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TIME AND SPACE *

* On May 2, 1997, American University convened a symposium (Peter Jaszi, chair) on the WIPO Diplomatic Conference, consisting solely of presentations from participants who had also been present in Geneva. This article derives from the keynote address delivered to that symposium by David Nimmer, who attended the Diplomatic Conference on behalf of the United States Telephone Association. It is Part Two of a triptych concerning the WIPO Copyright Treaty. Part One of this triptych appeared as *A Tale of Two Treaties*, 22 *Colum.-VLA J.L. & Arts* 1 (1997), and Part Three is scheduled to be published as *Aus der Neuen Welt*, in volume 63 of the *Nw. U. L. Rev.* (1998).

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I. Introduction

A. No Space

I come from Los Angeles to Washington, D.C., in order to discuss Geneva, Switzerland. These particular peregrinations through space are ironic, inasmuch as the efficient cause of our conference today is cyberspace. In practical terms, cyberspace is the realm of no space; it is a type of wormhole which instantaneously connects realms otherwise geographically distant.

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B. No Laws?

The question arises whether cyberspace is also the realm of no laws. Many Netizens urge that position. For instance, the Electronic Frontier Foundation has come to be associated with the notion that information wants to be free. ⁿ² Wired magazine of late has been leading what some might view as a crusade against digital copyright protection ⁿ³

But, of course, pro-copyright crusaders also abound today ⁿ⁴

Those who wish to posit cyberspace as the realm of no laws may not be on the most solid of ground. Certainly, cyberspace should not be portrayed as a realm of no laws to the couple from Milpitas, California currently languishing in a Tennessee jail for uploading in California material deemed to be obscene by the community standards of Memphis, Tennessee, where a postal inspector downloaded them ⁿ⁵

C. Time and Space I

My challenge in these remarks is to root a discussion of the treaties confronting the Internet in their appropriate locale. Specifically, where in time and space do they belong ⁿ⁶ As already mentioned, I will invoke a spatial triangle that links Los Angeles, Washington, D.C., and Geneva for the purpose of grounding the observations that follow. In addition, I have imposed a temporal restraint on myself: As we stand on the cusp of a new millennium, I promise to limit myself solely to events that have transpired during the current millennium ⁿ⁷

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D. Towards the Old World

I began my preparations for these remarks by searching the Internet through the instrumentality of Yahoo! for "Geneva." I promptly found myself in a web site for the "Knights of Malta." Those Knights bear a tangential relationship to our story, for they are the forebears of the crusaders invoked above. In the year 1099, during the First Crusade, Pope Paschal II invested the Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes and of Malta. The purpose of this fraternal organization was to provide a hospice and infirmary for pilgrims to the Holy Land. By a papal bull to Brother Gerard dated February 15, 1113, the Order of the Knights Hospitallers was formalized
n8

Perhaps you are more familiar with their more famous cousins, the Knights Templar, who became one of the major forces of Christendom until forcibly disbanded by France's King Philip IV during the infamous events of October 1307. n9 The difference between the Knights of Malta and the Knights Templar is that the former has existed continuously for 900 years. The proof is that they have their own web site today. In fact, Le Mus e de l'Ordre de Malte at the Commanderie de Compesi re is located on land that the Bishop of Geneva ceded to the Order in the year of Our Lord 1270. n10 That museum is the site in meatspace where the Internet node I came across is located.

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How ironic to reach Geneva through a Catholic organization! After all, the city is known as the "Protestant Rome." Its most famous son (not quite native) is John Calvin. Speaking of whom, at the Roundtable in Multimedia held in April of 1997, the digerati gathered as they do every year, and at that event Alan Kay described the Internet in terms not quite of Calvin himself, but of Martin Luther. Let's see how.

E. Felling the Proscenium Arch

Every medium poses the question: What does that medium want you to be? If you ask that question of parchment, you obtain the answer: "the conveyer of the sacred heritage. n11 You can ask the same question of a newspaper, to which it replies: "a participant in the unfolding events of history." And if I were to tell you that the answer is "couch potato," it should not take you long to determine that the relevant inquiry concerns television n12

The printed book that was made possible by the invention of movable type inaugurated a new medium. Yet a full century passed until Luther answered the question what that particular medium wanted its users to be. The answer is: "a laity composed of religiously literate individuals." He thus initiated one of the first projects for the codex book made with movable type, namely, that everyone should learn Latin in order to understand the Gutenberg Bible.

But then came a new inspiration to Luther, namely, the advent of vernacular literature. The only difficulty was that no standard German language existed at that time. In order to solve that little problem, Luther invented Hochdeutsch to take advantage of the new medium n13

The question that faces us at present, as Alan Kay further explains, is: Who will invent the new language of the Internet? Today, in cyberspace, we attempt only weak imitations of things probably better accomplished in meatspace. As Douglas Adams (of Hitchhiker fame) stated at the start of the very first Digital World in Beverly Hills, the proscenium arch has yet to fall n14 To elaborate, when the motion picture

[*505] was born in the midst of an entertainment world dominated by the legitimate theater, early celluloid dramatists simply set their actors on stage in front of a movie camera to declaim their lines. Only after the passage of much time did budding filmmakers realize that they could record closeups, flashbacks, aerial shots, and other distinctive points of view made possible by the new medium. At that point, the proscenium arch fell, and the art of cinematography was born.

We do not know yet what the Internet will be. Without question, it induces dreams of great wealth (and in several cases, the realization of that wealth!) n15 To bring the matter back to another of the points of my L.A. - Geneva-D.C. triangle, and to move from Martin Luther to Martin Luther King, Jr., one of the most famous sentences of the late twentieth century, spoken in Washington, D.C. in 1963, "I have a dream, n16 appears also to be the mantra of many enterprising Netizens. The Internet today, in short, seems to be the medium for users who have a dream.

II. Convening the Diplomatic Conference

What will the Internet be? This is the pressing issue that brought the world to Geneva in December of 1996. As we confront this Berne Convention-event, I would like to digress to talk about press reports.

A. Framework of the Berne Convention

The stories leading up to the international copyright accord emanating from Berne were replete with stories of piracy. One pop idol was particularly outraged that his latest works were routinely pirated, mass produced across the ocean by those industrious, but immoral, hoards.

The distinctive feature of that particular idol is his name . . . Charles Dickens. The target of his ire was . . . none other than the United States of America, and the year was . . . 1842.

[O]f all men living I am the greatest loser by it. . . . The wonder is that a breathing man can be found with temerity enough to suggest to the Americans

[*506] the possibility of their having done wrong. . . . My blood so boiled as I thought of the monstrous injustice n17

Over time, the space changes, but the issues endure.

