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The European Union Internet Copyright Directive as Even More Than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory

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THE EUROPEAN UNION INTERNET COPYRIGHT DIRECTIVE AS EVEN MORE THAN IT ENVISIONS: TOWARD A SUPRA-EU HARMONIZATION OF COPYRIGHT POLICY AND THEORY

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Abstract: Evolving global markets in electronic commerce highlight the importance of developing a copyright regime capable of flowing with the changing landscape of international intellectual property law. Traditional boundaries based on time and distance erode as business, education, and the world at large become more digitized. In order to respond to the increasingly widespread digital age, copyright law must become less nationalistic and more global in scale. Both the United States and the European Union have acknowledged the dynamics of intellectual property in today's digital revolution. The United States has responded with, among others, the Digital Millennium Copyright Act and the Uniform Computer Information Transactions Act, and the European Union has similarly answered with its Directives on Copyright and E-Commerce. Historically, the United States, in contrast with the European Union, has shown reluctance to recognize moral rights as an important aspect of copyright law. Going forward, it is in the interest of both trading entities to work together to create a more harmonized market that will be better suited to international business in the 21st century.

INTRODUCTION

International copyright law and its related issues and limitations, which were formerly more conceptual theory than legal practicality, have become increasingly concrete as technology and the internet have created substantial global markets in electronic commerce (e-commerce). In June 2000, a panel of the Dispute Settlement Body (DSB) of the World Trade Organization (WTO)[1] issued the first opin-

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[1] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994) [hereinafter Marrakesh Agreement].

ion (panel report)[2] in its history on an alleged violation of the copyright provisions contained in the Agreement of Trade Related Aspects of Intellectual Property (the TRIPS Agreement).[3] Although significant international copyright agreements have existed for well over a century,[4] until recently no dispute regarding member state compliance had ever been submitted to a formal dispute settlement process,[5] much less one supported by effective mechanisms of enforcement. Even so, after adoption by the full DSB of the panel report[6] which found a recent amendment of Section 110(5) of the United States Copyright Act[7] to be in violation of U.S. obligations under the TRIPS Agreement, the United States is now obliged to amend its copyright law or to face damages or trade sanctions for its violation of the TRIPS Agreement.[8] It follows that with such enforcement

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[2] Such a panel report is distributed to all Members of the World Trade Organization (WTO) (after being preliminarily reviewed by the disputing parties) for adoption by the full Dispute Settlement Body, an entity comprised of representatives from all member states. The panel report is adopted unless there is a consensus specifically not to do so. *See* Marrakesh Agreement, *supra* note 1, art. 16(4). Note that this reverses the prior equivalent procedure under the General Agreement on Tariffs and Trade (GATT). Under this procedure, reports required a consensus before they could be adopted. The effect of this change was to go from a system where the losing party could block adoption of the report to a system in which adoption of the report is presumed absent clear consensus intention to the contrary. For general background and a more complete discussion of this 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, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS--RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPS Agreement]. The TRIPS Agreement is one part of the trade agreement establishing the WTO coming from the Uruguay Round Revision of the General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], and it includes provisions on all aspects of intellectual property including copyright. *See generally* J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345 (1995) (providing an overview of the TRIPS Agreement).

[4] *See infra* notes 17–29 and accompanying text (discussing evolution of the Berne Convention).

[5] *See infra* notes 104–108 and accompanying text (discussing Article 33 of the Berne Convention).

[6] For a comprehensive discussion of the Panel Report and a thorough analysis of its implications, see Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 748–77 (2001).

[7] *See* Fairness in Music Licensing Act, Pub. L. No. 105–298, 112 Stat. 2830–31 (1998) (codified primarily at 17 U.S.C. § 110(5)(B) (1976); §§ 101, 504, 512 (1994 & Supp. IV 1998)).

[8] The United States elected not to appeal the panel finding, and an arbitrator under Article 21 of the Dispute Settlement Understanding gave the United States until July 21, 2001 to bring itself into compliance with TRIPS. The United States has further indicated

mechanisms in place, and with the DSB willing to challenge the national procedures of individual countries, the United States and the European Union (EU), two major worldwide trading entities, will find it increasingly necessary to achieve accord not only in the burgeoning area of e-commerce but also in intellectual property law in general.

The United States made its first such attempts with its 1998 Digital Millennium Copyright Act (DMCA),[9] the Uniform Computer Information Transactions Act (UCITA),[10] and the proposed Collections of Information Antipiracy Act (CIAA).[11] The EU has followed with its Directives on Copyright[12] and E-Commerce,[13] two directives intended to progress further toward harmonization of intellectual property laws throughout the EU.[14] Eventually, such directives and their accord with the EU's major trading partners could lead to harmonization at a global level—an increasingly important goal in today's digital age.[15] Indeed, "[c]ultural 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."[16]

Copyright law must give way to this digital revolution and, in doing so, become less nationalistic and more global in its scale. This note explores the history of copyright law in Europe and in the United States, providing emphasis on the evolution of the moral

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to WTO members that it intends to comply with the panel report and make the necessary amendments to U.S. law. *See* WTO, Award of the Arbitrator, United States–Section 110(5) of the US Copyright Act, WT/DS160/12 (Jan. 15, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/160_12_e.pdf. For more on the U.S. response to the panel report, *see* Dinwoodie, *supra* note 6, at 762–64; *see also* U.S. Copyright Act, 17 U.S.C. § 110(5) (1976).

[9] Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 1201–1205 (1998).

[10] Uniform Computer Information Transactions Act (UCITA) (Final Version, Aug. 23, 2001), *available at* http://www.ucitaonline.com/ucita.html. UCITA was "[d]rafted by the National Conference of Commissioners on Uniform State Laws and ... approved and recommended for enactment ..." at its 1999 Annual Conference in Denver, Colorado. *Id.* Currently, only Maryland and Virginia have adopted UCITA. UCITA Online, Status of UCITA in the States (Apr. 6, 2001), *at* http://www.ucitaonline.com/slhpsus.html.

[11] Collections of Information Antipiracy Act (CIAA), H.R. 354, 106th Cong. (1999).

[12] Council Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167)10 [hereinafter Copyright Directive].

[13] Council Directive 2003/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive].

[14] *See id.*; Copyright Directive, *supra* note 12, at art. 1.

[15] *See* Jacqueline Lipton, *Copyright in the Digital Age: A Comparative Survey*, 27 RUTGERS COMPUTER & TECH. L.J. 333, 368–69 (2001).

