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Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?**

In a village marketplace, where food and wares are exchanged, the law need only decide disputes about what is my property and what is yours. In the global marketplace, where technological innovations and media creations are exploited, the situation becomes far more complex. There, national and international laws draw purely conceptual boundaries around industrial as well as literary and artistic properties. If courts vacillate in choosing and applying such laws, we become unsure of what we are buying and selling.

Since the nineteenth century, the Paris and Berne Conventions have governed the choice of intellectual property laws. This Paris-Berne regime brought reliability to a marketplace that spread outwards from Europe to most of the world. Now, at the end of our twentieth century, negotiations under the General Agreement on Tariffs and Trade (GATT) have resulted in an Agreement on Trade-Related Aspects of Intellectual Property, so-called TRIPS. Hence the question I propose to examine with you today: How might the TRIPS Agreement be best applied to intellectual property in the global marketplace?¹

Paris and Berne provisions, along with those of related treaties, are incorporated

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1. Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, Dec. 15, 1993, GATT Doc. MTN/FA II-A1C [hereinafter TRIPS Agreement], *reprinted* in 33 I.L.M. 81 (1994) and in 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 209 (1994).

into the TRIPS Agreement to establish its most basic standards.² Thus, at the heart of our question, we find another: How does the Paris-Berne regime relate to the TRIPS Agreement? I shall accordingly analyze the TRIPS initiative in three steps: First, I shall take stock of the crisis which the Paris-Berne regime has been undergoing. Second, I shall critique the TRIPS Agreement as, at best, a partial and problematic response to this crisis.³ Third, I shall ask how to interpret abstract Paris-Berne terms, which set TRIPS standards, in the face of this crisis.

I. The Crisis in the Paris-Berne Regime

The present crisis started with the best of intentions. Lawmakers have been responding to progress in technology and the media with new rights of intellectual property. On the one hand, lawmakers seek to encourage investment by protecting innovation and creation; on the other, they seek to keep competition open by avoiding overbroad statutory monopolies. In isolation, each new right might well aim at a healthy, local marketplace; however, as Professor Reichman has shown, the proliferation of such rights now threatens intellectual property in the global marketplace.⁴

Consider rights in designs of integrated circuits used in semiconductor chips. Pioneering such "chip rights," the United States had to decide on what basis to extend them to foreign designs. It demanded reciprocity, requiring that other countries protect designs from the United States on substantially the same basis of protection as its own law assured. Fellow members of the Paris Union, that is, other countries adhering to the Paris Convention, could have responded: "These chip rights protect a kind of electronic utility model, or at least they entitle owners to remedies against unfair competition. Since, in either event, they constitute industrial property in the broad sense, under the Paris Convention they are subject to national treatment." No such challenge was successfully made, and we now live with the fait accompli that this new right stands outside the classic Paris-Berne regime.⁵

2. See *id.* arts. 2, 9, 35. The TRIPS Agreement refers only to the Paris Convention for the Protection of Industrial Property in its Stockholm Act of 1967 [hereinafter Paris Convention], and to the Berne Convention for the Protection of Literary and Artistic Works in its Paris Act of 1971 [hereinafter Berne Convention], reprinted respectively in 3 SOURCES OF INTERNATIONAL UNIFORM LAW E325 and E301 (Konrad Zweigert & Jan Köpholler eds., 1973).

3. For an analysis of resulting tensions, see J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 171 (1993) [hereinafter Reichman, *TRIPS Component*].

4. See J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. (forthcoming 1994). See also Paul Edward Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J. LAW & ARTS 461, 464-67 (1993) (proliferation of copyright-related entitlements endangers international regime).

5. See Thomas Dreier, *National Treatment, Reciprocity and Retorsion—The Case of Computer Programs and Integrated Circuits*, in GATT OR W.I.P.O.? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 63, 70-73 (Friedrich-Karl Beier & Gerhard Schricker eds., 1989) [hereinafter GATT OR W.I.P.O.?].

What happens when a right falls outside this regime? We see, in the foregoing example of chip rights, the temptation to regress to a primitive type of reciprocity, namely material reciprocity. Before the Paris and Berne Conventions, countries often said to each other: "I shall grant rights in innovations or creations originating in your country if, or to the extent, you grant them in those from mine." Accordingly, for competing technological innovations or media creations, a country could grant different levels of protection, depending on the respective countries of origin of these innovations or creations. As a result, the value of such competing intellectual products might vary on this country's marketplace, as well as between national markets, depending on their respective countries of origin. Of course, if enough countries agree, it is always possible for them together to retrace the steps taken in the Paris and Berne Unions to achieve national treatment. Granting national treatment, each member of such a union applies its own law to the same intellectual products originating anywhere else in the union.⁶

I must now attack a widely accepted theory: the territoriality of intellectual property. There are more and more cases in which it is difficult to localize the origin or the infringement of intellectual property territorially.⁷ Research teams increasingly develop inventions by collaborating in many countries at the same time within the framework of multinational corporations or consortiums. Authors increasingly collaborate within worldwide telecommunication networks, creating works that are in turn susceptible of instantaneous dissemination throughout such networks. The difficulty is illustrated by the case in which the Nike company wanted to have its trademark attached to the clothing worn by Olympic athletes in Barcelona in 1992. A Spanish claimant had previously registered the name "Nike" as a trademark in Spain and sued to prevent the Nike Company from using this name in Barcelona. National treatment results in subjecting Nike to prior registration in Spain, just as it would any Spanish national. But should this purely territorial priority preclude disseminating a trademark worldwide? That was, in any event, where Nike wanted its mark televised from the Olympics.⁸

The increasing difficulty of localizing such facts territory by territory has manifold consequences. Reciprocity, if it limits protection to the level established

6. For accounts of progress from material reciprocity to national treatment, see 1 STEPHEN P. LADAS, *PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION* chs. 3-11 (1975); SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* chs. 1-3 (1987).