When the world convened in Geneva in December of 1996, the time was actually "overdue." The year 1886 represented the initial breakthrough when, thanks to Charles Dickens, Victor Hugo, Anthony Trollope, et al., the Berne Convention was born. Thereafter, it was revised regularly at 20-year intervals, the most recent being the Paris revision of 1971 n18

After Paris, the next revision was due in 1991, but at that moment, the snake was still busy digesting the elephant: The U.S. joined the Berne Union amidst great fanfare in 1989 n19 Far from being the pirate of the nineteenth century, the U.S. had, by the late twentieth century, matured to the point of becoming the high protecto n20 of copyright.

For the United States to assume its mantle of leadership in an expanded Berne Union, more time was needed. Therefore, the world pushed the Asnooze button" and deferred action when the alarm sounded in 1991 n21

But the pressure has built continuously since then. At the time of the 1971 Paris revision, personal computers were not yet invented. By the 1990s, in contrast, works of authorship could potentially be exploited through the unanticipated instrumentality of PCs. A host of issues were begging to be addressed, ranging from transmission to communication to volatile distribution.

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B. Committees of Experts

In order to lay the groundwork for dealing with these matters, a committee of experts convened. But just what kind of experts were they? The answer is that their expertise lay in copyright law, not in the Internet. These are the later-day Knights of Malta, providing for the health of copyright pilgrims attempting to reach the terra sancta of the Internet.

The next question concerns the homelands from which these experts hailed. The WIPO is an instrumentality of the United Nations. Given that each country is as fully fledged as any other in the world of international diplomacy, these experts came from all countries. The fact that the majority of Internet nodes at that time were located in the United States was of no moment²² Instead, experts converged from across the globe.

The final question is: With what type of focus did this global collection of experts convene? Each government has its own history in the copyright arena. In the Bahamas, for example, copyrights have historically been handled by the Ministry of Foreign Affairs. In Panama, all industrial property is lumped together under the aegis of the Ministry of Education. In Sweden, it is the Ministry of Justice to whom one should turn with copyright questions. The United States has its own autonomous Copyright Office within the Legislative Branch, plus a Patent and Trademark Office as part of the Executive Branch of the government. The latter PTO, rather than the Copyright Office, sent its head as chef de mission for the United States²³ Thus, unique circumstances of time and space dictated the dramatis personae for the various nations convened in Geneva.

These considerations, in turn, led directly to the selection of delegates of the Diplomatic Conference itself. It is only natural that a government which had previously sent an expert from its Ministry of X should send to Geneva the same point-person who had already gained experience and exposure. Thus, the pressures that were brought to bear were entirely centrifugal. Each nation had its own interests, as is always the case under U.N. auspices. And although the subject matter was the Internet, the expertise, if not simply a function of general diplomacy, lay entirely in traditional copyright.

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C. Time and Space II

Summing up the determinants that framed the issues, we see that they are two: time and space. In terms of space, experts participated on a national basis. Had the decision been made, au contraire, to dole out representation on a quantitative basis according to the number of Internet nodes located in each country, then the Conference would have been dominated perforce by American nationals. Given the U.N. mandate of "one nation, one vote," however, such a course of action was impossible. But lest I wax too amerocentrist, let the record reflect that Geneva itself is a most fitting environment in which to confront the future of the Internet - the International Telecommunications Union is headquartered there, as is CERN (Centre Europeen pour la Recherche Nucl eaire), which many credit as the birthplace of today's Internet n24

With respect to time, the groundwork was laid during the window after the United States joined the Berne Union in 1989. This period of time corresponded to the interval in which the Internet mushroomed. Yet, it also occupies a niche in time before we know what the Internet ultimately will prove to be n25 The question recurs: What does the Internet as a medium want us to be? The proscenium arch has not yet fallen.

III. The Current Time: Dominated by an American Space

Despite the formal rule of "one nation, one vote," U.S. participation in Geneva was actually massive. In the first instance, a disproportionate number of the NGOs (non-governmental organizations accredited to attend the Convention) were of U.S. origin. In fact, within the telecommunications industry, almost all voices emanated from America.

More fundamentally from my own parochial perspective, the world of copyright is now dancing to an American tune. To quote no less a watershed than the Reagan/Mondale battle, the entire world looks towards this new Jerusalem, this "shining 'city upon a hill.'" n26 If I may offer a personal perspective, Los Angeles represents the quintessence of

[*509] the United States. California's status as the seat of the Hollywood studios, the record industry and Silicon Valley all cement its status at the cynosure.

But, one might retort, the book publishing industry is still located in New York. Sadly, the surreply to that quibble is: Who reads books any more? Bestsellers today typically bear such titles as *The World Wide Web for Dummies* n27 Or else they consist of the "true confessions" of participants in the endless television spectacle of the O.J.HSimpson trial (another Los Angeles extravaganza).

In claiming that the world is now dancing fundamentally to an American tune, I intend to invoke both point and counterpoint. For we see in this context that the events in Geneva were an "international" conference for an "American" problem.

The point is the one already mentioned, namely, that the United States has progressed over the course of the last two centuries from being the number-one piracy haven in the world to becoming the self-styled king of copyright. As one commentator puts it:

We can't make a toaster any more, a VCR, or even a decent faucet, but we can create desire. We can make fetching footwear, beautiful games, exquisite motorcycles, hot TV, great rock-and-roll records, and dazzling movies. Such artifacts constitute our principal contribution to global commerce n28

The counterpoint is no less deserving of our attention. For in addition to being king of copyright, the U.S. has become virtually "home" to the Internet n29 After all, most Internet nodes are located in this country n30 In fact, Internet domain names themselves convey that

[*510] conclusion; only "other" countries have a suffix for their identification. A user whose e-mail address concludes with ".uk" or ".it" is immediately identifiable by country of origin as residing in the United Kingdom or Italy, respectively. But Americans typically shun the ".us" suffix; they alone appear to be "truly cyberspatial." n31 Thus, the conundrum of cyberspace could be mapped as an American threat to an American industry n32

A. Snapshots of Copyright's Undergirding Philosophy

In fact, this very way of approaching the field affects the modalities of discourse. There are many ways in which we could enter the field of copyright. Copyright may be seen as:

- <bullet>the expression of a natural right from parent to artistic progeny;
- <bullet>giving vent to democratic discourse through engaging disparate points of view;
- <bullet>protecting a country's cultural patrimony; or <bullet>safeguarding the moral rights of authors.

In contrast to all of these views, the distinctly "American way" of approaching copyrights seems to be . . . through the pocketbook n33

It is beyond peradventure that copyright exists in a marketplace of goods. Nonetheless, I would posit that it does not exist solely as an economic commodity. There are indeed other parallel universes in which copyright's role should not be underappreciated.