[16] Dinwoodie, *supra* note 6, at 777.

rights doctrine in the United States as compared with Europe. It also addresses the impact of the internet and e-commerce on the traditional conceptions and mechanisms of copyright law. Finally, this note concludes that if the EU and the United States are to remain prominent world trading partners and primary producers of copyrighted material to each other and to the rest of the world, the digital revolution necessitates not only increased harmonization of copyright law throughout the EU, but also between the EU and the United States. It is this movement toward harmonization that will necessitate greater U.S. recognition of the moral rights doctrine. Through such recognition, the EU and the United States will enjoy a state of heightened copyright policy congruity within which both world powers can operate.

I. The Berne Convention as an Early and Ongoing Attempt to Globalize Copyright Law

A. *The Early Days of the Berne Convention as a Mechanism to Safeguard Both Moral Rights and Economic Interests in Copyright*

International copyright relations seriously commenced in 1886 with the conclusion of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).[17] Countries participating in the dialogue leading to the Berne Convention sought copyright protection outside national borders for the works of their own citizens.[18] Such an objective could have been achieved in a few different ways. Several countries supported a comprehensive universal copyright law that would have established uniform standards to be applied in all adherent countries.[19] However, such a strict, demanding approach was eventually deemed too much of a potential obstacle to the overall growth of the Berne Union.[20]

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[17] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221(as last revisited July 24, 1971) [hereinafter Berne Convention].

[18] *See* Dinwoodie, *supra* note 6, at 737.

[19] *See id.* Germany was one of the strongest advocates of uniform standards. *Id.* (citing 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 generally the events leading up to the Berne Convention).

[20] Dinwoodie, *supra* note 6, at 738. Dinwoodie notes that even as early in copyright history as the late nineteenth century, the copyright laws of several European countries were adequately developed to highlight the differences among countries. *Id.* at 737. Attempting to achieve uniform standards would have been even more difficult in such areas where

This being the case, the text of the 1886 Berne Convention sought broader international copyright protection through the principle of national treatment—a provision in the Berne Convention that essentially served as the "equal protection clause of international copyright law."[21] The national treatment provision required that member countries provide nationals of other member countries, or works first published in other member countries, with copyright protection at least equivalent to that offered to their own citizens and works.[22] This approach obliged member parties to agree to a set of "minimum standards of copyright protection" that were neither as stringent nor as comprehensive as those proposed by advocates of uniform standards.[23] The Berne Convention minimum standards set forth a required level of copyright protection for member states, but they did not prevent countries from providing more extensive protection to copyright holders and copyrighted works within their borders.[24] The Berne Convention was revised five times over the next century, but the basic structure of national treatment plus minimum standards was preserved.[25]

The current text of the Berne Convention, the text with which the United States complied in 1988, is the Paris Act of 1971.[26] The World Intellectual Property Organization (WIPO) manages the Berne Convention.[27] A "specialized agency" within the United Nations, WIPO researches, designs, and provides services to ensure worldwide intellectual property protection.[28] The WIPO Director General and staff supervise the "Berne Union," an entity comprised of "Member States" that was established by the Berne Convention.[29]

"divergent national jurisprudence had already taken root." *Id.* Accordingly, rigid uniform standards such as those advocated by Germany would more likely act as a deterrent to Berne adherence rather than as the intended vehicle to encourage intellectual property harmonization. *Id.* at 737–38.

[21] *See id.* at 738.

[22] *See id.*

[23] *See id.* at 739.

[24] *See id.*

[25] *See* Report Accompanying the Berne Convention Implementation Act, H.R. REP. NO. 100–609, at 11–13 (1988) (summarizing the 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.*

[26] *See* CRAIG JOYCE, ET AL., COPYRIGHT LAW 35 (5th ed. 2001).

[27] *Id.*

[28] *Id.*

[29] *Id.*

The First Article of the Paris Act reads: "(t)he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works."[30] By explicitly and immediately addressing the protection of authors' rights in this way, the language of the treaty connects the Berne Union with that conception of copyright primarily based on "authors' rights," as opposed to the economic or utilitarian approach to copyright protection (to which the United States primarily adheres).[31] Generally, the aspiration to harmonize the protection of artistic, intellectual property throughout the world has propelled the evolution and actions of the Berne Union since its inception.[32]

Following this First Article of the Paris Act, the next twenty articles comprise the Berne Convention's substantive provisions which set forth both specific and general obligations compelled by membership within the Berne Union.[33] The remaining rules are elective and thus may be, but are not required to be, adopted by member countries.[34] Administrative provisions and an appendix that includes "special provisions for developing countries" follow the substantive provisions.[35]

The Convention relies on national compliance with "Convention minima," obligations that generally are considered quite arduous in terms of intellectual property treatment, especially by U.S. standards.[36] Specifically, the Berne Convention's emphasis on "moral rights" as the primary justification for copyright law seems to clash with the traditional, economically-based U.S. approach.[37]

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[30] *See id.* (citing Berne Convention).

[31] *See* JOYCE, *supra* note 26, at 35.

[32] *See id.* (citing SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986, at 151–52 (1987)). Note the use of the word "union" to connote the group of member states that has signed on to the Berne Convention. *Id.* at 35, n.48. It has been suggested that this usage was intended to perform a "symbolic function" beyond simply the narrow meaning within international law as a group of member states. "It can be seen as embodying the ultimate ideal of universal codification—an international regime under which authors are protected uniformly everywhere throughout the territory of the Union. It this ideal now seems obsolete, or even dangerously out of touch with modern realities, it should be recalled that the protection of the Berne Convention has been steadily enhanced over the first century of its existence, and that it does presently embody a limited international codification of the law relating to authors' rights." *Id.*

[33] *Id.* at 35.

[34] *Id.*

[35] *Id.*

[36] JOYCE, *supra* note 26, at 35–38.

[37] *See id.* at 37.