7. For difficult patent and copyright cases, respectively, see Dieter Stauder, *Patent Infringement in Export Trade—The Vulnerable Combination Patent*, 3 INT'L REV. INDUS. PROP. & COPYRIGHT L. 491 (1972) and *Patent Protection in Extraterritorial Areas (Continental Shelf, High Seas, Air Space, and Outer Space)*, 7 INT'L REV. INDUS. PROP. & COPYRIGHT L. 470 (1976); Paul Edward Geller, *International Copyright: An Introduction* § 3[1][b], in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller & Melville B. Nimmer eds., 1994).

8. Ultimately, the case was decided on other grounds, notably the cancellation of the prior Spanish registration of a "Nike" mark. Appeal 325/91, *America Nike v. Amigo*, Judgment of Dec. 10, 1993, Juzgado de Primera Instancia no. 9, Sección 1 (Court of first instance), Barcelona, Spain.

in a country of origin, requires localizing the fact of innovation, creation, or first use in that country. If that fact takes place across national borders, for example, because of coproduction in many countries, selecting any one country of origin will at least partially result in a legal fiction. Further, to determine in what country to claim national treatment relative to rights of intellectual property, it is necessary to ascertain in what national territory to localize infringement of such property. Suppose, for example, that a pirate inputs a literary or artistic work into a worldwide telecommunication network without consent: the copyright owner might not be sure in which country or countries to assert infringement claims—at points of input or access in the network, or both.⁹ Finally, the judge might hesitate in deciding which country's or countries' laws to choose to determine rights enforceable at such points. All these Gordian knots may be cut by imposing much the same rights for any given property across many countries at once. This the Paris and Berne Conventions began to do in establishing minimum rights for intellectual properties.¹⁰

Now, in practice, Europe is solving these problems within its Internal Market. No doubt, harmonizing intellectual property and choice-of-law rules helps to build a trading bloc, but not necessarily to integrate that bloc into the global marketplace. The United States has from the start applied federal patent and copyright laws, and more recently trademark law, across a continent-wide market, but it has only begun to conform its copyright and trademark laws to worldwide models in the last two decades.¹¹ The European Community (E.C.) need no longer look to the Paris or Berne revision processes to harmonize the laws of intellectual property within its Internal Market, since it is itself effectuating that goal with the European patent system and Council directives relative to trademark and copyright. E.C. case law has also begun to moot the operation of the Paris-Berne regime as between E.C. Member States by confirming that E.C. nationals obtain full national treatment without reliance on any intellectual property convention.¹²

Recall, too, that European nation-states originally brought their colonial empires into the Paris and Berne Unions. In this century, former European colonies

9. See Paul Edward Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 54, 55-56 (1994) [hereinafter Geller, *The Universal Electronic Archive*].

10. See I LADAS, *supra* note 6, at 233, 272-75; RICKETSON, *supra* note 6, at 142-43, 367-69.

11. See, e.g., Copyright Act, 17 U.S.C. §§ 106A, 302, 401-412 (1993) (moral rights for visual artists, life-plus-fifty year general term of duration, and optional rather than mandatory formalities introduced into copyright law); Trademark (Lanham) Act, 15 U.S.C. §§ 1051(b)-(d), 1057(c) (1993) (intent-to-use application allowed for registration, which constitutes constructive use of trademark nationwide).

12. See Joined Cases C-92/92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft mbH*, Judgment of Oct. 20, 1993, E.C. Court of Justice, [1993] 3 C.M.L.R. 773. Cf. Joined cases T-70/89, T-69/89, and T-76/89, *Independent Television Publications, Ltd. v. Community Commission*, Judgment of July 10, 1991, E.C. Court of First Instance, [1991] 4 C.M.L.R. 745, 773-76 (*Magill TV Guide*) (dictum that, were it to conflict with Berne Convention, E.C. law would prevail between E.C. Member States).

began to doubt that improving the Paris-Berne regime served their interests. Thus North-South tensions preceded those now starting to arise between different sides of the Atlantic, not to mention the nascent economic powers of the Far East.¹³

This brings me to my central concern: How should we respond to this crisis—I am tempted to say, this Balkanization—of the international regime of intellectual property?

II. Reglobalization in the TRIPS Agreement?

In December of last year, the Uruguay Round of the GATT negotiations finally concluded. The Final Act included the Agreement on Trade-Related Aspects of Intellectual Property. This TRIPS Agreement attempts to reglobalize the international regime in many ways. It is intended to bind most countries, cover much of the field of intellectual property, and mandate sanctions for failures to meet its terms. My qualifiers, like “most” countries and “much” of the field, nonetheless betray the incomplete success of this initiative.¹⁴

The TRIPS Agreement does fill some gaps in the Paris-Berne regime. For example, it fills the gap relative to designs of integrated circuits with provisions from another treaty.¹⁵ Note that I use the English term “gaps” in the law more broadly than I might, for example, the Latin word *lacuna* or the French *lacune*. By this term I mean any and all open points of law, even those deriving from problematic, basic concepts such as territoriality. The TRIPS Agreement does not constitute a wholly new regime systematically filling all the gaps left open from the old regime. Rather, it patches together Paris and Berne notions—like spare parts salvaged from obsolete machines—with improvised trade devices. To illustrate how the TRIPS Agreement mixes different types of conceptual machinery, I shall evoke Descartes as a parallel to Professor Petersmann’s reference to Hobbes.¹⁶

On the one hand, the Paris and Berne Conventions both protect abstract, intellectual products—Cartesian products, if you will—of private subjects. These con-

13. See GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 93 (1992) (TRIPS negotiations shift “from a North-South to a North-North confrontation”).