Nonetheless, at the Geneva Diplomatic Conference, the "American way" absolutely predominated. The debate was focused on one issue and one issue alone: fairness of the impact on the pocketbook that would result from the deliberations in Geneva. Indeed (at least as it seemed to this observer), the spirit of Francis Fukuyama bestrode the

[*511] Palais des Conferences like a colossus, proclaiming The End of History and the triumph of the American point of view n34

This phenomenon played itself out with respect to the very terms of the debate. One heard precious little about copyright being:

<bullet>as inseparably connected to the authors who create copyrightable works as are our arms to our bodies, a notion that leads to the concept of inalienability n35
<bullet>needed only so long as it is coterminous with the democratic need for individual expression n36 <bullet>the illegitimate instantiation of an "intellectual property land grab; n37

<bullet>an outmoded relic of the fiction of the romantic genius who labors alone in his garret, an image of authorship utterly at odds with the Internet world of authorial collaboration and of interactivity n38 <bullet>merely the opiate of a bourgeoisie desperately seeking escape from a failed capitalism; or n39 <bullet>an offense to Allah, given its protection of graven images n40

Instead, all arguments followed the following format: Copyright should reach to field X because otherwise authors and owners would be denied a valuable royalty stream. In turn, that point of view was opposed by the point of view that copyright should stop short of field X as, otherwise, innocent parties would be left holding the infringement bag, which would harm the development of a new medium, which ultimately

[*512] would result in authors and owners losing the same valuable royalty stream that flowed by just one sentence ago.

B. Performers and Frenchmen

Even in France, it seemed that francs triumphed over all else. In order to understand this matter, a detour is required into the WIPO Performances and Phonograms Treaty that was on the table at the Diplomatic Conference. As originally drafted, that treaty was intended to apply both to actors in films and to performers of a more traditional bent, such as singers of concerts and actors in plays. In addition, it is noteworthy that the proposed draft treaty would have provided significant moral rights protection to all performers, both on stage and in films.

The combination of movies and moral rights immediately raises antennae in this country. In particular, since its accession to the Berne Convention in 1989, the United States has continuously and studiously (or, if you will, "studio U.S.-ly") avoided according any protection for moral rightsⁿ⁴¹ Hollywood has long organized itself according to the work-for-hire principles enshrined in U.S. lawⁿ⁴² On that basis, the studios have claimed to own plenary copyright over their motion pictures. Actors, directors, producers, and the like have thereby lacked much in the way of moral-rights protection under American law - in stark contrast to the way these artists/auteurs are treated abroadⁿ⁴³

It is no accident, therefore, that Anjelica Huston filed suit in France to forestall Le Cinq's impending broadcast of a colorized version of her father's classic, *The Asphalt Jungle* - notwithstanding that the individual frames had been colorized in the United States and that such exploitation has never been barred in this country. Her success at the Cour de Cassation only highlights the difference between Continental and Anglo-American norms in this arenaⁿ⁴⁴

In the past, the United States government has always successfully resisted any incoming tide of moral rights emanating from the Berne Convention ocean. That dynamic seemed poised on the brink of change

[*513] at the Geneva Diplomatic Conference; the pressures of harmonization appeared ready to burst the first hole in the American dike holding back a flood of moral rights onto U.S. territory.

The details emerged at one of the U.S.-government briefings held at 8:30 a.m. each day in a conference room across the street from the Palais des Conférences. The government there informed the assembled NGOs of U.S. nationality that the following scenario had transpired: France had, as is de rigueur, supported moral-rights protection for performers under the WIPO Performances and Phonograms Treaty. Also, France urged that that treaty apply to audiovisual performers just as it applies to more traditional artisans. After much horse-trading, the U.S. ultimately - and most reluctantly - agreed to relent to the French position.

The French responded to that concession in a curious fashion. Snatching defeat for French actors out of the jaws of victory, the French government withdrew support from its own proposal that the subject treaty should extend to audiovisual performances.

At the end of the day, the WIPO Performances and Phonograms Treaty that emerged did indeed incorporate moral-rights protection. However, the treaty as a whole is inapplicable to motion pictures n45 As a result, Woody Allen and his aggrieved confreres in Hollywood remain unable, even when this new international instrument becomes effective, to extirpate new atrocities in celluloid, such as the colorization of *The Asphalt Jungle* (or, for that matter, *What's Up, Tiger Lily?*, an early pastiche trampling on moral rights, courtesy of Woody Allen himself) n46

This resolution, of course, caused a great sigh of relief to come from the Hollywood studiosH.H.H. and equal shrieks of frustration from film actors. In fact, the Screen Actors Guild and the American Federation of Television and Radio Actors at one point tore up their prenuptial agreement in frustration over the eventualities of the performers' treaty n47

The question arises why the French retreated. Again, per the government briefing, one explanation is that if audiovisual performers had been included in the treaty (in the manner it was initially drafted), then the film industry in general would have fallen more clearly under the international copyright framework. France would then have had less of a

[*514] basis to claim that this domain lies outside the norms of international trade, which historically has been the French excuse for regulating domestic content of film and television as a matter of its internal cultural policy n48 The spectre would thus loom that U.S. movies could, as a matter of consumer preference, flood the French airwaves from Bourgogne to Bretagne n49 The political conclusion at LeHQuai d'Orsay was that it was better to maximize le portefeuille francais, even if at the cost of sacrificing the ideological purity of le droit moral.

IV. The Triumph of Meatspace Over Cyberspace

A. The Power of Presence

You had to be there to appreciate the dynamic as it actually unfolded. This brings to mind a central principle that pertains to Diplomatic Conferences and all manner of other human events: the power of presence n50 As you look to the dais today and see the various speakers assembled to hold forth on their views concerning what transpired in Geneva, one point of commonality is undeniable - all of us here in Washington, D.C. today were physically present in Geneva last December.

Each of you in the audience also, if not present in Geneva, at least has made the trek to this auditorium here at American University to hear our various perspectives. I find nothing strange in this convocation; after all, the baud rate of actual reality is absolutely incomparable. It was for exactly that reason that I was happy to board a plane in Los Angeles to come here instead of simply telecommuting. The same consideration applies to each of the panelists (and audience members) who journeyed

[*515] from their respective homes. It should therefore be no surprise that this exact same dynamic worked itself out in convening the delegates in Geneva.

No one has ever tried to negotiate a draft for a committee of experts via the Internet. A fortiori, people do not contribute interactively through their Internet nodes in order to put together the text of a treaty. Indeed, the very notion of a Diplomatic Conference convened over the Internet brings a smile to our lips, even today, as we contemplate the disk failures, crashes, wipeouts, blackouts, incompatibilities, and other horrors that would attend any such effort. Indeed, as of today, that technology might as well be a thousand years distant into the future n51

In fact, the dynamic that unfolded in Geneva was the polar opposite of the thought experiment posited a moment ago of attempting to visualize virtual presence. This brings me to my favorite moment in Geneva, the first vote that was cast n52

The delegate from the European Union wished to obtain permission to cast an armful of votes on behalf of each of the member states represented n53 Many other nations were opposed to that procedural mechanism. The United States accordingly proposed a compromise: The EU delegate would be permitted to engage in bloc voting - but only when its member-states' delegates were physically present in the hall n54 Thus,

[*516] to the extent that Ireland had to use the bathroom or Italy had to make a phone call, the robustness of the EU delegate's vote would shrink accordingly.

