPS. See *id.* at 473 (treating the Agreed Statements as “subsequent agreements” relevant to TRIPS interpretation under article 31 of the Vienna Convention on Treaties). Placing weight upon this difference might, however, result in the Agreed Statements being accorded more weight in interpretation than the WCT itself. *But see id.* (arguing that, even if the WCT cannot be considered a “subsequent agreement” regarding TRIPS because of article 1(1), both the WCT and Agreed Statements will be directly relevant to TRIPS interpretation as indications of subsequent state practice).

¹⁹⁴ It would also permit the infusion of values not restricted to trade, because these other fora are not as trade-dominated as is the WTO. The WCT was adopted at a diplomatic conference in 1996 organized under the auspices of WIPO. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369 (1997) (discussing the conclusion of the WIPO Copyright Treaty).

¹⁹⁵ Neil Netanel has argued that the WCT (and the accompanying Agreed Statements) may constitute subsequent agreement and state practice under both Berne and TRIPS, and thus be relevant to a WTO panel’s interpretation of TRIPS. See Netanel, *supra* note 160, at 464–75. This will, as Netanel concedes, depend upon a variety of considerations such as how many WTO members adhere to the WCT and the practice of WCT parties in implementing those obligations. *Id.* at 468. But Netanel’s resort to the WCT in interpreting TRIPS is in part filtered through the

device—which is surely activist in nature given the panel’s Vienna Convention analysis—would do so in a less worrisome way than activist interpretation of TRIPS generally because the WCT was itself constrained by many of the traditional brakes of public international copyright lawmaking. Although the WCT addressed new issues not fully developed at the national level (such as protection against circumvention of technological measures regulating copying or access), it was adopted by consensus and only after a full and open airing before multilateral international copyright policymaking bodies.¹⁹⁶ And, the panel has, by stressing the textual basis for its decision, by characterizing the WCT as merely subsidiary support for its conclusion regarding TRIPS rather than as an independent source of law, and by framing its forward-looking perspective as a reconciliation of the intent of the TRIPS negotiating parties, injected some controlled dynamism without overstepping the bounds of adjudicative conduct.

7. *Language and Results: Ensuring Legitimacy*

The circumspect approach of the *Section 110(5)* panel closely resembles that found in the first Appellate Body report on a TRIPS complaint (involving Indian patent law).¹⁹⁷ As in the *United States—India* Appellate Body report, the *Section 110(5)* panel was careful to link all of its reasoning to the agreed-upon text of the TRIPS Agreement. This was crucial in lending legitimacy to the decision finding India in violation of TRIPS,¹⁹⁸ and the same is true in *Section 110(5)*. Yet, despite the cautious interpretive approach signaled by both the panels and Appellate Body to

WCT’s relevance to the interpretation of the Berne Convention. *Id.* at 469–75. If the WCT and Agreed Statements were relevant to TRIPS interpretation only indirectly through the Berne Convention, this would limit their relevance to Berne-derived provisions, and thus (Netanel concedes) prevents their consideration in construing independent (albeit similar) provisions such as article 13 of TRIPS. *Id.* at 470–75. The panel here appears willing to look at the WCT directly, a position also endorsed by Netanel before the initiation of the *Section 110(5)* complaint. *See id.* at 473.

¹⁹⁶ Concerns about transparency in the development of international norms have found expression not only in critiques of WTO lawmaking, but also in the context of WIPO’s increased use of soft law mechanisms, such as non-binding resolutions of the WIPO Assembly. *See* Joint Resolution Concerning Provisions on the Protection of Well-known Marks, General Report of the Assemblies of the Member States of WIPO, 34th Annual Meeting, Doc. A/34/16 ¶¶ 178 (Sept. 1999) (noting the concerns expressed by the Argentinian delegation “over the creation of de facto norms without defining a mechanism that ensured permanent transparency of the negotiation and decision-making processes, as well as a clear vision of the objectives”).

¹⁹⁷ *See* India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Doc. No. WT/DS50/AB/R (WTO Appellate Body, Dec. 19, 1997) available at <http://www.wto.org/> [hereinafter *United States—India*].