14. Compare Jörg Reinbothe & Anthony Howard, *The State of Play in the Negotiations on TRIPS (GATT/Uruguay Round)*, 13 EUR. INTEL. PROP. REV. 157, 158 (1991) (TRIPS goal of “a comprehensive agreement on all internationally important aspects of intellectual property protection”) with Reichman, *TRIPS Component*, *supra* note 3, at 179-80 (final TRIPS draft displays subsisting “untried, stopgap provisions, a few serious lacunae, and lots of loopholes”).

15. See TRIPS Agreement, *supra* note 1, art. 35 (Washington Treaty on Intellectual Property in Respect of Integrated Circuits).

16. See Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trading System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems*, in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 33, 51 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988) (“International trade rules find their reason in the desire of people to transform the Hobbesian war of each against all into mutually beneficial cooperation and to increase their individual and national welfare through international trade.”).

ventions constitute a regime of private international law to ensure respect for property interests in these products across national borders. On the other hand, the World Trade Organization (W.T.O.), in administering the TRIPS Agreement, among others, will maintain a truce in an all-too concrete, Hobbesian war of each against all.¹⁷ In this regime of public international law, W.T.O. members try to supplant trade wars across national borders with an extended truce; however, if one member breaches this truce vis-à-vis another, and fails to settle any resulting dispute, it opens the way to new warlike measures against itself. We now come to the theoretical heart of the problem: Paris, Berne, and related treaty provisions need not always mean the same thing in the abstract Cartesian universe of intellectual property as in the concrete Hobbesian world of trade wars and truces. In practice, domestic courts have interpreted the Paris-Berne regime, but only in cases between private parties, while TRIPS panels will apply Paris and Berne provisions in the TRIPS Agreement to disputes between public entities, that is, W.T.O. members. Domestic courts could construe Paris-Berne obligations differently than do TRIPS panels, resulting in jurisprudential schizophrenia between the private and public international laws of intellectual property.¹⁸

Where is the source of such schizophrenia? It is not necessarily the distinction between private and public international laws. In principle, private and public international laws can reinforce each other, much like laminated sheets in plywood.¹⁹ A liberal system of private international law assures private parties of property rights in which they may freely trade across national borders. A liberal system of public international law, like the GATT, precludes nation-states from taking measures to restrain that freedom to trade in tangible goods at their own borders. The TRIPS Agreement coordinates these aims a bit differently, since it obligates W.T.O. members to undertake measures to protect property interests in intangibles both within and at their own borders.²⁰ Nor does the danger of schizophrenia lie in the minimal rationale for protecting intellectual property at these points: technological innovations and media creations must at least be protected against misappropriation to assure some stable marketplace for them. To

17. For examples of pre-GATT trade wars, see WINHAM, *supra* note 13, ch. 2.

18. The dichotomy could also be jurisdictional. In principle, the International Court of Justice (I.C.J.) may hear disputes between Paris or Berne members concerning "the interpretation or application" of Paris or Berne provisions. See Paris Convention, *supra* note 2, art. 28(1); Berne Convention, *supra* note 2, art. 33(1). It is, however, not clear whether this power of review extends to TRIPS readings of such provisions. Cf. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 91 (1989) [hereinafter JACKSON, *THE WORLD TRADING SYSTEM*] (I.C.J. perhaps without power to review "internal GATT interpretative processes").

19. See Petersmann, *supra* note 16, at 38. Note that private interests are often at stake in cases of public international law. See HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW IN THE INTERNATIONAL COURT* 31-33 (rev. ed. 1958).

20. Cf. J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks in a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 806-11 (1989) [hereinafter Reichman, *GATT Connection*] (any distinction between protecting foreigners' tangible and intangible property interests no longer makes sense in a rapidly integrating world market).

go back to my introductory example of the village marketplace, if passers-by did not respect property there, if they could pick up goods and walk away with them at will, no one would come to trade at that marketplace.²¹ The TRIPS Agreement accordingly imposes measures that, at a minimum, are intended to prevent pirates from raiding intellectual property anywhere in the global marketplace. Our danger rather arises out of the difficulty of fashioning rights of intellectual property at optimum levels to encourage investment without obstructing competition. Such rights should, to quote Professor Lehmann, serve as "restrictions in competition in order to promote competition."²²

This analysis suggests a distinction that might help delimit TRIPS decision-making powers. It is one thing to fill gaps in the global fabric of protection, notably gaps in which pirates find havens. It is quite another thing to fill gaps between the levels of protection already legislated into national laws and international treaties.²³ The TRIPS negotiators did not reinvent the wheel with regard to such levels of protection; they built upon the consensus which the Paris-Berne regime represented. Nonetheless, we would do well to ask just what the TRIPS consensus fixed: Is it confined to categories of rights which the TRIPS Agreement enumerates, or does it systematically embrace Paris-Berne principles for adjusting levels of protection in the future?²⁴ This question is critical for knowing how far TRIPS panels may go in resolving disputes between W.T.O. members, as well as the principles that might guide them on the way. Confined to standards that represent intellectual property at present levels, TRIPS panels may have to acquiesce in many gaps left in the present state of the law. The Paris and Berne Conventions share the same choice-of-law principles for adjusting protection in the future: national treatment bolstered by minimum rights. The GATT offered the comparable, if not stronger principle of most-favored-nation treatment, which

21. For this rationale in the TRIPS initiative, see Jacques J. Gorlin, *GATT—A View from the United States*, 5 CANADIAN INTEL. PROP. REV. 275 (1989). For a skeptical analysis of the possibility of disentangling this rationale from others relating to levels of protection, see Friedl Weiss, *TRIPS in Search of an Itinerary: Trade Related Intellectual Property Rights and the Uruguay Round Negotiations*, in LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT 87, 91-98 (Giorgio Sacerdoti ed., 1990).