The Convention's very first decision was to adopt the U.S. compromise. When you think about it, the upshot of that vote was the following: Physical presence, within actual visual range, was deemed to be the all-decisive determinant as to how voting would take place. In essence, that method of proceeding represents the very antithesis of the zeitgeist of cyberspace.

B. Bloc Voting and Lobbying

Another interesting development in Geneva concerned bloc voting. Before The End of History, there were ideological voting blocs. Thus, we would see Cuba aligned with North Korea, both voting together with East Germany. On the other side of the aisle, the United States would pair up with Taiwan and West Germany. Today, the only blocs that remain are cartographic n55 Thus, no more would we see a North American country allied with an Asian country and a European country, as with both of the blocs limned above. Instead, those present in Geneva heard endless xylophone preludes to the loudspeaker announcement that "the Asian group will meet in HallHA" or "le groupe africain se rencontrera dans la salleHB."

The European Union has become a group unto itself, thus excluding the U.S. The JUSCAN thereby formed, to allow the U.S. to meet with Canada and Japan. It is another sign of our times that geographic space (not yet cyberspace!) has become dominant.

For the NGOs gathered in Geneva, the primary amusement available was to engage in the lobbying of national delegates. Thus, we saw NGOs waiting endlessly outside of Conference RoomH1 for the chance to buttonhole a favorite target. This was an intensely physical activity. In fact, there is nothing remotely cyberspatial about it - it occurs only on a face- to-face basis.

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C. Time and Space III

Lobbying is also a nationalistic activity. Once again, we can discern two familiar components, time and space.

With respect to time, some say that the Internet's transborder capabilities will make the nation state as we know it anachronistic in the future. Regardless of the accuracy of that prediction as to times yet to come, it represents a sensibility emphatically not evident in Geneva.

As for space, we saw the intricacies of geography represented in various ways in Geneva. One particular geographic issue concerns Article 7, the grant to copyright owners of the right to control the "direct and indirect reproduction of their works, whether permanent or temporary." n56 The fervent denunciation of that article by some countries was matched, blow for blow, by its steadfast support among others.

Among the detractors was Norway n57 Norway is well known for its support of the academic community and for championing users' rights n58 Nonetheless, in the same way that the United States does not sing a one-note song on copyright but instead contains a veritable choir of copyright voices, so too does Norway contend with disparate perspectives on copyright. While the Convention itself was taking place, authors in Norway were demonstrating against what they perceived as their own government's traducing of their interests. A certain Norwegian who served as an NGO in a camp opposing Article 7 went into overtime lobbying his national delegates.

As another example, consider what was happening concurrently with the WIPO meeting in Geneva, namely, the convocation of the World Trade Organization in Singapore. For this purpose, I will share a rumor buzzing about on the Convention floor. (I introduce this hearsay rumor, I must hasten to add, not for the truth of the proposition, as I never saw any corroboration for it in the press, but simply as evidence of what went through the minds of individuals present there.) Rumor had it that the United States Trade Representative in Singapore was pressuring Chile into supporting the U.S. position on Article 7 as a precondition for Chilean entry into NAFTA n59 I have no particular basis for believing that

[*518] there is any truth to that rumor, but, true or false, it exerted its own influence and became "real" regardless of its truth content. (As Mark Twain once famously observed, "Interesting, if true, and interesting anyway.") From Singapore to Chile to Geneva, the national enterprise of pressuring, lobbying, horse-trading, cajoling, and pleading expressed itself in geographical space.

V. The Road Not Taken

In an ideal universe, treaties would solve many problems. My own wish list includes the following:

a) Gray market and importation. A recent case illustrates how convoluted the fact patterns can become when copyrighted goods are imported into the United States n60 In that case, the copyrighted work consisted of computer software that was used to operate an ophthalmologic laser n61 Manufacture of the software took place in the United States n62 Nonetheless, sales of the laser itself were barred because the medical technology had not yet won approval from the Food and Drug Administration n63 Accordingly, the plaintiffs sold the work abroad, only to be faced with its later importation into the United States n64

In this manner - and in countless others - puzzles remain as to how to treat the topic of parallel importation n65 I would have liked the treaty to have attempted to unravel some of these conundra. b) Forum non conveniens in international copyright litigation. Some other recent cases pose the issue of forum non conveniens.

One case presented the curious fact pattern of a costume designer

[*519] employed by the BBC, who created the memorable character "Mr. Blobby;" when dissatisfied with the character's exploitation by his erstwhile employer, Mr. Blobby's creator responded with a copyright suit n66 The distinctive feature is the forum that he chose. Notwithstanding that both he and the BBC (and presumably Mr. Blobby too) were British nationals, the plaintiff chose to sue in the Southern District of New York. The court responded by dismissing the case on grounds of forum non conveniens n67

Why on earth did this Briton choose to sue the venerable Beeb in U.S. courts in the first instance? His reasoning consisted of the availability of contingent fees under U.S. law n68 not to mention the jury system (which has gone the way of the dodo in the home of Magna Charta, insofar as civil cases are concerned).

Those desiderata led to international forum shopping. That phenomenon is not unique to this case.

In another case of similar vintage, one Singapore corporation sued another Singapore corporation over the violation of a dozen U.S. copyrights n69 Nonetheless because parallel proceedings were simultaneously pending in the courts of Singapore n70 the determination was made that this case would be better litigated there n71 Accordingly, this case also was dismissed on forum non conveniens grounds n72

These cases demonstrate the varied postures in which plaintiffs can seek favorable adjudication in courts not their own. Again, that matter of international comity would be best addressed within the framework of a treaty n73

c) National treatment as a structural matter. A key doctrine in international copyright jurisprudence is Anational treatment."

[*520] Under its strictures, courts should apply the law of the nation where infringement occurs. Therefore, a Brazilian pirate who smuggles recordings of a Nigerian musical composition surreptitiously recorded in Malta across the border from Burma to India, where they are broadcast over the radio without permission, should have his conduct gauged under the substantive rules of Indian law, rather than under those of any of the other nations cited (at least insofar as the radio broadcast itself is concerned).

As we confront the Internet, we enter a curious progression from atomic distribution carved up in geographical territory to worldwide bit diffusion. Whereas in years past it might have made sense to provide by contract that the atoms of vinyl - long-playing records - could be distributed only in the territory of the United States or Canada, a wholly new dynamic exists as a result of the worldwide profusion of Internet nodes. The bits encapsulated in the music, if available on a server anywhere, are simultaneously available everywhere.

Indeed, the situs where infringement occurs itself is increasingly no longer meaningful. In times past, that situs proved determinative as to whose laws apply. The copyright world is on the brink of a revolution in terms of application of the notion of national treatment. Surely, any forward-looking resolution of current puzzles on the Internet would address this issue as well.

d) New forms of interactive authorship. Getting even further "out there," the question arises whether the Internet will facilitate new forms of authorship that were not hitherto possible n74 For instance, a recent SIGGRAPH conference in L.A. was described to me as follows: Each member in the audience was given a wand, while supersensitive electronic equipment was calibrated to the totality of those wands. When the thousand members in the audience waved and manipulated their wands, the result was the creation of images of colors and movement on a gigantic, full-wall electronic screen.