B. *The Berne Convention and the Principle of Moral Rights as the Driving Force Behind Copyright Law*

The nonextensive text of Article 6bis of the Berne Convention addresses "moral rights."[38] The Berne Convention requires that certain "moral rights" be recognized "[i]ndependently of the author's economic rights, and even after the transfer of the said rights."[39] Article 6 requires that all signatories protect authors' and artists' moral rights in their domestic laws.[40] Article 6bis(1) provides that: "[T]he 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."[41] Article 6bis(2) mandates that these rights last at least until the economic rights end.[42] It is here that the Berne Convention legitimizes the recognition of a general "*droit moral*" or "moral right" that conceives of an author's work as much more than a simple economic, profit-making tool.[43] In fact, such a moral right (in contrast with simple economic interests) is "inalienable," and a "natural right" that arises from the idea of the work "as an extension of the author's personality."[44] Indeed, in the civil law countries of Europe, copyright protection schemes developed initially from a natural law philosophy.[45]

The civil law tradition considers copyright an extension of the author's or creator's personality.[46] As Professor Roberta Kwall writes, "[m]oral rights, or rights which protect the personal interests of all authors, safeguard the dignity, self-worth, and autonomy of the author."[47] Accordingly, only individuals can be "creators;" companies and organizations per se cannot be "creators" because they lack the (essential) "person" in "personality."[48]

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[38] Peter Jaszi, *International Copyright from Basics to Current Issues*, *in* ADVANCED SEMINAR ON COPYRIGHT LAW 2001 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course, Handbook Series, 2001), *available at* 653 PLI/PAT 301, 327 (2001).

[39] *See* Berne Convention, *supra* note 17, art. 6bis(1).

[40] *See id.*

[41] *Id.*

[42] *Id.* art. 6bis(2).

[43] JOYCE, *supra* note 26, at 625.

[44] *Id.*

[45] *See* Irene Segal Ayers, *The Future of Global Copyright Protection: Has Copyright Law Gone Too Far?*, 62 U. PITT. L. REV. 49, 65 (2000).

[46] Lipton, *supra* note 15, at 335.

[47] Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implication for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 5 (2001).

[48] Lipton, *supra* note 15, at 335.

The basis for copyright protection is recognition of, and regard for, individual achievements of creation or production.[49] Therefore, protection exceeds mere economic rights or interest in the monetary value of the work product.[50] Indeed, "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."[51] At least the civil law tradition supported these values; accordingly, protection in such countries extends to "moral rights" such as the right to be identified as the creator of a work and the right to have the integrity of that work maintained and preserved.[52]

Such works are not simple commodities, but rather enjoy synonymy with the creator's identity.[53] Copyright theory, recognizing authorial importance in this way, is thus sharply prejudiced in favor of the author and stands, with only a few narrow exceptions, for strong copyright protection for authors.[54] It is this concept of "moral rights" that the United States has hesitated to incorporate into its own copyright laws.[55]

The extent of the definition of moral rights differs among countries.[56] Generally, the formulation of moral rights is made up of several similar and overlapping parts.[57] Most consider an author's moral rights to include:

> 1) *the right of integrity*: the right to insist that a work not be mutilated or distorted; 2) *the right of attribution*: the right to be acknowledged as the author of a work and to prevent others from naming anyone else as the creator; and 3) *the right of disclosure*: the right to decide when and in what form the work will be presented to the public.[58]

In fewer cases, moral rights include the right of withdrawal (the right to control the fate of all distributed copies) and the right to stop "excessive criticism" (this is based on the idea that criticism of the work

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[49] *See id.*
[50] *See id.*
[51] Dinwoodie, *supra* note 6, at 766.
[52] *See id.*
[53] JOYCE, *supra* note 26, at 65.
[54] *See* Ayers, *supra* note 45, at 65.
[55] JOYCE, *supra* note 26, at 37.
[56] *Id.* at 626.
[57] *Id.*
[58] *Id.*

amounts to criticism of the author, as the work is considered a simple extension of the author).[59]

C. *Initial U.S. Refusal to Participate in the Berne Convention*

Until 1891, the United States lacked any "international copyright relations."[60] In fact, during much of the nineteenth century, the United States was infamous as a "pirat[e]" nation—the best-selling literary works in America were unapproved, "piratical" copies of British works.[61] However, as times changed, the U.S. publishing industry began to feel its own economic pressures.[62] The uncontrolled copying of British books began to create increasingly debilitating competition and, thus, out of economic necessity, the United States started to shift its own laws toward regulations more closely resembling those found in Europe.[63]

The Chace Act of 1891, an amendment to U.S. copyright law, gave the President authority to protect works originating in certain foreign countries, as long as those foreign countries furnished equivalent protection to the works of American authors.[64] This began a series of similar proclamations in which the United States joined into bilateral copyright agreements with other countries.[65] In each of these cases, the impetus behind enacting such agreements was to protect the valuable and expanding market of literary and artistic works originating within the United States.[66]

The United States increasingly seemed to be creating, in a "piecemeal" fashion, its own international copyright laws by means of these bilateral agreements.[67] However, eventually such discrete arrangements made on a country-by-country basis became insufficient.[68] Newer, brighter, and faster ways of communication and dispersal created a seemingly contracting universe of intellectual property; those regulations that once fit U.S. purposes both domestically and abroad

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[59] *Id.*
[60] JOYCE, *supra* note 26, at 33.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 33–34. The President could exert this authority "by proclamation." *Id.*
[65] *See* JOYCE, *supra* note 26, at 34.
[66] *See id.*
[67] *Id.*
[68] *Id.*

became too simple as the world evolved into one of ever-heightening complexity.[69]

As a reaction to these changing world conditions, beginning in 1935 the U.S. Senate endeavored to ratify the Berne Convention, but rescinded ratification when it became obvious how drastically different U.S. copyright policies were from those of the Berne Convention countries.[70] In order for the United States to have signed on to the Berne Convention at that point, it would have had to change its laws substantially, specifically those laws regarding term of protection and copyright formalities.[71] In light of the fact that the U.S. approach to copyright matters focused on (and continues to focus on) providing authors merely with sufficient economic incentive to engage in creation, such changes were inimical to U.S. values at the time.[72]

By the early 1950s, the United States had begun to export increasing numbers of copyrighted works, and thus it became critical for the United States to take part in a more comprehensive and unified system of international copyright.[73] The "piecemeal" agreements the United States had been entering into became glaringly inadequate for the task of protecting U.S. copyright interests worldwide.[74] In fact, the United States recognized its need for greater international participation but still felt the standards of the Berne Convention were too different from U.S. standards to justify Berne Convention ratification at the time.[75] The Berne Convention conception of a "moral right" recognizes an author's continuing interest in his or her work.[76] As such, the author may control certain uses of the work itself even after he or she has transferred economic rights to others—a concept squarely in conflict with traditional American copyright law, and thus a concept that veritably insured at the time that the United States would refuse to sign on to the Berne Convention.[77]

In response to these developments, a group of countries convened by the Copyright Law Division of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) created the