22. Michael Lehmann, *The Theory of Property Rights and the Protection of Intellectual and Industrial Property*, 16 INT'L REV. INDUS. PROP. & COPYRIGHT L. 525 (1985). For an analysis indicating the difficulty of determining trade effects of different levels of rights, see Keith E. Maskus & Denise Eby Konan, *Trade-Related Intellectual Property Rights: Issues and Exploratory Results*, in ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM 401 (Alan V. Deardorff & Robert M. Stern eds., 1994).

23. Cf. Hanns Ulrich, *GATT: Industrial Property Protection, Fair Trade and Development*, in GATT OR W.I.P.O.?, *supra* note 5, at 129, 146-59 (risks in TRIPS process of leveling international protection across diversely situated national circumstances).

24. This ambivalence afflicting the entire TRIPS Agreement is betrayed in its cryptic footnote 3: "For the purposes of Articles 3 and 4 of this Agreement, protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement." TRIPS Agreement, *supra* note 1, art. 3.

was devised for trade cases. The TRIPS Agreement applies all these principles, but neither clearly nor coherently across the field of intellectual property.²⁵

Turn now to gaps endemic to the Paris-Berne regime which the TRIPS Agreement largely, if not altogether, incorporates. The most obvious set of gaps arises because Paris and Berne provisions establishing minimum rights are subject to varying readings. Commentators have noted the open texture of such Paris and Berne rights: some are mandatory; some may be implemented with varying degrees of discretion; and some are altogether optional.²⁶ However, to this point, only national courts have construed these rights, deciding which ones are mandatory and to what extent national legislators or courts themselves have discretion in formulating the other rights or fashioning remedies for them. For example, national courts have had to decide how to interpret the rather shadowy language which, in article 10*bis* of the Paris Convention, assures relief against unfair competition in an open-ended range of cases.²⁷ National courts may, of course, refer to the often-rich jurisprudence of their own constitutional and private international laws in applying international Paris and Berne provisions to diverse cases. The TRIPS Agreement in itself provides no such background against which TRIPS panels may understand the Paris and Berne minimum rights that it incorporates.²⁸

I have already spoken of material reciprocity as the choice-of-law principle predating that of national treatment bolstered by minimum rights. Both material reciprocity and national treatment, I also noted, presuppose the old doctrine that intellectual property originates, and is enforced, territory by territory.²⁹ Not only does the TRIPS Agreement incorporate such territorial premises as the Paris-

25. Compare *id.* arts. 1(2) (covers "categories of intellectual property that are the subject of Sections 1 to 7 of Part II"), 3(1), and 4(c) (national and most-favored-nation treatment excluded for neighboring rights not "provided under this Agreement") with Paris Convention, *supra* note 2, arts. 1(3), 2(1) (national treatment for industrial property "understood in the broadest sense" with respect to "advantages" that laws "now grant, or may hereafter grant") and Berne Convention, *supra* note 2, art. 5(1) (such treatment for author's rights that laws "do now or may hereafter grant"). For commentary on applying GATT principles to copyright, see JOSEF DREXL, ENTWICKLUNGSMÖGLICHKEITEN DES URHEBERRECHTS IM RAHMEN DES GATT pt. 3 (1990).

26. See generally G.H.C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 11-16 (1968) (Paris rights); WILHELM NORDEMANN, KAI VINCK, PAUL W. HERTIN, & GERALD MEYER, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW: COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY 16-17 (R. Livingston trans., 1990) (Berne rights).

27. See, e.g., Case 3008, *Établissements J. Pansu et Cie. v. Tessitura Meccanica Jacquard Fli. Limonta*, Judgment of Oct. 25, 1971, Corte di Cassazione (Supreme Court), Italy, GIUR. IT., pt. 1, § 1, 67, translated in 3 INT'L REV. INDUS. PROP. & COPYRIGHT L. 524 (1972) (slavish copying actionable as unfair competition even where product copied is initially marketed outside territory where it is copied); *Wells Fargo v. Wells Fargo Express Co. AG*, Vaduz, Judgment of Sept. 22, 1977, Supreme Court, Liechtenstein, translated in 11 INT'L REV. INDUS. PROP. & COPYRIGHT L. 531 (1980) (protection against unfair competition includes relief against misleading filing of well-known trademark).

28. See Paul Edward Geller, *Can the GATT Incorporate Berne Whole?*, 12 EUR. INTELL. PROP. REV. 423 (1990) [hereinafter Geller, *Can the GATT Incorporate Berne Whole?*].

29. See *supra* text accompanying notes 5-10.

Berne regime brings with it, but it still bears traces of comparable premises in the GATT, which above all concerned trade in tangible goods that can always be located territorially, at given spots on this earth. The TRIPS Agreement effectively devotes many provisions to the old problem of controlling the traffic in infringing goods moving from one national territory to another. This perspective, however, is not necessarily always appropriate to more volatile forms of trade in intangibles, such as commerce in intellectual property or in services.³⁰

A purely territorial approach will not help us to confront the reality of the twenty-first century. Already today, the Internet is where prior art, relevant for determining the novelty of inventions, might be aired worldwide. The Nike example, which I invoked earlier, illustrates how telecommunication allows trade and service marks to be used in transborder marketing campaigns. Unlike the TRIPS Agreement, the North American Free Trade Agreement (NAFTA) at least contemplates sanctions against pirate decoders of encoded satellite signals carrying copyright materials across borders.³¹

The TRIPS Agreement, in hesitating on the threshold of the coming century, leaves us with the questions: How may it be adapted to this future, which will soon be upon us? To that end, may TRIPS panels fill gaps in the TRIPS Agreement, notably those inherited from the Paris-Berne regime? To the extent a panel may do so, how should it proceed?