From a copyright standpoint, what resulted? Was it graphical? Was it fixed? Was it a work of authorship? Whose?

Was it even "art"?

These questions simply adumbrate in miniature the completely unanticipated vistas that a world of interactive authorship

[*521] might show us. Most, if not all, doctrines of copyright law are destined to become inapplicable, anachronistic, or at least severely distended, in such a brave new world. For the High Priesthood of copyright to even contemplate such potentialities might require the utmost in retooling. Not surprisingly, contemplation of developments such as these was not much in evidence in Geneva.

As to the wish list outlined above, the tally is that none of these issues found themselves addressed to even the slightest degree. Instead, the treaties adopted in Geneva turned out to be somewhat "retro" in their orientation.

When we focus on the organization of the Diplomatic Conference that met to adopt the treaties, their retrospective orientation is hardly surprising; it is inherent in the organization itself. The Diplomatic Conference was comprised of nation states, not of copyright theorists. In addition, the delegates were drawn from the political branches in the various nation states that hold jurisdiction over copyright issues - not the particular governmental authority charged with regulation of the Internet. Indeed, the entire enterprise in Geneva was conceived of as a revision to the Berne Convention. The sensibilities of that international instrument stem from 1886, not even from 1986. Given that the seeds from which the Conference sprouted contained no genetic coding for a new conceptual breakthrough in intellectual property, it is clear that any hope for such breakthroughs to germinate in the underlying realities of the 1990s was rather panglossian.

As a result, the framework for applying the treaties continues to be the one formulated over a century ago. National implementing legislation will be required in each country to effectuate the treaty terms, varying exemptions may apply within each nation after adoption of these treaties just as before, and enforcement will occur on a country-by-country basis.

A. Limited Sensibilities

The debates I saw in Geneva were strictly zero-sum games. Some copyright owners would say, "We need copyright liability to extend explicitly to fieldHY, as otherwise the consequences would be too horrific to contemplate." Those copyright owners threatened that, absent adoption of norms satisfactory to them, the Internet would never carry the crown jewels within their control. To that pronouncement, some technology companies replied, "We can't afford a legal scheme that

[*522] includes liability in fieldHY, and indeed, if such a liability scheme is adopted, we will not build the infrastructure for the Internet, meaning that there will be no Internet for anyone to enjoy and all will lose."

At base, those contrasting positions violate the very ethos of the Net, which I would characterize as "give it away for free in order to make money. n75 We have seen that ethos acted out in many arenas, from the astounding growth of Netscape to the advent of Java, a programming language seemingly developed by a renegade Trotskyite arm of Sun Microsystems and currently evangelized under the banner of being given away freely n76

This last ethos represents the antithesis of Malthusian scarceness. It represents, instead, a world of frightening abundance. I am reminded of the words of Jonas Salk at the Roundtable in Multimedia convened shortly before his death. He referred to the Internet, with its worldwide heightening of consciousness through increased communication, as threatening "an epidemic of health."

Having invoked Dr.HSalk, my conclusion is that we need a comparable visionary to formulate the ethos of the Internet today. The pronouncement I await is, "We'll give you everything you want so that we can simultaneously achieve everything that we want." Even better would be to hear the words, almost beatific in their effect, "We'll give you more than you thought possible because it will cost us less!"

Lest you think I have taken violent leave of my senses, let me try to root some of these ruminations (however tenuously) in reality. One example is the system for tracking packages that Federal Express currently uses. Customers using that service in years past wanted more and better information about the status of their packages. Federal Express responded by hiring more and more customer-service representatives to dispense the needed information. Then a conceptual breakthrough took place: With the development of an appropriate web site, Federal Express could provide all information about every package. The result is that Federal Express now pays less for customer-service representatives. The customers themselves perform the work of logging on to the Net and issuing the commands to ascertain the location of their particular package, and so the customers get more. Everyone is happier.

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B. Sense of Common Enterprise

What byword was needed for the conventioners? Moving from Martin Luther, with his shades of John Calvin and Geneva, past Martin Luther King in Washington, D.C., I would like to alight on Rodney King of Los Angeles and his famous catchphrase, "People, can't we all just get along?"⁷⁷ If the copyright tide rises, all will benefit; authors will share in the cornucopia, as will content purveyors, and, equally, backbone providers, intermediaries, and every fish, big and small, all along the copyright waterfront.

This notion involves a search for cooperation. A Diplomatic Conference is often viewed as a battle royale in which some are destined to fall off their horses while others proudly march away with the ribbon. Cooperation is something profoundly different.

Cooperation emphatically exists in today's business world, co-existing in fact with cutthroat competition. What we need for the millennium of copyright to dawn is for this notion of cooperation to gain more widespread support.

VI. Future Portents

A. The Strange

1. Invoking wisdom from that great sage Yogi Berra, "The one thing I refuse to predict is the future." How strange a world can you imagine?

One world to project into the future is composed of current models extrapolated. People will still want to see *The Lion King* and *Jerry Maguire* under this view, but they may tire of the magic of a darkened hall and an immersive screen. Instead, they will wish to view those opuses⁷⁸ in the corner of a computer screen while they

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insert their own dialogue interactively and simultaneously participate in a MOO, as they check the stock quotes for their portfolio on a running ticker all the while. Does that sound plausible to you? It sounds anything but pleasurable to me, and I personally hope that such a future never dawns.

2. A separate view is to look at the Internet as a tool, not as an end in itself. Perhaps we should draw an analogy to the telephone. What was the expectation for that instrument at its outset? If you had asked Dr. H. Alexander Graham Bell the utility of his new invention, he would have told you that it would be particularly apropos for listening to music remotely from a scheduled concert in another locale. In short, he anticipated a musical performance, thus implicating copyright concerns via the use of telephone lines. He never anticipated telemarketers or even social phone calls, as no sane person in his age would stand for the intolerable rudeness of unannounced ringing in their living room
n79

Moving from the expectation for the telephone at its invention, let us talk about its possibilities. The concerts that Dr. H. Bell expected to be carried over phone lines implicate the performance right under copyright law. Faxes have been with us for over a decade. A "facsimile," of course, is simply a "reproduction." Thus, the fax machine massively implicates the reproduction right, which is the very bullseye of copyright ownership
n80

Imagine a Centrex voice mail that records messages. One could sing ditties to friends over it, which similarly would give rise to copyright concerns. In this manner, one could have expected the telephone to be a source of endless copyright litigation.

3. Turning now from possibility to experience, we have not seen any such cases over the last century. To make the point acronymically, AT&T and like RBOCs have not been SOL over POTS, according to SOP in the USA over the last century. Instead, they are concerned with the advent of this new medium, the Internet.