¹⁹⁸ Indian commentators viewed the Appellate Body decision in *United States-India* as much preferable to the panel decision because they believe it adhered more closely to the TRIPS Agreement that was negotiated. Jayashree Watal went so far as to say that the Appellate Body decision “restores some of the faith that we had lost in the WTO.” *The WTO Appellate Body: The First Four Years*, 2 J. WORLD INTELL. PROP. 425, 432 (1999) (comments of Jayashree Watal).

date, all four panel reports on TRIPS complaints have found some violation of TRIPS.¹⁹⁹ This may, however, be attributable to the early cases being brought, namely relatively clear transgressions. In this, the member states appear (largely) to be heeding the advice of commentators tendered soon after the conclusion of TRIPS.²⁰⁰ Indeed, the extent of current restraint (at least in so far as formal complaints are concerned) is graphically demonstrated by the decision of the United States to concentrate on violation complaints in initiating proceedings for TRIPS infractions, while taking the position that the moratorium on nonviolation complaints instituted by article 64(2) of TRIPS has expired.²⁰¹

This cautious approach is consistent with approaches historically used by international adjudicatory institutions seeking to mediate the demands of effective adjudication while providing reassurance to member countries regarding judicial activism. Thus, panels of international institutions such as the European Court of Human Rights are wont to announce that they have power to decide particular issues, but refrain from immediate exercise of that power.²⁰² Alternatively, panels will make

¹⁹⁹ See Panel Report, *supra* note 6; Canada—Patent Protection of Pharmaceutical Products, Doc. No. WT/DS114/R (WTO DSB Panel Report, Mar. 17, 2000), *available at* <http://www.wto.org/>; Canada—Term of Patent Protection, Doc. No. WT/DS170/R (WTO DSB Panel, May 5, 2000) *available at* <http://www.wto.org/>; *United States—India*, *supra* note 197. Panels have, however, also found that some counts in the complaints did not reveal violations of TRIPS.

²⁰⁰ See Judith Bello, *Some Practical Observations about WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 358–59 (1997). One exception is the request which the United States has made for consultations with Brazil regarding a long disputed point of interpretation that is conceded by the United States to be a “narrow one.” See Press Release, Office of the United States Trade Representative, 2001 Special 301 Report (May 1, 2000), *available at* www.ustr.gov/html/special.html.

²⁰¹ At the March 2000 TRIPS Council meeting, several countries suggested that the moratorium should remain in effect until new provisions on the “scope and modalities” of nonviolation complaints are agreed upon as contemplated by the TRIPS Agreement. The United States favored ending the moratorium, and took the position that the moratorium had automatically expired on January 1, 2000. See TRIPS Agreement, *supra* note 3, art. 64. But the United States indicated that it is not presently preparing to pursue non-violation cases. See Daniel Pruzin, *European Countries Call for Negotiations on Geographic Indications at Farm Talks*, [Mar. 24, 2000] INT'L TRADE DAILY (BNA), d4. The United States is showing less restraint in its annual Special 301 review of foreign country intellectual property practices. In that context, the United States Trade Representative has criticized several states that are in compliance with the clear obligations of TRIPS, but which have proposed facially TRIPS-compliant laws that are inconsistent with the United States' interpretation of optimal intellectual property rules. Press Release, Office of the United States Trade Representative, Executive Office of the President, USTR Announces Results of Special 301 Annual Review (Apr. 30, 1999), *available at* <http://www.ustr.gov/releases/1999/04/99-41.html> (discussing U.S. criticism of New Zealand's and Australia's efforts to reform their copyright law to permit parallel importing, notwithstanding the express refusal of TRIPS parties in article 6 to address that issue in the TRIPS Agreement).

²⁰² See Laurence R. Helfer, *Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. J. INT'L L. 357, 409–10 (1998) (discussing the jurisprudence of the European Court of Human Rights and noting that the Court has espoused many of its forward-looking interpretations in cases in which the government ultimately prevailed

decisions holding countries in violation of international standards, but do so only on very narrow grounds.²⁰³ Each device is an attempt to retain legitimacy while making progressive developments in the international law. The WTO panels, including the one that issued the report in *Section 110(5)*, are thus operating within the mainstream of international bodies struggling to achieve the gains of judicial lawmaking without suffering the costs of judicial activism. It is a universal judicial struggle, although one that is made more difficult in a context where the international institution is the object of continuing legitimacy critiques.