III. An Approach to TRIPS Dispute Settlement

In the short run, TRIPS panels are to deal with disputes; in the long run, the TRIPS Council is charged with reviewing the TRIPS Agreement.³² I wish to focus on dispute settlement, concluding with a speculative word on possible consequences of this process for revising the TRIPS Agreement itself or related treaties. To that end, I shall ask whether, and how, TRIPS panels may fill gaps in relevant law, especially gaps now breaking up the Paris-Berne regime.³³ Bear in mind that W.T.O. members with nascent intellectual property disputes will have a vital interest in even the hypothetical scope of TRIPS decision-making

30. Compare Detlev Witt, *Free Trade in Telecommunications Services Under the GATT*, in *LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT*, *supra* note 21, at 133, 140-49 (International Telecommunication Union, segmenting market along territorial lines, in tension with GATT most-favored-nation treatment with "extraterritorial" reach) with Mary E. Footer, *GATT and the Multilateral Regulation of Banking Services*, 27 *INT'L LAW.* 343, 357-59 (1993) (difficulty of applying notions such as "commercial presence" in "global market environment").

31. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1707 [hereinafter NAFTA] available in WESTLAW, NAFTA file.

32. See TRIPS Agreement, *supra* note 1, arts. 64, 71.

33. For a critical analysis of dispute settlement generally, see Robert E. Hudec, *Dispute Settlement*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 180 (Jeffrey J. Schott ed., 1990).

powers. Indeed, they will negotiate their disputes in the light of decisions such as they expect TRIPS panels to make.³⁴

This scope may be measured from opposing standpoints. On the one hand, a minimalist would argue that TRIPS panels have no powers to fill gaps in the law. This view finds support in the Dispute-Settlement Understanding³⁵ which, in article 3(2), states that such panels "cannot add to or diminish the rights and obligations provided in the covered agreements." This language would confirm the minimalist interpretation limiting panels to rights that the TRIPS Agreement specifically incorporates or enumerates, subject to minor adjustments to the circumstances of each case.³⁶ On the other hand, a maximalist would argue that TRIPS panels are mandated to fill gaps that leave present law uncertain, absent which these panels might fail to bring, in the words of the provision I just cited, "security and predictability to the multilateral trading system." This language might prompt the maximalist to compare the prohibition of adding to or diminishing TRIPS rights to the limitation which, in theory, has confined the E.C. Court of Justice in Luxembourg to ruling on the "exercise" but not the "existence" of intellectual property rights. This Court, in practice, has not allowed this distinction to stop it from effectively making new law when subjecting such rights to the requirements of free European trade. By the same token, the TRIPS panels might reconstrue rights in comparably flexible terms that transcend the circumstances of any given case.³⁷

Following the minimalist view, TRIPS panels, without power to fill gaps in the Paris-Berne regime, could have no impact on the crisis of this regime. Turning to the maximalist view, TRIPS panels, with at best an implicit mandate in this regard, could help with the crisis, but it is not clear to what extent they could help. The analogy only goes so far with European supranational law, which not only directly binds E.C. Member States, but may directly affect private rights within national laws.³⁸ By contrast, TRIPS rulings may at most hold W.T.O.

34. See Meinhard Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 16, at 285, 288-89.

35. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, GATT Doc. MTN/FA II-A2, reprinted in 33 I.L.M. 112, 115 (1994). For criticism, see Pierre Pescatore, *The GATT Dispute Settlement Mechanism—Its Present Situation and Its Prospects*, 27 J. WORLD TRADE 5, 17-19 (1993).

36. Compare OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1985) (rights subject to "pragmatic approach") with Reichman, *TRIPS Component*, *supra* note 3, at 258-63 (rights to be adjusted in view of "special circumstances of any developing country").

37. Cf. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 157 (4th ed. 1990) ("Analytically, the existence of a right consists of all the ways it may be exercised. In ruling that an important difference rests on a distinction that cannot be drawn by logical analysis, the Court created a very flexible instrument for it to develop the law.").

38. See, e.g., Case 6/64, *Costa v. ENEL*, Judgment of July 15, 1964, E.C. Court of Justice, 1964 E.C.R. 585 (distinguishing provisions of Treaty of Rome that create private rights).

members accountable, as creatures of public international law, for their failures to assure private intellectual property rights. In truth, each TRIPS panel will have to find its own jurisdictional level somewhere between minimalist and maximalist positions from case to case.³⁹ To do so, it will have to ask: "Are we mandated to fill, or precluded from filling, this particular gap in the law at issue in the case before us? And, if so, how may we fill it?" As I have already observed, different Paris or Berne rights incorporated into the TRIPS Agreement vary in the extent to which they may be subject to national discretion in implementation.⁴⁰ Furthermore, while some of these rights are well delineated, others remain partially obscured in the shadows of difficult or emerging legal concepts. A TRIPS panel might have to ask: "To what extent may we pull rights out of such shadows by construing statutory or treaty provisions?" Where these overlap, as do TRIPS with Paris and Berne provisions, they may be read, of course, to meet common purposes.⁴¹

During a period of five years, TRIPS panels may hear complaints for the violation of TRIPS "obligations," but not for any measure that prejudices a TRIPS "benefit" without violating an express obligation.⁴² Arguably, in ruling on a nonviolation complaint, a TRIPS panel could exercise "a certain kind of lawmaking power—the power to impose new quasi-obligations, by a process of logically extending the sense, purpose, and policy of the legal obligations already consented to."⁴³ It is tempting to reason *a contrario*, by arguing that the deferral of nonviolation complaints in the TRIPS context deprives the TRIPS panels of any mandate to base their readings of incorporated Paris and Berne provisions on the sense or purpose motivating these provisions. This inference, however, seems hazardous, if for no other reason than the fact that experience concerning nonviolation complaints has, until now, been drawn from disputes regarding trade concessions made purely within the old GATT regime.⁴⁴ By contrast, TRIPS panels will have to determine obligations under the originally self-standing Paris and Berne Conventions that, conceived to respond to fast-moving technological and media developments, have proven themselves susceptible of great flexibility

39. For the tight links between the scope of jurisdiction and the scope of substantive decisions in public international law, see LAUTERPACHT, *supra* note 19, at 33-35, chs. 6 and 12.