Now let us examine another potential future: The World Wide Web could become as ubiquitous as Ma Bell, but just as the good mother herself has not been known for being embroiled in

[*525] copyright litigation, perhaps that Internet of the future could similarly exist with nary a copyright concern. Instead, the Internet could play the role of the essential tool for communication that the telephone has served during much of our lifetimes.

3. Turning now to a separate possibility, perhaps cyberspace will become a wholly new realm. People might use it to engage in truly new forms of collaborative authorship, such as the one described a moment ago at SIGGRAPH. In such a world, we would not be guided by traditional notions under copyright law such as joint authorship and national treatment. Instead, it is possible that consensual guild rules would eventuate.

Trotter Hardy refers us back to the medieval Law Merchant which regulated the "global" commerce of its day.⁸¹ That legal development, contemporaneous with the growth of the Knights of Malta, serves as his template of what the governing law of the Internet should be. When we see the institution of a virtual magistrate to adjudicate disputes that arise in web sites, there might be a glimmer of possibility for that institution.

We need to await the reality of the proscenium arch dropping in order to appreciate what this new realm of cyberspace could bring. What will its impact be on old forms? They could simultaneously co-exist with the new, but continue to be exploited through traditional channels as new vistas of collaborative authorship arise on the Internet as a separate species of entertainment.

4. Another possibility is that the Internet will become the realm of crusaders. People who want to spread the good news of their particular point of view, rather than to make sales through advertising, might become its most notable denizens. Already, there is a lot of religion on the Internet. People who write law review articles,

[*526] to cite but one example, could probably be dismissed as crusaders of a particularly ineffectual sort n82

B. The Stranger

Among all of these models that I have proposed, which strange model will likely take off? Even before there was an Internet, I loaded a program called "Beyond Cyberpunk" onto my kids' MacintoshHLC and learned about the Church of the Subgenius. Its credo is worth noting: "If you want a rational belief system, you have to make it up."

I come from Southern California, the end of space in humanity's westward migration over the last four centuries of time - or perhaps I should characterize my home in Los Angeles as the beginning of space in new migrations from the Pacific rim to the "western" world n83 In fact, flying from there to Washington, D.C., I read an op-ed piece in the Los Angeles Times that tells it all:

I know children who are Jewish Filipinos with Iranian cousins who are married to Guatemalans. No wonder L.A. has become the true capital of America n84

C. Time and Space IV

Southern California is also often derided as the home for New Age religions and other forms of kookiness. Perhaps that explains the weird dream that visited me on the plane ride as I returned home from the Diplomatic Conference.

I dreamt about the world's worst screenplay. It dealt with a project of having 39Hpeople design World Wide Web sites. Then, it took the unbelievable twist of having them commit mass suicide because an object was flying through space, heading close to earth at this particular time n85 To be as heavy-handed as possible, the talentless screenwriter set the variables as blatantly as possible:

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First, the time was set to have these web designers take their own lives during Holy Week, that is, the week leading up to Easter Sunday.

Second, as to space, the home of these lunatics was called "Rancho Santa Fe." What does that mean? The etymology is blatant - "Santa Fe" refers to the Heavenly Faith, which for these purposes is brought down to the good old Southern California ranch n86

D. Lessons

What lessons can we derive from these various scenarios? Whatever fevered and bizarre - even apocalyptic - event we can imagine invariably turns out to be less strange than what later transpires. The simple truth is that we know today neither what the Internet of tomorrow will look like nor how it will evolve. Yet, a Diplomatic Conference, like every other phenomenon of human origin, results from adventitious circumstances of space and time.

The one that we saw in Geneva was the product of particular geopolitical forces unfurling in the space of our world at this particular time. It happens to be ironic that those forces coalesced at this most uncertain of times, before the proscenium arch has dropped, before we really know what the Internet as a medium will be, and more importantly what it wants us to be.

VII. Envoi

In any event, it is a most remarkable time, not only to be practicing copyright law, but simply to be alive n87 As we on this planet continue to hurtle through spaceH.H.H. it will be fascinating to see the new scenarios into which copyright will travelH.H.H. with the passage of time.

n1 The decision to root my own treatments of cyberspace very pointedly in geographic space stems from an overweening sense of the importance of place - it forms a small personal effort at reclaiming "awe before the real, the extraordinary source and grounding of all our human endeavors." Charlene Spretnak, *The Resurgence of the Real: Body, Nature, and Place in a Hypermodern World* 35 (1997). The "hero" of Spretnak's book is William Morris, nineteenth-century founder of the Arts and Crafts Movement (whom she transports to twenty-first-century Ohio for mythic effect). *Id.* at 187-215. In the process, she dumps not a little criticism on the world of the Internet. See, e.g., *id.* at 203 ("Abandon Hope, All Ye Who Enter" inscribed above an architectural work called the "Bill Gates"). Although there is no ready correlation between Morris's vocation and my own, his description in *Some Hints on Pattern Designing* strikes me as a remarkably apt goal for writers of law-review articles, too: "Ornamental pattern work, to be raised above the contempt of reasonable men, must possess three qualities: beauty, imagination, and order." *Id.* at 151.

n2 See John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age* (Everything You Know About Intellectual Property Is Wrong), *Wired*, Mar. 1994, at 84.

n3 See Pamela Samuelson, *The Copyright Grab*, *Wired*, Jan. 1996, at 134.

n4 See Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (1995).

n5 See Michael Dertouzos, *What Will Be: How the New World of Information Will Change Our Lives* 289 (1997).

n6 Even the meanings of these terms fluctuate as the text below uses them in various senses. "[W]e have found that the conception of space and time upon which certain non-Western languages are structured is radically different in kind from the conceptions on which familiar Indo-European languages are structured." Mark Johnson, *The Body in the Mind: The Bodily Basis of Meaning, imagination, and Reason* xiii (1987).

n7 Others have shown similar restraint. See Felipe Fernandez-Armesto, *Millennium: A History of the Last Thousand Years* (1995).

n8 See Museum of the Order of Malta (visited Apr. 18, 1998) <<http://www.isoft.ch/GuidedeGeneve/malta/home.html>>. See also The Order of Malta (visited Apr. 18, 1998) <<http://chivalricorders.org/chivalric/smom/malta.htm>>. See generally Jonathan Riley-Smith, ed., *The Oxford Illustrated History of the Crusades* 44 (1995) (color illustration of 54 Templars burned at the stake).

n9 Advancing one of the great conspiracy theories of all time, one weird book posits that the Knights simply went underground as of 1307 and have been engaging in all-powerful machinations behind the scenes for the last six centuries. See Michael Baigent, Richard Leigh & Henry Lincoln, *Holy Blood, Holy Grail* (1982) (Protocols of the Elders of Zion [sic], under this reading, is the widely misunderstood Manual of the underground organization). Perhaps it is only my own personal Rosicrucian fantasy, but I cannot escape the notion that Umberto Eco, *Foucault's Pendulum* (1989) is a direct parody of *Holy Blood, Holy Grail* (albeit less funny).