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[69] *Id.*
[70] JOYCE, *supra* note 26, at 34 n.45.
[71] *Id.*
[72] *See id.* at 34.
[73] *Id.*
[74] *Id.*
[75] *See* JOYCE, *supra* note 26, at 34.
[76] *Id.* at 37.
[77] *See id.*

Universal Copyright Convention (U.C.C.) treaty between 1947 and 1952.[78] The purpose of UNESCO in developing this treaty was to draw hesitant countries into a worldwide copyright system—essentially a pseudo-Berne type of union.[79] Indeed, UNESCO sought to entice such nations by setting forth U.C.C. standards thought to be less stringent than those of the Berne Convention,[80] believing that more reluctant nations would be willing to ratify the U.C.C. even while they were unwilling to ratify Berne.[81] Specifically, the U.C.C. distinguished itself from the Berne Convention by its lack of a provision on moral rights, an absence pointedly designed to draw the United States under the U.C.C. umbrella.[82] In fact, the U.C.C. ultimately functioned as a stepping stone to the Berne Convention.[83] The United States elected to sign on to the U.C.C. in 1955.[84]

The United States Copyright Act of 1976 (1976 Act) represented both an overhaul of copyright legislation and also the first major change to U.S. copyright law since 1909.[85] The 1976 Act began to bring U.S. law closer to some of the major standards of the Berne Convention.[86] For example, the 1976 Act extended copyright term duration nineteen years—increasing the maximum term duration from fifty-six years to seventy-five years.[87] In light of the fact that the (predominately European) moral rights conception seeks to expand and to extend authors' rights over their works, such a duration extension began to make U.S. law look a little more like European law.[88] The duration extension thus concomitantly made adhering to the Berne Convention minima slightly more palatable to the United States.[89] The 1976 Act, however, still failed to constitute enough of a change in U.S. law through its implementation to further U.S. compatibility with Berne Convention standards.[90] At the same time, and increasingly since the 1976 Act's implementation, the United States

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[78] *Id.* at 34 n.45.

[79] *Id.*

[80] JOYCE, *supra* note 26, at 34.

[81] *Id.*

[82] *See* Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate its Development?*, 16 B.U. INT'L L.J. 165, 173 (1998).

[83] JOYCE, *supra* note 26, at 34.

[84] *Id.*

[85] *See id.* at 21.

[86] *See id.* at 22–23.

[87] *Id.* at 23.

[88] *See* JOYCE, *supra* note 26, at 24.

[89] *See id.* at 23.

[90] *Id.* at 39.

began to move gradually toward a conception of copyright that at least minimally acknowledged authorial moral rights over works.[91] Indeed, given U.S. interest in protecting its intellectual property works abroad, eventual Berne Convention compatibility seemed to be a foregone conclusion.[92]

The U.S. Congress began ostensibly to gravitate toward Berne Convention compliance in the late 1980s.[93] In making this decision, Congress emphasized the worldwide value of U.S. intellectual property and acknowledged that protecting this valuable commodity required moving toward compliance with international standards.[94] However, the fact remained that U.S. copyright law was (and still is) very different from the civil law approach in Europe.[95] Accordingly, Congress took what has been considered a "minimalist" approach in amending U.S. copyright law.[96] That is, Congress sought to amend U.S. law only as much as necessary to meet minimal Berne Convention obligations.[97]

The Berne Convention Implementation Act of 1988 (Berne Convention Implementation Act) amended prior U.S. law so as to bring it into compliance with Berne requirements.[98] The amendments changed some technical rules with respect to notice, registration, and other formalities, but failed to adopt explicitly the Berne Convention approach to authorial moral rights.[99] In fact, the United States signed on to the Berne Convention without actually adopting its Article 6bis—the article that emphasizes the importance of an author's nontransferable and eternal right in his or her work simply because of his or her role as creator of the work.[100]

The Berne Convention allows member states flexibility in the implementation of its standards so that states may tailor their laws to fit with their own social mores, culture, and economic priorities.[101] Historically, great deference has been shown to member states' own

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[91] *See id.*

[92] *See id.*

[93] *See* JOYCE, *supra* note 26, at 38–39.

[94] *Id.* at 38–40; *see also* Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 (1988) [hereinafter Berne Convention Implementation Act].

[95] *See* JOYCE, *supra* note 26, at 39.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 41.

[100] *See* JOYCE, *supra* note 26, at 41; *see also* Berne Convention, *supra* note 17, art. 6bis.

[101] *See* Dinwoodie, *supra* note 6, at 740–41.

interpretations of what compliance with the Berne Convention requires.[102] Thus, the United States was able to adhere nominally to the Berne Convention in 1988 without offering any moral rights protection per se. Instead, it offered only a motley group of federal regulations and state common laws that, according to the U.S. interpretation, combined to extend the requisite protection to moral rights.[103]

Indeed, the United States claimed that its law had "evolved" to the point that, taken as a whole, it could provide the minimal safeguards for artists' moral rights set forth in the Berne Convention.[104] Congress further noted that even if U.S. law taken in totality still failed to provide this minimum protection, other member countries also were not in compliance and no objection had ever been made to their membership.[105] While this may be true, the fact of the matter, as Professor Dinwoodie points out, is that U.S. success with its compliance argument probably resulted more from the "deferential" approach taken toward member state compliance with Berne obligations than it did from a searching analysis of U.S. law.[106] Moreover, even though Article 33 of the Berne Convention permitted the referral of compliance disputes involving the Convention to the International Court of Justice,[107] this mechanism had never been used.[108]

While U.S. adherence to the Berne Convention in the late 1980s introduced limited changes to certain minutia of U.S. law, perhaps more notably it reflected subtle and not-so-subtle changes in the

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[102] *See id.* at 741.

[103] *Id.* Dinwoodie notes that these state and federal causes of action "coincidentally" offered authors protection in circumstances similar to those in which a moral right claim might lie. *Id.* (citing H.R. REP. No. 100–609, at 34) (listing the different causes of action upon which the U.S. argument of compliance was based).

[104] *See* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 97 (1997).

[105] *Id.* (citing Ralph S. Brown, *Adherence to the Berne Copyright Convention: The Moral Right Issue*, 35 J. COPYRIGHT SOC'Y 196, 205 (1987–88)).

[106] *See* Dinwoodie, *supra* note 6, at 741. Further, "[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." 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).

[107] *See* Berne Convention, *supra* note 17, art. 33, art. 33(1).