III. THE ROLE OF PRIVATE LAW MECHANISMS IN INTERNATIONAL COPYRIGHT LAW

In recent years, national courts have been confronted with an increasing number of copyright disputes among private parties involving international questions. This is hardly surprising. The same reasons that have made international copyright norms relevant to the legislative debate have generated private disputes implicating the often conflicting interests of a number of nations. Cultural assimilation and the ability of digitized works to evade national regulation make it significantly more likely that modern copyright litigation will entail analysis of different national laws. Such litigation will, however, rarely require direct attention to more than one (seemingly paradoxical) principle of international copyright law: all copyright is local. International copyright law merely operates as a system to connect disparate, if increasingly harmonized, national laws. Adherent countries to the Berne Convention undertook to accord national treatment to nationals of other Berne members, and agreed that their copyright law would provide a basic level of copyright protection as defined by the minimum standards set out in the Convention. The TRIPS Agreement augmented these minimum standards, and backed up the obligations with an effective enforcement mechanism. But TRIPS did not alter the basic premise, established in 1886, that private litigation would be resolved by the application of national law.²⁰⁴

only to rely on such principles in subsequent cases to justify a ruling against national governments).

²⁰³ *See id.* (noting that “even when a petitioner prevails on the facts, the [European Court of Human Rights] is careful to stress that governments are entitled to a measure of discretion, thereby limiting the impact of its ruling and suggesting that national discretion may prevail in future cases”).

²⁰⁴ Within the EU, copyright harmonization has been effected through the use of directives. To be effective, directives require affirmative implementation in the laws of member states; they are not directly applicable in the member states. *See Treaty Establishing the European Community, as amended by the Treaty on European Union, art. 249* (“A directive shall be binding, as to the result to be achieved, . . . but shall leave to the national authorities the choice of form and methods.”). In this regard, a directive parallels the Berne Convention as an instrument of international copyright law in the United States. But certain provisions of directives may be treated as directly creating rights in member states under the doctrine of “direct effect.” *See generally* P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW* 150 (6th ed. 1995). This differs from the parallel question with respect to international treaties, because EU law (and, ultimately, an

Thus, while the public international lawmaking process has been substantially reformed in recent years, the forces of internationalization have not yet fully filtered down to the context of private litigation. But private litigation must still deal with international disputes, which it does by localizing such disputes using traditional private law techniques. The starting point for such a methodology is the presumption of territoriality.²⁰⁵ The presumption infuses the philosophy and text of the Berne Convention, and it similarly pervades copyright analysis in U.S. courts. A dispute will be found to arise under the U.S. copyright laws, and thus to implicate the federal question jurisdiction of the U.S. courts, only if it involves an act of infringement alleged to have occurred in the United States.²⁰⁶

The U.S. courts have nevertheless derogated from this general proposition in several ways. First, in some courts the mere authorization in the United States of infringing conduct abroad will be treated as sufficient to implicate U.S. jurisdiction and U.S. copyright law on the basis that authorization is itself actionable infringement.²⁰⁷ Second, the U.S. courts have assumed jurisdiction over activity abroad that contributes to infringement within the United States.²⁰⁸ Finally, the U.S. courts have granted relief in respect of acts of overseas infringement where a predicate act of infringement occurring within the United States enabled further infringement abroad.²⁰⁹

In each of these cases, the courts have almost reflexively applied U.S. law to the

EU-level court, the European Court of Justice) will determine whether the directives have direct effect, while national laws determine whether international treaties are self-executing or otherwise have direct effect in national law. *See supra* note 22 (discussing self-execution). As this distinction highlights, EU law is a body of supranational law with more intrusive effect upon national sovereignty than the Berne Convention or even TRIPS.

²⁰⁵ *See Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994) (en banc).

²⁰⁶ *See id.*

²⁰⁷ *See, e.g., Expeditors Int'l of Wash., Inc. v. Direct Line Cargo Mgmt. Servs., Inc.*, 995 F.Supp. 468, 477–78 (D.N.J.1998); *Curb v. MCA Records, Inc.* 898 F. Supp. 586 (M.D. Tenn. 1995). Courts are split on this question, however. *See, e.g., Subafilms*, 24 F.3d at 1095 (overruling *Peter Starr Prod. Co. v. Twin Cont'l Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986)); *Fun-Damental Too Ltd. v. Gemmy Indus. Corp.*, 41 U.S.P.Q.2d (BNA) 1427 (S.D.N.Y. 1996) (following *Subafilms*); *Armstrong v. Virgin Records Ltd.*, 91 F. Supp. 2d 628, 634 (S.D.N.Y. 2000) (noting repudiation of *Peter Starr*). The weight of authority probably favors the *Subafilms* position.