n10 See Museum of the Order of Malta, *supra* note 8. I use the locution "Our Lord," notwithstanding that, along with Bertrand Russell, I am not a Christian. See David Nimmer, *Adams and Bits: Of Jewish Kings and Copyrights*, 71 *S. Cal. L. Rev.* 219 n.** (1998). Nonetheless, I hold with "Jaroslav Pelikan, Sterling professor of history emeritus at Yale, [that] 'Jesus is too important a figure to be left only to theologians and the church.'" Edward McGlynn Gaffney Jr., *Jesus the Jew*, *L.A. Times Book Rev.*, Dec. 21, 1997, at 6.

n11 Nimmer, *supra* note 10 is my extended ode on the subject.

n12 See Jerry Mander, *Four Arguments for the Elimination of Television* (1977).

n13 See Daniel J. Boorstin, *The Discoverers: A History of Man's Search to Know His World and Himself* 521 (1983).

n14 Instead of regaling the audience with stories about his Hitchhiker's Guide to the Galaxy (1979), Adams instead delivered an address there about computer models in evolutionary biology. His point was that the overly robust growth of a species leads to extinction, whereas more modest growth could lead to that species' prospering. He thereupon concluded that individual death constitutes a savvy strategy towards collective eternal life.

n15 See David R. Johnson & David Post, Law and Borders- The Rise of Law in Cyberspace, 48 *Stan. L. Rev.* 1367, 1384-85 (1996).

n16 See *King v. Mister Maestro, Inc.*, 224 *F. Supp.* 101 (S.D.N.Y. 1963) (alleging copyright infringement in famous "I Have a Dream" speech).

n17 amish Sandison, The Berne Convention and the Universal Copyright Convention: The American Experience, 11 *Colum.-VLA J.L. & Arts* 89, 92 (1986) (citing Letter from Charles Dickens to John Foster (Feb. 24, 1842), reprinted in Dickens on America & the Americans 75 (M. Slater ed. 1978). See William P. Alford, To Steal a Book Is an Elegant Offense: Intellectual Property in Chinese Civilization 130 (1995) (A Christmas Carol offered for sale in the U.S. for 64 as opposed to \$ 2.50 in Great Britain).

n18 See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright 17.01[B][1] (rel. no. 44, Dec. 1997) (hereinafter Nimmer on Copyright).

n19 See David Nimmer, The Impact of Berne on United States Copyright Law, 8 *Cardozo Arts & Enter. L.J.* 27 (1989).

n20 The names "Melvin" - and, derivatively, "Melville" - come from the Celtic for "High Protector."

n21 See Mihaly Ficsor, Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument, in *The Future of Copyright in a Digital Environment* 111 (P. Bernt Hugenholtz, ed., 1996).

n22 See *infra* note 30.

n23 Pamela Samuelson, The U.S. Digital Agenda at WIPO, 37 *Va. J. Int'l L.* 369, 380 (1997).

n24 The Web originated with Tim Berners-Lee at CERN, the European Laboratory for Particle Physics, in 1990," (visited Apr. 18, 1998) <<http://info.cern.ch/httpd 3.0/>>.

n25 See generally Mark J. Stefik, Internet Dreams: Archetypes, Myths, and Metaphors 224-38 (1996).

n26 Evan Thomas, The Goal: A Landslide - Reagan Pads His Margin While Mondale Tries To Buffer His Party, *Time*, Nov. 5, 1984 at 18. The quotation actually derives from John Winthrop, speaking in 1630 of "A Model of Christian Charity," a sermon delivered on board the Arabella.

n27 There can be no better exemplar than a recent ad placed by Barnes and Noble (or, more precisely, <<http://www.barnesandnoble.com>>) in a recent issue of *Wired* magazine. The full-page ad features six titles focused exclusively on software and the Internet, collected under the caption "Read Less. Learn More." *Wired*, December 1997, at 109.

n28 Dave Hickey, *Air Guitar: Essays on Art & Democracy* 68 (1997).

n29 Resentment of American domination is giving rise to countermeasures: While the French are beginning to take the Internet and the Web to their hearts, French industry and the country's government are becoming increasingly critical of that they see as the "American hegemony" over the Internet. French government and industry, arguing that Internet is now global, wants a much bigger say for itself and other countries in the management of this aspect of the Web. Alan Tillier, *French Organize Resistance to U.S. Net Plans*, *TECHWEB NEWS* (Mar. 10, 1998)
<<http://www.techweb.com/wire/story/domnam/TWB19980310S0012>>.

n30 One recent survey notes that 58% of "Internet hosts" were located in the United States as of January, 1997. Win Treese, *The Internet Index*, (compiled Oct. 10, 1997)
<<http://www.openmarket.com/intindex/>>

n31 See David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 *Harv. J.L. & Tech.* 1, 4 n.9 (1996).

n32 Cf. Keith Aoki, (Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship, 48 *Stan. L. Rev.* 1293, 1298 (1996).

n33 I show my bias here in modeling the United States as the most "modern" nation. In fact, the condition that I posit "reflects a central bias of modernity: economism, the tendency in modern societies to regard economics as the fundamental determinant of everything else." Spretnak, *supra* note 1, at 40.

n34 See Francis Fukuyama, *The End of History and the Last Man* (1992).

n35 See 3 Nimmer on Copyright, *supra* note 18 at 8D.01[A].

n36 See generally Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283, 336 (1996).

n37 See generally James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (1996).

n38 See generally Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 *Cardozo Arts & Enter. L.J.* 279 (1992); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 *Cardozo Arts & Enter. L.J.* 293 (1992).

n39 Cf. Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (1991).

n40 The Islamic Republic of Iran duly sent its delegate to sit in his spot in French alphabetical order.

n41 See 3 Nimmer on Copyright, *supra* note 18 at 8D.02[D][1].

n42 See 1 Nimmer on Copyright, *supra* note 18 at 5.03.

n43 See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 *Va. J. Int'l L.* 369, 371 (1997).

n44 See Paul Edward Geller, *French High Court Remands Huston Colorization Case*, 39 *J. Copyright Soc'y* 252 (1992); Andr Lucas & Robert Plaisant, *France*, in 2

International Copyright Law and Practice 7[1][c][ii] & 7[4][a] (Paul Edward Geller gen. ed., 1997) (originally edited by Melville B. Nimmer and Paul Edward Geller).

n45 Nimmer, A Tale of Two Treaties, *supra* note **, at 23.

n46 See Lawrence A. Beyer, Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights, *82 Nw. U. L. Rev.* 1011 (1988).

n47 Robb, SAG and AFTRA Faces WIPO-Out, *The Hollywood Reporter*, Feb. 4, 1997, at 1.

n48 The same tension between trade and cultural protectionism plays itself out in the otherwise largely untroubled alliance between the United States and Canada. See Trading Shots, *Hollywood Rep., Weekly Int'l Ed.*, Nov. 25, 1997, at 16-17.