[108] *See* J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT'L L. 335, 339 n.17 (1997). No "state ever took such action, nor did any invoke the doctrine of retaliation and retorsion theoretically available under international law for violation of international minimum standards of intellectual property protection." *Id.*

American legal approach to copyright.[109] In fact, U.S. adherence to the Berne Convention slightly has begun to shift the U.S. conception of copyright from one based in pure economics to one more grounded in moral rights.[110] Perhaps the civil law's author-centered tradition has begun to be absorbed into American legal culture.[111] If this is so, then what began as an economic necessity may also have sown the seeds to create a cultural shift in American thinking.[112] Such a shift could eventually push U.S. copyright law and, by extension, U.S. intellectual property law, closer to the ideal envisioned by the recent European Copyright Directive.[113]

Such favorable movement toward harmonization, however, may be wholly illusory without actual federal law recognition of an author's moral rights in his or her creations.[114] In the Berne Convention Implementation Act,[115] Congress specifically declined to implement Article 6bis on the ground that existing federal and state laws and common law roughly equaled the Article 6bis guarantees of the right of integrity and of attribution.[116] Of course, the Berne Convention's inclusion of, and emphasis on, moral rights required that the United States address the moral rights issue in order to comply (at least ostensibly) with Berne Convention standards. However, in light of U.S. reluctance to recognize moral rights and the U.S. minimalist approach to compliance with the Berne Convention, the reality is that, absent federal legislation providing for protection against the infringement of moral rights, the United States still fails copyright holders in its lack of an integrated approach to the protection of moral rights.[117]

D. *U.S. Copyright After the Berne Convention Implementation Act*

Before signing on to Berne on March 1, 1989, the United States was the only influential Western country not yet a Berne Convention signatory.[118] Between 1955, when the United States signed on to the

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[109] *See id.* at 339.

[110] *See id.*

[111] *See* Damich, *supra* note 106, at 662.

[112] *See id.* at 662–63.

[113] *See id.*

[114] *See* Jane C. Ginsburg, *Art and the Law: Suppression and Liberty*, 19 CARDOZO ARTS & ENT. L.J. 9, 10 (2001).

[115] Berne Convention Implementation Act, *supra* note 94, at 2853.

[116] *See* H.R. REP. No. 100–609, at 37–39.

[117] *See* Ginsburg, *supra* note 114, at 10–11.

[118] JOYCE, *supra* note 26, at 38.

U.C.C., and the late 1980's, the advantages of U.S. membership in the Berne Convention became increasingly evident.[119] The United States had become the world leader in the exportation of copyrighted works and thus had a strong interest in doing whatever it could to limit the market of international piracy jeopardizing U.S. copyright holders' creations.[120] Further, the United States, by that time, had both removed itself from UNESCO and withdrawn its U.C.C. membership.[121] Moreover, many U.S. trading partners were members of the Berne Convention.[122] The Untied States had grown into a major intellectual property player, and U.S. entry into the Berne Union seemed to be the only way both to cultivate these relationships and to continue American influence in the copyright arena.[123]

Before U.S. entry into the Berne Union, U.S. copyright holders had to utilize the Berne Convention's so-called "back door" provision in order to gain international protection for their works.[124] Through this "back door to Berne," U.S. authors or copyright holders could ensure copyright protection individually in each country in which they desired protection.[125] Copyright owners had to meet each country's specific requirements for protection—an onerous burden that presented cost concerns and increased risks to copyright holders.[126] The procedures were costly because of the expense of creating and submitting separate applications for each target country.[127] They were also risky because an applicant could fail to understand each country's requirements and thus ultimately fail to gain protection.[128] U.S. entry into the Berne Convention meant that American authors and copyright owners no longer had to rely on this "back door" procedure—those seeking protection for their works could rely on each member country of the Berne Union to recognize the copyright holders' rights in his or her property through only one general application procedure.[129]

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[119] *Id.* at 38–39.
[120] *Id.* at 39.
[121] *Id.*
[122] *Id.*
[123] *See* JOYCE, *supra* note 26, at 39.
[124] *Id.*
[125] *Id.* at 36.
[126] *See id.*
[127] *Id.*
[128] JOYCE, *supra* note 26, at 36
[129] *See id.* at 33.

In 1990, Congress again amended the 1976 Act, explicitly granting limited "rights of attribution and integrity" to certain types of artists and their works.[130] The Visual Artists Rights Act (VARA),[131] enacted in 1990, grants authors of "works of visual art" the right "to prevent any intentional distortion, mutilation or other modification" of those works.[132] VARA's problem lies in its restrictiveness: it grants protection only to those artists whose works are included within VARA's narrow definition of "works of visual art."[133] As such, VARA protects only a work's physical original and thus fails to protect later representations or derivations of the art image.[134] As Professor Ginsburg points out, "real" moral rights do much more than just safeguard the "alteration of the original physical object;" "real" moral rights also guard against "distortion of representations of the art image."[135]

In 1994, the United States continued to work on its international copyright relations, implementing the North American Free Trade Agreement (NAFTA) and joining in the Final Act of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[136] In December 1994, Congress enacted the Uruguay Round Agreements Act (URAA), by which (among other things) large numbers of foreign works in the U.S. public domain were granted retroactive protection.[137]

On October 27, 1998, President Clinton signed the Sonny Bono Copyright Term Extension Act (Copyright Term Extension Act), an act that lengthens (for the fourth time in the history of U.S. copyright law) the duration of copyright protection.[138] With the enactment of the Copyright Term Extension Act, U.S. law now mirrors EU law with

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[130] *Id.* at 637.

[131] *See* Visual Artists Rights Act (VARA), 17 U.S.C. §§ 101, 102, 106(a), 107, 601 (1990).

[132] *See id.* § 106A(a)(3)(B). Note that the right to prevent destruction of works of visual art only applies if the work is of "recognized stature" under the Act. *Id.*

[133] *Id.* § 101.

[134] *See id.* § 106A(c)(3) (stating that integrity rights do not apply to reproductions). However, some state moral rights statutes protect images of art works, as well as the physical originals, from distortion and then the subsequent attribution back to the artist. *See, e.g.*, Wojnarowicz v. American Family Assn., 745 F. Supp. 130 (S.D.N.Y. 1990) (construing the N.Y. Artists' Authorship Rights Act, N.Y. Cultural Affairs Law § 14.03(1) (McKinney's Supp. 1990)).

[135] Ginsburg, *supra* note 114, at 11.

[136] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057 (1994), 32 I.L.M. 605 (1993); GATT, *supra* note 2.