²⁰⁸ *See, e.g., Armstrong*, 91 F. Supp. 2d at 635–36 (S.D.N.Y. 2000) (finding that jurisdiction may exist over defendant's foreign acts to the extent that the defendants could be liable contributorily or vicariously for subsequent infringement within the United States); *Blue Ribbon Pet Prods., Inc. v. Rolf C. Hagen (USA) Corp.*, 66 F. Supp. 2d 454, 461–63 (E.D.N.Y. 1999).

²⁰⁹ *See, e.g., L.A. News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987 (9th Cir. 1998) (unauthorized transmission and copy of work made in the United States and then further transmitted to Europe and Africa); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939) (awarding plaintiff profits from both U.S. and Canadian exhibition of infringing motion picture where a copy of the motion picture had been made in the United States and then shipped to Canada for exhibition), *aff'd*, 309 U.S. 390 (1940).

dispute before them.²¹⁰ But, strictly speaking, a localizing philosophy requires a localizing rule. And thus there is a long-standing, and, until recently, rarely discussed, copyright choice of law rule. Traditionally, and still typically, copyright disputes are litigated in and under the laws of the country in which the act of infringement is alleged to have occurred. This is taken by many courts and scholars to flow from article 5(2) of the Berne Convention, which provides that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”²¹¹

Recently, U.S. courts have, however, paid more attention to choice of law in copyright disputes. Most notably, in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, the Second Circuit found existing commentary unduly simplified and thus developed a copyright choice of law rule as a matter of federal common law.²¹² The court concluded that different laws may apply to different issues in a copyright litigation.²¹³ In particular, the court determined the ownership of the copyright in question by looking to the law of the place with the most significant relationship to the parties and the transaction.²¹⁴ This test, reflecting the influence of the *Second Restatement of Conflicts*, persuaded the court to give most weight to the nationality of the authors, and the place of first publication, both of which were Russian. But, on the separate question of which law applied to determine questions of “infringement,” the court concluded that the *lex loci delicti* would apply.²¹⁵ This led the court to

²¹⁰ Courts applying this theory have not analyzed whether the acts abroad were infringing under the foreign law in question. *See, e.g., Sheldon*, 106 F.2d at 52. *But cf. Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91 (2d Cir. 1981) (declining to enjoin foreign exhibition absent proof that foreign copyright laws were infringed). Courts have, however, been insistent that the U.S. activity truly be a predicate for the foreign acts. *See Robert Stigwood Group Ltd. v. O’Reilly*, 530 F.2d 1096, 1101 (2d Cir. 1976) (finding that noninfringing rehearsals in the United States were not a predicate for unauthorized live performances in Canada); *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988) (noting that unauthorized live performances of song in France did not flow from the act of unauthorized reproduction in the United States).

²¹¹ *See* Berne Convention, *supra* note 13, art. 5(2). Textually, article 5(2) could be read to institute a rule of *lex fori* because the forum is “the country where protection is claimed.” But the accepted reading of the provision is that it refers to the country in respect of which protection is claimed, that is, where infringement is alleged to have occurred. *See, e.g., Graeme W. Austin, Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 24–25 (1999).

²¹² 153 F.3d 82 (2d Cir. 1998).

²¹³ The court thus recognized the doctrine of *depeçage*, which permits courts to apply the law of one state to one issue in a litigation before it and the law of another state to a separate issue in the same litigation. *Id.* at 88–92. It thus recasts the choice of law exercise as an effort to select the law applicable to decide an issue rather than a case. *See Willis L.M. Reese, Depeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 58 (1973).

²¹⁴ *Itar-Tass Russian News Agency*, 153 F.3d at 90.

²¹⁵ The court would have reached this conclusion whether through application of a fixed rule (akin to the *First Restatement*) or as a result of a broader interest analysis (more similar to the

apply U.S. law to the question of infringement, notwithstanding that Russian law had applied to determine the ownership of the copyright in question.²¹⁶

But nationality and place of publication may say little about the respective prescriptive claims of interested states in a more complex global economy. And the rule of *lex loci delicti* may provide too many *loci delicti* in a digital world where, for example, publication may occur simultaneously in a number of countries. Indeed, under prevailing copyright doctrine, these places can easily be interpreted, in most cases, to include the United States if the digital copy is accessible by persons in the United States.²¹⁷

Thus, conventional choice of law doctrine used in private international copyright litigation is problematic on its own terms. And, by insisting upon localization of a multinational dispute within a single territory, traditional private law techniques forswear the ability to contribute to international norm development by fictionalizing international disputes as national in nature. If, instead, courts addressed international disputes in real terms that accounted for the international nature of the dispute, rather than through the fiction of localization, they could contribute to the development of international copyright norms.