n49 For an analysis of cultural protection policies as they relate to the development of international copyright doctrine, see Neil W. Netanel, Asserting Copyright's Democratic Principles in the Global Arena, *51 Vand. L. Rev.* 217 (1998). One should also keep in mind the warning that "cultural homogenization . . . might . . . turn the world into a much less stimulating environment." 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, 306-7 (1997).

n50 The power of place has already been noted. See *supra* note 1. In addition, body is another hallmark of the real. See generally Spretnak, *supra* note 1. The combination of body and place, which underlies presence or "being there," may thus be conceived as hyperreal.

n51 By that time, undoubtedly googols of dollars will be imminently due to solve the "Year 3000 problem."

n52 Though I already made the point in Nimmer, *supra* note 31, at 3 n.7, I cannot resist elaborating upon it here.

n53 The basic proposal from the EU was as follows: [T]he European Community and its Member States would like to restate that no extra or additional vote for the EC is being requested. The idea is that the EC should be able to vote, in place of its Member States, on matters that are within its exclusive competence. This is the logical consequence of the EC having its own legal status under international law and having exclusive competence over a number of the issues which will be covered by the future treaties. In no case will the votes exercised by the Community and its Member States exceed the total number of its member States party to the treaties. Communication by the European Commission (visited Apr. 18, 1998)
<<http://www.wipo.org/eng/diplconf/distrib/7dc.htm>>.

n54 The US-authored compromise that the Convention adopted was that: The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that . . . (ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote. Proposed Amendment to Rules 2(2) and 33 of the Draft

Rules of Procedure (visited Apr. 18, 1998)
<<http://www.wipo.org/eng/diplconf/distrib/8dc.htm>> (emphasis added).

n55 In that spirit, Gerardus Mercator and Martin Waldseemüller are the focal point of the final installment of this triptych. See *supra* note **.

n56 Nimmer, *A Tale of Two Treaties*, *supra* note **.

n57 Amendment to Article 7 of Draft Treaty No. 1 and to Articles 7 and 14 of Draft Treaty No. 2 (visited Apr. 18, 1998) <<http://www.wipo.org/eng/diplconf/distrib/22dc.htm>>.

n58 Cf. Jane Jacobs, *Systems of Survival: A Dialogue on the Moral Foundations of Commerce and Politics* 155-57 (1992).

n59 Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 *Va. J. Int'l L.* 369, 393 n.135 (1997).

n60 *Summit Tech., Inc. v. High-Line Medical Instrs. Co.*, 922 *F. Supp.* 299 (C.D. Cal. 1996).

n61 *Id.* at 301.

n62 *Id.* at 313.

n63 *Id.*

n64 *Id.*

n65 The United States Supreme Court has offered some guidance in this realm. See *L'Anza Research Int'l, Inc. v. Quality King Distribs., Inc.*, 118 *S. Ct.* 1125, 45 *U.S.P.Q.2d* (BNA) 1961 (1998) (holding that the first sale doctrine allows one to purchase U.S.-made copyright-protected products abroad and then resell them inside the United States, even when such resale undercuts the domestic marketing strategy of the manufacturer and original seller).

n66 *Murray v. British Broadcasting Corp.*, 81 *F.3d* 287, 38 *U.S.P.Q.2d* (BNA) 1405 (2d Cir. 1996).

n67 *Id.* at 289, 38 *U.S.P.Q.2d* (BNA) at 1406.

n68 *Id.* at 292, 38 *U.S.P.Q.2d* (BNA) at 1409.

n69 *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 *F.3d* 696, 35 *U.S.P.Q.2d* (BNA) 1590 (9th Cir. 1995).

n70 *Id.* at 699, 35 *U.S.P.Q.2d* at 1591.

n71 *Id.* at 704, 35 *U.S.P.Q.2d* at 1596.

n72 For more on this doctrine, see Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 *Va. J. Int'l L.* 505, 579-80 (1997); Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 *Va. J. Int'l L.* 587, 593-94 (1997).

n73 See 4 Nimmer on Copyright, *supra* note 18 at 17.03, 17.05.

n74 See Pamela Samuelson, Some New Kinds of Authorship Made Possible by Computers and Some Intellectual Property Questions They Raise, *53 U. Pitt. L. Rev.* 685 (1992).

n75 Johnson & Post, *supra* note 15, at 1384-85.

n76 As long as we are on the subject of Sun in the context of the current religious meditation about the Internet, it is worth noting that Sun Microsystems itself, in a two-page spread, recently deemed it fit to proclaim, "Religions split us." *Wired*, Jan. 1998, at 24.

n77 Videotapes of the Rodney King beating led to a trial of police officers in which they were acquitted, which in turn caused riots and new beatings, which were in turn videotaped. The end result was copyright litigation. See *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 42 U.S.P.Q.2d (BNA) 1080 (9th Cir. 1997); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 942 F. Supp. 1265, 40 U.S.P.Q.2d (BNA) 1592 (C.D. Cal. 1996); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 942 F. Supp. 1275 (C.D. Cal. 1996); *Los Angeles News Serv. v. Conus Communications Co.*, 969 F. Supp. 579 (C.D. Cal. 1997).

n78 Actually, the Latin plural of "opus" is "opera." But if I used that word in the text to characterize The Lion King and Jerry Maguire, it would seem an act of *l se majest* to the Rodney Gilfreys and Carol Vanesses of the world.

n79 See Lawrence Lessig, The Path of Cyberlaw, *104 Yale L.J.* 1743, 1747 n.13 (1995) (citing Michael et al., The Complete Survival Guide to the Information Super Highway, 224 *Popular Sci.*, May 1994, at 97, 100).

n80 See 2 Nimmer on Copyright, *supra* note 18 at 8.02-8.08.

n81 I. Trotter Hardy, The Proper Legal Regime for "Cyberspace," *55 U. Pitt. L. Rev.* 993, 1019 (1994). Why reach back to antique laws for lessons in cyberspace? And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time mis-employed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, without having recourse to the antient. William Blackstone, *Commentaries on the Laws of England - Book the Second*, at 44 (1753).

n82 See *47 Stan. L. Rev.* 1117ff. (1995) (special issue on Law Review Conference); Louise Harmon, Law, Art, and the Killing Jar, *79 Iowa L. Rev.* 367, 399 (1994).

n83 See Fernandez-Armesto, *supra* note 7, at 601ff.

n84 Richard Rodriguez, Perspective on Los Angeles: Letter From 2042, an L.A. Memory, *L.A. Times*, Apr. 27, 1997, at M5.

n85 Group Awaited Spacecraft Behind Comet; Members Designed Web Sites, Saw Hale-Bopp as "Marker" to Trip "Home," *Washington Post*, Mar. 28, 1997, at A1.

n86 Richard Rodriguez, End of the Line, Minneapolis Star Tribune, April 3, 1997 at 18A (concluding that "this is not religion. It is the expression of despair in our technological age.")

n87 Bliss was it in that dawn to be alive But to be young was very Heaven! William Wordsworth, The Prelude, quoted in Spretnak, supra note 1, at 140.