40. See *supra* text accompanying notes 26-28.

41. See generally 1 FERENC MAJOROS, *LES CONVENTIONS INTERNATIONALES EN MATIÈRE DE DROIT PRIVÉ* 233-58 (1976) (in cases of conflicts between treaties, provisions applied to give "optimum effectiveness" to common purposes).

42. TRIPS Agreement, *supra* note 1, art. 64(2) (referencing Agreement establishing the MTO, art. XXIII:1(b)).

43. Hudec, *supra* note 33, at 196.

44. See Ernst-Ulrich Petersmann, *Violation-Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GER. YEARBOOK INT'L L. 175, 220-26 (1991); cf. Footer, *supra* note 30, at 349 (reason for deferral lies in fact that "[u]nlike goods and services, . . . the TRIPS Agreement does not provide for the negotiation of reciprocal concessions or commitments").

in judicial hands.⁴⁵ Recall the distinction which I drew in this regard, between filling gaps in the global fabric of protection and leaving gaps between levels of protection for statutory or treaty revision.⁴⁶ A few hypothetical cases will illustrate how a TRIPS panel might draw such distinctions before deciding which gaps in the Paris-Berne regime to fill.

Assume that a TRIPS panel had to decide whether the TRIPS Agreement imposed national treatment relative to a "data right" such as the European Community is now contemplating. In the context of an E.C. Directive, which would also confirm copyright in original databases, the E.C. Commission has proposed this right to protect the possibly nonoriginal contents of databases.⁴⁷ It could be argued that the copyright context of such a data right would compel treating it as a copyright-related entitlement and that, as such, it should fall just outside the ambit of the Berne Convention and, as a result, into a gap in the international regime where it would not be subject to Berne national treatment. Unfortunately, this argument would be caught in the vicious circle of reading the international standards of the TRIPS Agreement, namely those incorporated from the Paris and Berne Conventions, purely in terms of the national laws to be judged by these standards, eventually the European laws implementing the data right in copyright contexts.⁴⁸ It could also be argued that a data right would fall within the meaning of "[i]ndustrial property . . . in the broadest sense" set out in article 1(3) of the Paris Convention, indeed that it would qualify as a right against unfair competition under the subsequent article 10*bis*, and that it should accordingly be subject to Paris national treatment. The TRIPS panel would then have the Solomonian task of settling the dispute at hand by asking whether the clear-cut geometry of the E.C. data right—in other words: what it protects; what parties may assert it; against what acts it may be asserted; and to what effect—squared with the rather fuzzy profile of the Paris right against unfair competition. On the one hand, the E.C. right is delineated as follows: it would protect the contents of a database "in whole or in substantial part"; makers of databases would own it; they could assert it against the "unauthorized extraction or re-utilization" of such contents "for commercial purposes"; and it would mandate injunctions to "prevent" such acts as well as other remedies.⁴⁹ On the other hand, the Paris

45. For a different view of the TRIPS deferral of nonviolation complaints, see J.H. Reichman, Memorandum (unpublished, Feb. 1, 1994), subsequent to his *TRIPS Component*, *supra* note 3.

46. See *supra* text accompanying notes 22-23.

47. Amended Proposal for a Council Directive on the legal protection of databases, arts. 10-13, 1993 COM 464 final-SYN 393 (Oct. 4, 1993), 1993 O.J. (C 308) 1 [hereinafter Amended Proposal for Directive on databases].

48. See generally Eugen Ulmer, *The 'Droit de Suite' in International Copyright Law*, 6 INT'L REV. INDUS. PROP. & COPYRIGHT L. 12 (1975) (domestic name or framework of right not dispositive of whether or not it is subject to national treatment). See, e.g., Paul Edward Geller, *The Proposed EC Rental Right: Avoiding Some Berne Incompatibilities*, 14 EUR. INTELL. PROP. REV. 4, 7-8 (1992) (treating right of audiovisual producers as a "neighboring right" does not bring it out of the scope of Berne national treatment when it covers Berne "cinematographic works").

49. See Amended Proposal for Directive on databases, *supra* note 47, arts. 10-13.

right is left vague on the following points: it has no specific subject matter; it applies between parties in "competition"; and it lies against acts that are "unfair" according to a criterion which, to quote Professor Bodenhausen, takes account of "practices established in international trade."⁵⁰ Inevitably, the TRIPS panel would face some gap, albeit one of initially uncertain character, between the clear-cut geometry of the E.C. right and the fuzzy profile of the Paris right. It would then have to make a fact-intensive inquiry to determine whether the data right addressed misappropriation that was unfair, given practices current in international trade.⁵¹

Assume in turn that a TRIPS panel is petitioned to extend more precisely formulated Berne provisions to new cases. I already noted that the NAFTA, unlike the TRIPS Agreement, specifically deals with decoders that allow for enjoying works carried by encoded telecommunication signals.⁵² The TRIPS Agreement does incorporate Berne provisions, such as articles 11(1), 11*bis*(1), 11*ter*(1), and 14(1), that generally assure rights to authorize the "communication" to the "public" of works. In interpreting these Berne provisions, a TRIPS panel need not stop where the case law now stops, no more than national courts have confined themselves to old case law in applying article 11*bis* to new cases.⁵³ Suppose that unauthorized decoders are made or sold in one country and then resold or used in another, this time a W.T.O. member, or that they are used to decode broadcasts relayed by satellite into that country from abroad. Of course, in the NAFTA, an express provision would apply to such cases left open in the TRIPS Agreement, so that Canada, the United States, or Mexico would have the option of subjecting any dispute on point to this provision in NAFTA rather than TRIPS dispute-settlement procedures.⁵⁴ Articles 11(1), 11*bis*(1), 11*ter*(1), and 14(1) of the Berne Convention, incorporated into both the NAFTA and the TRIPS Agreement, would seem colorably applicable to the pirate decoding of works disseminated by satellite relay or within a cable network, eventually on a global "information highway." I envisage both the satellite and network cases precisely because they would both test whether the TRIPS Agreement necessarily presupposes the doctrine of territoriality or could be interpreted to transcend this old doctrine.⁵⁵ The TRIPS aim of denying havens to pirates in the global

50. BODENHAUSEN, *supra* note 26, at 144; *see also supra* text accompanying note 27 (courts may construe article 10*bis* flexibly to apply it to diverse factual circumstances).