[137] *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, §§ 101–103, 108 Stat. 4809 (1994).

[138] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

respect to copyright duration.[139] The influence of major corporate copyright holders notwithstanding,[140] the United States had to extend the copyright term in order to comply with the already longer term recognized by the EU; before the terms were harmonized by the Copyright Term Extension Act, U.S. copyright owners were disadvantaged in foreign countries vis-à-vis the "rule of the shorter term."[141] Under this rule, a work with an expired copyright in its home country could not enjoy protection in foreign countries, even where the foreign countries would provide longer protection under their own copyright laws.[142] As such, U.S. copyright holders were disadvantaged when they could no longer receive protection in foreign countries due to the shorter copyright term in the United States.[143] Indeed, the Copyright Term Extension Act was considered indispensable in order to compete effectively in international trade with the Europeans.[144]

II. Principal Bases upon Which Copyright Rests in the EU and in the United States

Berne Convention member countries normally manifest their recognition of moral rights through statute.[145] However, even Berne Convention members with similar legal structures do not hold the same conceptions on moral rights.[146] Within individual countries, scholars, legislators, and judges fail to agree on the interpretations of existing statutory and decisional law concerning artists' moral rights.[147] France, Spain, and many other civil law countries are committed to furnishing rights that are "absolute, personal, and actionable solely at the author's discretion."[148] In fact, France is generally considered the most comprehensive country with respect to the scope

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[139] E. Scott Johnson, *Law Gives Copyright New Life*, Nat'l L.J., Feb. 8, 1999, at C12. The EU had already adopted a "life of author plus 70" standard. *Id.*

[140] *See id.* It is interesting that the Copyright Term Extension Act lengthened the duration of many valuable copyrighted works due to enter the public domain before the end of the twentieth century. Included among these are George and Ira Gershwin's "Fascinating Rhythm," George Gershwin's "Rhapsody in Blue," and Disney's "Steamboat Willie" cartoon (the first appearance of the Mickey Mouse character) and "Winnie the Pooh." *Id.*

[141] *Id.*

[142] *Id.*

[143] *See id.*

[144] *See* Ayers, *supra* note 45, at 74.

[145] Jaszi, *supra* note 38, at 328.

[146] *Id.*

[147] *See* Hansmann & Santilli, *supra* note 104, at 97.

[148] Jaszi, *supra* note 38, at 328.

of artists' moral rights.[149] Other civil law countries, however, stop short of such an express, affirmative commitment to authors' rights.[150]

Further, such countries as the United Kingdom, Canada, and Australia have thus far declined to put economic considerations on the same level as moral rights.[151] Argentina indirectly grants rights of integrity and paternity in its copyright law, requiring that its citizens not engage in acts that would alter the attribution of authorship in works.[152] Moreover, a more expansive recognition of moral rights, to varying extents, can be found in the laws of Germany, Japan, Mexico, Morocco, the Netherlands, Nigeria, and Brazil. Each of these countries can be said to place more emphasis on moral rights than the United States currently does.[153]

Copyright in the civil law world is known as "droit d'auteur" in France, "derecho de autor" in Spain, and "Urheberrecht" in Germany—all terms that translate to "author's (or authors') rights."[154] In contrast, the United States uses the simple, common law term of "copyright," and in doing so impliedly relegates the concept of "authors' rights" to a position subordinate to that of economic justification.[155]

Though the civil law emphasizes "author autonomy and personal connectedness" to one's work, U.S. law developed very differently.[156] Early on, the United States emphasized "economic incentives to promote the creation of subject matter deemed important to our society."[157] The Copyright Clause of the U.S. Constitution empowers Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[158] As such, U.S. copyright law prioritizes a conception (indeed, merely an idea) of attaining counterpoise: "copyright law, rather than serving to protect authors' (natural) rights or property interests, serves to sustain a balance of competing private and public interests."[159] That is, these private and

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[149] *See* Hansmann & Santilli, *supra* note 104, at 97.
[150] Jaszi, *supra* note 38, at 328.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] JOYCE, *supra* note 26, at 29.
[155] *Id.*
[156] *See* Kwall, *supra* note 47, at 21.
[157] *See id.* at 20.
[158] U.S. CONST. art. I, § 8, cl. 8.
[159] *See* Ayers, *supra* note 45, at 66.

public interests include both those of authors as well as more expansive social, cultural, and economic concerns.[160]

It follows that as U.S. law developed, the concept of copyright became concerned centrally with "the work" as opposed to the more romantic, civil law concern with the author.[161] Accordingly, when the U.S. concept of "the work" completely eclipsed the authorship idea, U.S. law turned full throttle toward unapologetically favoring the rights of publishers, purchasers, and the general public over those of authors.[162]

Economic justification for copyright is based on the idea that copyrights serve primarily as a major market facilitator and as a mechanism for moving existing *works* to their most efficient, or "highest socially valued uses."[163] The market determines how copyright property rights are allocated, and in this way society achieves optimal efficiency—the balance between the rights of copyright holders and the rights of the public.[164]

Throughout history, the United States, like some other common law countries, did not recognize moral rights of artists in their works.[165] Therefore, the implementation of VARA was a relatively big step for the United States in providing greater protection to artists' moral rights.[166] As of 1997, at least eleven states had incorporated some type of moral rights provisions into their statutes.[167] Further, even without actual legislation, some U.S. courts have recognized a moral rights protection through either or both of two available mechanisms: (1) the extension or generous application of common

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[160] *Id.*

[161] *See* Kwall, *supra* note 47, at 20.

[162] *See id.* (citing Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 471 who addresses *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514)). The recognition of "the work" as a legal concept increased the authority of publishers, who could then preside over the work and even exclude the author from any measure of control over the work. *Id.* at 478. Jaszi further discusses the apparent increase in U.S. interest in the moral rights doctrine, but notes that the United States still largely ignored the author's perspective and concerns. *Id.* (citing Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317, 326 (2000)) (showing Supreme Court rejection of "an author-centered version of the copyright law").

[163] Ayers, *supra* note 45, at 54 (noting also that such economic justification was largely influenced by the Chicago Law and Economics movement).

[164] *Id.*

[165] Hansmann & Santilli, *supra* note 104, at 96.

[166] *Id.* at 97.