This contribution could be facilitated by adopting a new approach to choice of law in international copyright cases. In particular, a court faced with an international copyright dispute might not necessarily apply the copyright law of a single state to the contested issues, but instead formulate a rule reflecting the varied national and international interests of the dispute before it.²¹⁸ This approach finds conceptual antecedents in a variety of historical settings, and falls within what is called the substantive law method of choice of law.²¹⁹

Second Restatement). *Id.* at 91.

²¹⁶ For a recent discussion of the *Itar-Tass* opinion, see William F. Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383 (2000).

²¹⁷ See *Allarcom Pay Television Ltd. v. General Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995) (performance occurs at place of receipt of satellite transmission); *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d (BNA) 1831, 1834–35 (W.D. Pa. 2000) (holding that where defendants originated the streaming of copyrighted programming over the internet from a website in Canada, public performances occurred in the United States because users in the United States could access the website and receive and view the defendants' streaming of the copyrighted material).

²¹⁸ See Dinwoodie, *supra* note 9, at 552–69 (discussing the application of such an approach). To the extent that courts drew from public international sources, such as the Berne Convention, the TRIPS Agreement, or WTO panel reports, in formulating such rules they would ensure more direct effectiveness of public international copyright law. *Cf.* Ginsburg, *supra* note 98, at 2 (noting that the impact of the *Section 110(5)* opinion may depend in part on the “willingness of national courts to look to the WTO panel decisions for guidance in evaluating local exceptions”).

²¹⁹ For a discussion of the leading historical schools of choice of law thought, see Symeon Symeonides, *General Report*, in SYMEON C. SYMEONIDES, *PRIVATE INTERNATIONAL LAW AT THE END OF THE TWENTIETH CENTURY: PROGRESS OR REGRESS* 9–21 (2000) (describing the schools of multilateralism, unilateralism, and substantivism). For a fuller explication of the antecedents, see Dinwoodie, *supra* note 9, at 543–45.

This substantive law approach can be supported as a matter of conflicts theory: it extends the critique of the formalistic claim that choice of law involves selecting between competing jurisdictions;²²⁰ it recognizes that national legislatures rarely enact laws with an eye to international disputes; and it maps applicable legal rules to the variety of national and international norms that citizens increasingly take to govern their lives. But, for the purpose of this article, the biggest advantages are with respect to what this approach might contribute to the internationalization of copyright law. Using the substantive law method to develop international norms takes advantages of the power of litigation. Like activist WTO adjudication, using domestic litigation to generate international norms more easily permits attention to issues raised by new technology, and can thus supply the dynamism missing from classical public international lawmaking.

However, the substantive law method will achieve this benefit without incurring the costs associated with broad WTO lawmaking. In particular, parties bringing private disputes to courts are likely to reflect much greater diversity than those having input into the conduct of WTO dispute settlement proceedings (even allowing for the evolving liberal approach by panels to third party involvement). Persons having input to the development of international norms would reflect a more varied set of interests. States would remain free to deviate from multinational standards developed by other countries' courts. Thus, although reference to the practices of other national courts devising international solutions would be encouraged, the facultative nature of this reference would encourage the national experimentation that activist WTO adjudication would threaten. Any harmonization that this approach engendered would be based upon the force of reason, rather than in response to the threat of trade sanctions. A national court decision articulating international standards is more readily subject to legislative reversal, and would thus be more closely linked to the democratic process than is the WTO dispute settlement mechanism. These advantages illustrate the claim of private international lawmaking to an important role in the development of international copyright norms.

CONCLUSION

International copyright law has clearly been transformed as a result of the availability of WTO dispute settlement proceedings. Indeed, developments in the WTO are emblematic of broader changes in the international copyright lawmaking process. International copyright law institutions are reacting to the demands of constant change in seeking to establish lawmaking mechanisms which are dynamic in nature. There are good reasons to support this development. Copyright law must keep current with the technological and cultural growth that it engenders. But it must also keep faith with the notion of cultural diversity that underlies both domestic and international principles. To do so, countries (especially developed countries) must resist the temptation to seek dynamic lawmaking from WTO panels. The gains may

²²⁰ See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 189 (1933).

be high, but so are the costs. Instead, private international litigation, if reconfigured to reduce application of purely national norms, might make a beneficial contribution to internationalization in ways that are dynamic, more balanced, and more respectful of national difference.