51. Cf. Reichman, *GATT Connection*, *supra* note 20, at 875-78 (need for TRIPS to supplement article 10*bis* of Paris Convention to confirm its extension to new rights).

52. *See supra* text accompanying note 31.

53. *See, e.g., Ciné Vog Films v. CODITEL*, Judgment of June 19, 1975, Trib. pr. inst., 2e ch. (Court of first instance, 2d chamber), Brussels, Belgium, 86 REV. INT'L DU DROIT D'AUTEUR 124 (1975) (article 11*bis* secures right to control cable-retransmission in Belgium of television broadcast of Berne work from Germany even if the broadcast were otherwise receivable in Belgium).

54. *See* NAFTA, *supra* note 31, arts. 1707, 2005. For caveats, *see* Gilbert R. Winham, *Dispute Settlement in NAFTA and the FTA*, in *ASSESSING NAFTA: A TRINATIONAL ANALYSIS* 251, 259-60 (Steven Globerman & Michael Walker eds., 1993).

55. *See supra* text accompanying notes 7-9, 29-31.

marketplace would arguably support compelling each member jurisdiction to grant relief against pirate decoders distributed across borders or used to decode foreign signals.⁵⁶ At the same time, a TRIPS panel would have to ask whether such relief would merely fill a gap in the worldwide fabric of protection, one leading to piracy, or would improperly affect the Berne level of protection.⁵⁷ Any response would then require clarifying whether pirate decoders sufficiently affect what the relevant Berne provisions call "communication" to the "public."⁵⁸

Before closing, let me make some more general observations on interpreting TRIPS-incorporated Paris and Berne provisions. Though subsequent to the Paris and Berne Conventions, the TRIPS Agreement may not be construed to derogate from the private rights that these prior treaties assure.⁵⁹ Consider article 13 of the TRIPS Agreement, which states: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal expectation of the work and do not unreasonably prejudice the legitimate interests of the right holder." This language is taken from article 9 of the Berne Convention, where it applies only to the minimum right of reproduction and takes on meaning without affecting the distinct limitations which subsequent articles of that Convention permit relative to its other rights, including article 11*bis* relative to rights of broadcast and cable retransmission. To start, the language of article 13 of the TRIPS Agreement evokes, at least in some minds, notions of "fair use" or "fair dealing" that only have their meanings fully determined by precedents of the common law and that, accordingly, remain without clear relevance in treaty contexts.⁶⁰ Furthermore, this language is misleading, since it

56. See *supra* text accompanying note 21.

57. See *supra* text accompanying notes 22-23.

58. Berne Convention, *supra* note 2, arts. 11(1), 11*bis*(1), 11*ter*(1), 14(1). For commentary, see RICKETSON, *supra* note 6, at 431-34, 439-53; NORDEMANN, *supra* note 26, at 119, 124-26, 131-32, 144-45. Compare *BBC Enterprises Ltd. v. Hi-Tech Xtravision Ltd.*, [1992] 9 R.P.C. 167, 195 (House of Lords affirming liability in U.K. for extraterritorial trade in unauthorized decoders); *id.* at 202 (Lord Brandon noting that, if laws providing such remedies were limited to decoders used domestically, they could "readily be bypassed by decoders being made" in one country and sold in another) with *Canal Plus GE*, Order of Dec. 18, 1986, Trib. cantonal (trial court), Vaud, Switzerland, 1987 REV. SUISSE DE LA PROP. INDUS. ET DU DR. D'AUTEUR 257, 262 (provisional relief against unauthorized decoders denied on copyright grounds, plaintiff "not broadcasting in Switzerland and defendants not effectuating any public communication" there).

59. See TRIPS Agreement, *supra* note 1, art. 2(2); see also Paris Convention, *supra* note 2, art. 19; Berne Convention, *supra* note 2, art. 20 (subsequent treaty may not "contravene" or be "contrary to" Paris or Berne provisions, respectively). For commentary, see 1 MAJOROS, *supra* note 41, at 313-15, 401-26, 432-38; 2 *id.* at 529-30. Note that article 30 of the Vienna Convention on the Law of Treaties, governing the "application of successive treaties relating to the same subject-matter," arguably only applies in the absence of dispositive treaty provisions on point. See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 97 (2d ed. 1984).

60. See generally IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 40-42 (4th. ed. 1990) (distinguishing permissible and impermissible uses of foreign law in adjudicating treaty law). See, e.g., Geller, *Can the GATT Incorporate Berne Whole?*, *supra* note 28, at 425-26 (GATT panel not bound by U.S. rulings on fair use).

ostensibly sets out general parameters for all limitations and exceptions to copy-right, while Berne rights incorporated into the TRIPS Agreement are respectively subject to specific limitations and exceptions. In any event, a TRIPS panel could at most look to national copyright laws for examples of how they implement international treaties, while it would best seek the meaning of given TRIPS language in interpreting it in the overall context of the Berne or Paris Conventions from which it was taken. A panel could accordingly read the general terms of article 13 of the TRIPS Agreement as further restricted by such narrower limitations or exceptions as the Berne Convention specifically sets out to its minimum rights. The panel would thus avoid derogating from these rights.⁶¹