[167] *Id.* (citing generally Thomas Goetzl, *California Art Legislation Goes Federal: Progress in the Protection of Artists' Rights*, 15 HASTINGS COMM. & ENT. L.J. 893 (1993)).

law rights, or (2) an expansive reading of statutory rights such as the Lanham Act of trademark law.[168]

While only recently recognizing any sort of moral rights in copyright, the United States proceeded with great hesitation in implementing legislation addressing these rights.[169] Indeed, the United States simply did not need such laws to protect its copyright property, as "nations that are principally importers rather than exporters have little incentive to protect the interests of producers."[170] Until the latter half of the twentieth century, for example, American artists had not risen to a level of prominence in the areas of painting and sculpture.[171] Historically, serious American art collectors were interested primarily, if not exclusively, in art of foreign origin.[172] Accordingly, it was not in U.S. interests to protect such foreign works with American legislation.[173] However, as American artists achieved greater prominence, it became more advantageous for the United States to enact such legislation.[174] It thus follows that the VARA of the 1990s concentrates its protection on painting and sculptural works.[175] Economic need provided at least partial motivation for U.S. legislation (narrow as it is) to recognize moral rights.[176]

Additional motivation might have been less conspicuously economic in nature.[177] U.S. export of products covered by conventional copyright—including books, movies, and recordings—also has become much more prevalent.[178] As such, U.S. interest in having foreign nations protect copyrights in those works has concomitantly increased.[179] The United States likely ratified the Berne Convention because of its strong interest in having those rights enforced abroad.[180] Additionally, the 1990s VARA may have been seen as a rather benign,

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[168] *Id.* It is still contended that more should be done to protect authorial moral rights. *Id.* (citing Jane Ginsburg, *Moral Rights in a Common Law System*, *in* MORAL RIGHTS PROTECTION IN A COPYRIGHT SYSTEM 18 (Peter Anderson & David Saunders eds., 1992)).

[169] *See id.*

[170] Hansmann & Santilli, *supra* note 104, at 142.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *See* Hansmann & Santilli, *supra* note 104, at 97, 142.

[176] *See id.* at 142.

[177] *Id.*

[178] *See id.*

[179] *Id.*

[180] *See* Hansmann & Santilli, *supra* note 104, at 142.

narrow, and limited measure toward showing "good faith compliance" with the standards of the Berne Convention.[181]

III. The EU Envisions the Harmonization of Copyright Law and Policy Brought About by the European Parliament's Internet Copyright Directive

A. *The EU Drives Toward Ever-Increasing World Trading Prominence vis-à-vis a Pan-European Approach*

With all of this as background, trade between the United States and the EU now flourishes and constitutes a major part of world business.[182] As trading partners, the two entities enjoy similar "size, prosperity, and outlook."[183] Further, the internet continues to cultivate explosive trade between the EU and the United States.[184] Moreover, the EU is a rapidly expanding playing field for all types of e-commerce transactions.[185] Revenues from e-commerce will likely exceed $300 billion by the year 2003.[186]

While EU member states are expected to act in accordance with EU legislation, EU law will not preempt national lawmaking, and therefore member states retain their own domestic legislative characters.[187] EU laws in this area have always been "directives," and thus they do not become effective until the member states implement their own respective legislation.[188] An EU Directive focuses on a specific matter and sets forth recommended action with regard to that matter.[189] Often, member states have significant flexibility as to how closely domestic legislation meets with the provisions of the Directive.[190] Member states are usually allotted a two-year period to implement appropriate legislation.[191]

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[181] *Id.*

[182] Mark Owen, *International Ramifications of Doing Business On-Line: Europe, in* Fourth Annual Internet Law Institute (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course, Handbook Series, 2001), *available at* 661 PLI/Pat 627, 635 (2001).

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] Lipton, *supra* note 15, at 335.

[188] Owen, *supra* note 182, at 636.

[189] Lipton, *supra* note 15, at 336.

[190] *Id.*

[191] *Id.*

In response to this growing trade industry largely fueled by the internet, European lawmakers have begun to focus on e-commerce issues.[192] However, while the EU works toward "pan-European harmonization," each member state's laws remain in effect.[193] Thus, any given individual country's approach may remain distinct from that approach taken on the level of either the United States or the EU as a whole.[194]

B. *The EU Copyright Directive: Its Short Past, Its Future, and Why It Should Be Adopted Without Undue Delay by Member States*

In 1996, after a series of hearings in Brussels and Florence, the European Commission (Commission) announced that copyright harmonization must become and remain a priority for the EU.[195] On July 27, 1995, the Commission issued the exhaustive Green Paper on Copyright and Related Rights in the Information Society (Green Paper)[196]—a document which, in the words of Single Market Commissioner Mario Monti, was meant to "contribute to a wide debate with all interested parties on the identification of a clear, stable and coherent regulatory framework for the development of the information society."[197]

One major issue the drafters of the Green Paper addressed was whether the present status of copyright harmonization, at the single market, EU-wide level, was adequate to meet the rapidly increasing demands of the digital revolution.[198] As far as the EU was concerned, the main difficulty created by the worldwide cyber market of the internet was (and, many believe, still is) "the danger of fragmentation of the Single Market as a consequence of a lack of harmonization between member states."[199]

The Copyright Directive requires member states to harmonize their laws concerning the reproduction right, the right of communi-

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[192] Owen, *supra* note 182, at 635–36.

[193] *Id.*

[194] *Id.*

[195] Virginie L. Parant, *Copyright Harmonization in the European Union: The Digital Alibi*, 16 ENT. & SPORTS LAW. 22, 32 (1998).

[196] Copyright and Related Rights in the Information Society: Green Paper from the European *Commission* to the European Council, COM (95) 382, *available at* http://europa.eu.int/scadplus/leg/en/lvb/l24152.htm (last visited Mar. 5, 2003) [hereinafter Copyright and Related Rights].

[197] Parant, *supra* note 195, at 22 (citing Copyright and Related Rights).

[198] *Id.*

[199] *Id.*

cation to the public, the distribution right, and technological measures against circumvention of copyright management and protection systems.[200] Article One outlines the intended scope of the Directive.[201] Article Two sets forth a broad, comprehensive definition of the reproduction right, covering all relevant acts of reproduction, on-line or off-line, in material or immaterial form.[202]

Article Three aims to achieve harmonization of the member states' laws concerning the right of communication to the public, providing a broad, comprehensive definition of "communications to the public" that addresses the interactive nature of the digital environment.[203] Article Four seeks to achieve harmonization of the right of distribution for all types of works where this has not yet been done,[204] and Article Five sets out exceptions to the rights set forth in Articles One through Four.[205]

Articles Six and Seven address the protection of technological measures and rights-management information.[206] Article Six sets forth member states' obligations as to technological measures,[207] and Arti-

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[200] *See generally*, Copyright Directive, *supra* note 12.

[201] *Id.* art. 1.

[202] *Id.* art. 2. Pursuant to Article 2:

> Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixation of films, in respect of the original and copies of their films; (e) for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Id. art. 2.

[203] *Id.* art. 3. Article 3 states:

> Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Id. art. 3.

[204] *Id.* art. 4. Article 4 states: "Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise." *Id.* art. 4.

[205] Copyright Directive, *supra* note 12, art. 5.

[206] *Id.* arts. 6, 7.

[207] *Id.* art. 6.

cle Seven addresses member states' obligations concerning rights-management information.[208]

On February 14, 2001, the European Parliament formally adopted the European Copyright Directive.[209] The Copyright Directive seeks to solidify the existence of an EU-wide "internal market in copyright and related rights," emphasizes e-commerce, and creates a legislative framework that will be able to handle the impending challenges of the digital revolution.[210]

Accordingly, swift adoption of the proposed Directive is crucial to ensure a Community-wide market in copyright with a particular focus on new products, technology, and services. Further, the adequate protection of intellectual property will foster creativity and innovation and enhance the availability and public acceptance of new services. Ultimately, adoption of the Directive will advance the goal of meaningful harmonization while maintaining a balance between all the rights and interests involved.

IV. Increased Levels of EU Copyright Harmonization Will Lead to Greater Global Harmonization as the United States and the EU Strive Toward Achieving Complementary Copyright Law and Policy

E-commerce and the digital revolution necessitate an integrated approach. Global e-commerce was a hot topic at the WIPO Conference in December 1996: members of national governments, companies, and nongovernmental agencies met in order to amend the Berne Convention with respect to copyright rights in an ever-changing and increasingly electronic world.[211] Instant, interactive, and digitized global communication had begun to speed up not only business and trade transactions, but also domestic and international communications in general.[212]

However, the digital revolution has also made it possible to "pirate digitized music, films, and software" repeatedly, while maintaining the quality of the original.[213] Distribution has become much

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[208] *Id.* art. 7.

[209] *See* Bruce A. McDonald, *International Intellectual Property Rights*, 35 Int'l Law. 465, 469 (2001).

[210] *Id.*

[211] Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. Pa. J. Int'l Econ. L. 535, 576 (1998).

[212] *See id.*

[213] *Id.*

quicker and easier, but unfortunately so has piracy.[214] Indeed, the internet and e-commerce allow for a wholly different type of product distribution from what business and trade knew before the advent of the internet.[215] Such a "paradigm-shift in product distribution," while exciting from the perspective of the businesses and economies of the different nations, challenges conventional methods of information technology and the copyright system as a whole.[216]

At a WIPO-sponsored Intellectual Property and Technology conference in Cambridge, Massachusetts in April, 1993, the following special characteristics of the digital revolution were pronounced:

> a) digital material is intangible until it is processed and projected through a microprocessor-controlled device; b) it can be copied repeatedly with no loss of quality; c) the way information is conveyed is flexible, as it can be combined, altered, mixed, and manipulated relatively easily; d) digital media has an indefinite life because it will not decay as time passes.[217]

Consumers of copyrighted works are now better able to control where and how copyrighted works materialize.[218] Works can be printed out and e-mailed with relative ease and across international borders.[219] Communication is essentially instantaneous.[220] Where national borders once slowed down communication and business transactions, the digital revolution has created domestic and foreign markets that have become identical for all practical purposes.[221] Indeed, "the ability of a single nation-state to implement autonomous cultural and information policies is diminishing; national policymakers need the cooperation of other nations if they wish to realize a particular goal (such as to ensure a secure environment for the creation and distribution of copyrighted works)."[222]

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[214] *See id.*

[215] *See id.*

[216] *See* Ryan, *supra* note 211, at 576.

[217] *See id.* at 576–77. Other international conferences were held in Palo Alto, California in March 1991, Paris in June 1994, Mexico City in May 1995, and Naples in October 1995. *Id.* at 576.

[218] *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 479 (2000).

[219] *See id.*

[220] *See id.*

[221] *See id.*

[222] *Id.*

The EU and the United States will, by necessity if not by simple common sense, work together to create a harmonized market—a market better suited to continued trade during the digital revolution. U.S. copyright law is already affected by international considerations.[223] As trade between the EU and the United States continues to flourish, such international considerations will only become more important to domestic courts and legislators.[224]

Consider the brief filed by the federal government in the recent case of *Eldred Press v. Reno,* a case that challenged the constitutionality of the Copyright Term Extension Act.[225] The government, advocating that the Copyright Term Extension Act passed muster under the U.S. Constitution, argued that the constitutional purpose of promoting the progress of science and the useful arts was advanced logically by the grant of twenty extra years of protection to existing works.[226]

Such furtherance of constitutional purpose, the government argued, is brought about because the amendment brings U.S. law more into cohesion with the laws of the EU.[227] The Court in this case did not actually reach that argument in upholding the constitutionality of the Copyright Term Extension Act,[228] but in bringing up this point, the government recognized the emerging fact that international integration is an important aspect of U.S. copyright law.[229]

Conclusion

Even though internationalization has not been a U.S. priority in the past, it becomes increasingly necessary with the digital revolution. Trade between the EU and the United States is central to the economies of both entities, and requires harmonization in order to operate efficiently. Therefore, in the economic interest of both trading blocks,

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[223] *See* Eldred Press v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999) (upholding the constitutionality of the provision of the Sonny Bono Copyright Term Extension Act that extends the copyright protection term by 20 years for already existing works).

[224] *See id.*

[225] *See id.*

[226] Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Pleadings at 4-7, Eldred Press v. Reno, 74 F.Supp.2d 1 (D.D.C. 1999) (No. 99–0065), *available at* http://eon.law.harvard.edu/openlaw/eldredvashcroft/cyber/Govt_Rep.pdf (last visited Feb. 25, 2003) [hereinafter Defendant's Memorandum].

[227] *See id.* at 8-14.

[228] *See Eldred Press,* 74 F. Supp. 2d, at 3.

[229] *See* Defendant's Memorandum, *supra* note 226, at 11-12.

the EU and the United States will move toward harmonization that far surpasses even that envisioned by the EU Copyright Directive.[230]

[230] *See generally* Copyright Directive, *supra* note 12.