In the TRIPS panels, we have created powerful decision-making machinery. Like Dr. Frankenstein contemplating his monster, we cannot quite predict how this machinery will behave. Still, our new TRIPS monster has built into it the more mature Paris-Berne regime of law, one developed over more than a century. If TRIPS panels remain true to the spirit of this regime, we may be optimistic, if not about our monster's behavior, then about the fear it could inspire in those whose paths it might cross. W.T.O. members deadlocked in a dispute would have little incentive to come to terms with each other if they thought TRIPS panels likely to refuse to fill gaps in relevant law. An aggrieved member might well resort to unilateral action in a dispute which arguably turned on any issue that TRIPS panels seemed hesitant to resolve. Such members might, however, reach settlements more in line with a global regime if they thought panels ready to fill gaps in the law as would principled judges. In the words of Professor Jackson, they might then more readily move from "power-oriented" to "rule-oriented" diplomacy.⁶²

Nation-states, by nature, will continue to be Hobbesian creatures. Each will continue to assert its will arbitrarily, without regard for either private or public international law, if it can get away with it. Once accused of noncompliance with the Paris-Berne regime incorporated into the TRIPS Agreement, a W.T.O. member will be tempted to argue that such incorporation is subject to this or that implicit caveat, giving the regime a different effect than it would have in a court of law. That is, when their interests so require, members will implore TRIPS panels to succumb to the schizophrenia in which judicial and TRIPS rulings part company. They will also be tempted to lapse into the sort of isolated reprisals at cross-purposes that coherent TRIPS dispute-settlement is intended to forestall.⁶³

61. For further analysis, see Mihály Ficsor, *International Norm-Setting in the Field of Copyright and Neighboring Rights: A Growing Number of Unsettled Problems*, in INTERNATIONAL CONFERENCE ON INTELLECTUAL & INDUSTRIAL PROPERTY: OBJECTIVES & STRATEGIES 53, 66-67 (E.C. Commission, D.G. XV, ed., 1994) (speech presented in Athens, Greece, April 13, 1994).

62. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 49-54 (1990).

63. See, e.g., Dani Rodrik, *Comments on Initial Draft of Paper*, in ANALYTICAL AND NEGOTIATING ISSUES IN THE GLOBAL TRADING SYSTEM, *supra* note 22, at 447, 450 (TRIPS process to avoid cases of countries caught between U.S. demands for copyright protection favorable to U.S. claimants and E.C. retaliation for failure to grant such treatment to E.C. claimants).

Dispute settlement between nation-states needs to proceed in the light of clear law just because nation-states are susceptible to pressures to act lawlessly. Backed up by an appellate body, TRIPS panels will have increased chances of rising above these pressures.⁶⁴ What long-term impact might TRIPS dispute settlement then have on the global marketplace?

IV. Conclusion

As time goes on, TRIPS panels will decide more and more cases. Of course, TRIPS rulings will not form binding precedents of public international law, much less private law.⁶⁵ Nor could they substitute for the systematic revision of the international conventions protecting intellectual property. TRIPS rulings could nonetheless serve as an interim source of guidance pending such revision, especially on points on which jurisprudence is otherwise rare. Here, indeed, lies a larger TRIPS rationale for confronting and, where appropriate, filling gaps in the Paris-Berne regime that the TRIPS Agreement has incorporated. As TRIPS jurisprudence enhances the international regime, private parties will have a clearer and more coherent legal framework for their transactions in the global marketplace.⁶⁶

TRIPS jurisprudence may also inform treaty revision itself. Here the imperfect analogy of the European experience is, one last time, illuminating. The E.C. Court of Justice has had to adjudicate cases in which national laws of intellectual property were challenged as obstructing European free trade. In doing so, the Court has on occasion highlighted points of disharmony in these laws, and the Commission has taken account of these remarks in harmonizing these laws in the Internal Market.⁶⁷ The TRIPS panels may draw comparable lessons from their most difficult cases, and the World Intellectual Property Organization and the TRIPS Council would do well to ponder these lessons.⁶⁸

TRIPS decision-making powers are nonetheless subject to a basic limitation. TRIPS panels will be focused on trade, while intellectual property laws, though

64. For a critical, but hopeful view, see Hudec, *supra* note 33, at 191-94.

65. Cf. JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 18, at 88-91 (1989) (*stare decisis* not applicable to GATT findings, although decision-makers "often mention precedents in some detail in GATT deliberations, as well as in formal dispute settlement").

66. Cf. MYRES S. MCDUGAL, HAROLD D. LASSWELL, & JAMES C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 260-61 (1967) ("Hence it is incumbent on the community's authorities to take responsibility for filling gaps by supplementing the known elements in the pattern of expectation in the light of public order goals").

67. For examples, see Herman Cohen Jehoram & Ben Smulders, *The Law of the European Community and Copyright* § 4, in 1 *INTERNATIONAL COPYRIGHT LAW AND PRACTICE*, *supra* note 7.

68. Cf. Reichman, *TRIPS Component*, *supra* note 3, at 254-58 (new dialectic between W.I.P.O. and TRIPS affecting treaty revision in intellectual property).

attuned to economic considerations, are motivated by other values as well.⁶⁹ As I noted, intellectual property will increasingly develop and be exploited worldwide within telecommunication networks, where issues of privacy, freedom of expression, and access to information will inevitably arise.⁷⁰ TRIPS panels may not be competent to resolve such larger issues.⁷¹

69. For a comparable reflection on the E.C. treatment of intellectual property, see Bernard Edelman, *Droit communautaire: Droits d'auteur et droits voisins dans la libre concurrence*, 1993 JURIS-CLASSEUR: PROP. LITT. ET ART. fascs. 1810 and 1820.

70. See *supra* text accompanying notes 7-8, 30-31. For analysis of issues of privacy and freedom of expression as they might arise in global telecommunication networks, see Geller, *The Universal Electronic Archive*, *supra* note 9, at 60-66.

71. See Werner Meng, *GATT and Intellectual Property Rights—The International Law Framework*, in *LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT*, *supra* note 21, at 57, 67-69.

