1984 and Beyond: Two Decades of Copyright Law

Tyler T. Ochoa

Santa Clara University School of Law, ttochoa@scu.edu

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1984 AND BEYOND: TWO DECADES OF COPYRIGHT LAW

Tyler T. Ochoa†

During the past two decades, engineers, authors, publishers, consumers, lawyers and academics have witnessed extraordinary developments in the technological landscape, often leading to equally dramatic developments in the law of copyright. Many of these developments have been chronicled (or foreshadowed) in the pages of the Santa Clara Computer and High Technology Law Journal. To celebrate the Journal's 20th Anniversary, this essay will place a number of articles which have appeared in the Journal in their historical context by taking a look back on how the law of copyright has changed during the past twenty years.

I. COPYRIGHT IN THE SUPREME COURT

In 1984, the Supreme Court issued its first written opinion in a case involving fair use, and it came in response to a new technological development: the manufacture and sale of home

† Professor, High Technology Law Institute, Santa Clara University School of Law. A.B. 1983, J.D. 1987, Stanford University. Copyright © 2003 Tyler T. Ochoa.

1. For example, the Journal's first issue featured an article on copyright law. See Colin Tapper, Copyright in Computer Programs: An International Perspective, I SANTA CLARA COMPUTER & HIGH TECH. L.J. 13 (1985). In addition, Volume 20 will be featuring a symposium devoted to copyright issues.

2. Technically, the Journal did not publish its first issue until 1985. However, the Journal was founded during the fall semester in 1984, and 2004 marks the completion of the 20th volume of the Journal. (Initially, both issues in each volume were published during the same calendar year; in recent years, however, the two issues have been published in the same academic year but in different calendar years. The transition was made in 1999, which saw the publication of both issues of Volume 15 and the first issue of Volume 16.) As the editors have chosen to celebrate the 20th Anniversary in 2004, I will use the year 1984 as my point of reference, both as a convenient dividing line in the history of copyright and for its Orwellian symbolic value.

3. Two previous efforts ended in affirmances by an equally divided Court. See Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956) (holding that parody was "no defense" to copyright infringement), aff'd by an equally divided Court sub nom. Columbia Broad. Sys. v. Loew's, Inc., 356 U.S. 43 (1958); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973) (holding that photocopying and distribution of journal articles to patrons on request by government libraries was a fair use), aff'd by an equally divided Court, 420 U.S. 376 (1975).
videotape recorders. In *Sony Corp. of America v. Universal City Studios, Inc.*, a 5-4 majority of the Court held that unauthorized home videotaping of broadcast movies for time-shifting purposes was a fair use, and also held that a manufacturer of recording equipment that was “capable of substantial noninfringing uses” could not be held liable for infringement by individual users. The following year, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court held 6-3 that unauthorized publication of excerpts from former President Gerald Ford’s memoirs two weeks before its publication in book form was not a fair use. Neither case presented a typical fair use situation, and many commentators criticized the reasoning of both decisions.

A decade later, in *Campbell v. Acuff-Rose Music, Inc.*, the Court surprised observers by holding unanimously that 2 Live Crew's raunchy rap parody of the popular song “Pretty Woman” could qualify as a fair use. The Court established a new standard of “transformative use” to be used in assessing the first fair use factor (“Purpose and Character of the Use”), and it disavowed *Sony*'s dictum that “every commercial use of copyrighted material is presumptively ... unfair.” *Campbell* has been characterized as “rescuing” fair use from the uncertainty engendered by *Sony* and

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5. *Id.* at 447-55.
6. *Id.* at 434-42. This portion of the Supreme Court’s opinion in *Sony* shaped the entire development of third-party liability for infringement during the next two decades. See infra notes 75-79 and accompanying text.
8. *Id.* at 549-69.
While some lower courts have had difficulty applying Campbell's more liberal approach to parody, others have relied on Campbell to permit both humorous parody and satirical social criticism.

In another landmark decision, the Court unanimously held in Feist Publications, Inc. v. Rural Telephone Service Co. that the telephone white pages were uncopyrightable. The Court held that "originality" was a Constitutional requirement; that facts were not copyrightable because they were discovered rather than created, and were therefore not "original" to the author; that a compilation of facts was copyrightable only if it featured an original selection and arrangement of facts; and that the "sweat of the brow" doctrine, which postulated that copyright was a reward for the time, labor and money invested in compiling a work, was not a valid basis for copyright protection. While Feist's rejection of "sweat of the brow" did not eliminate copyright for computer databases, it narrowed the scope of copyright in such works to such an extent that other means


16. See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (holding that The Cat NOT in the Hat!, a satire of the O.J. Simpson trial written and illustrated in the style of Dr. Seuss, was not a parody and was not a fair use). For criticism of the Dr. Seuss decision, see Ochoa, supra note 11, at 585-620.

17. See Leibovitz v. Paramount Pictures, Inc., 137 F.3d 109 (2nd Cir. 1998) (holding that movie poster for The Naked Gun 33-1/3: The Final Insult, in which head of actor Leslie Nielsen was superimposed onto body of nude, pregnant woman, was a parody of plaintiff's photo of Demi Moore on cover of Vanity Fair and was a fair use).

18. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (holding that The Wind Done Gone, a critical retelling of Margaret Mitchell's Gone With the Wind from the point of view of a mulatto half-sister of Scarlett O'Hara, used parody to criticize racial stereotypes in the original and was a fair use).


20. Id. at 346.

21. Id. at 347-48.

22. Id. at 356-59.

23. See id. at 352-54, 359-61.

of protection, such as shrinkwrap and click-on licensing, became more attractive alternatives.\textsuperscript{25}

In 2003, the Court disappointed public domain advocates\textsuperscript{26} by holding in \textit{Eldred v. Ashcroft}\textsuperscript{27} that Congress did not violate the "limited times" restriction of the Copyright Clause or the First Amendment in extending all existing and future copyrights by 20 years.\textsuperscript{28} Although \textit{Eldred} did not succeed in rolling back copyright terms, it did foster a movement to recognize the importance of the public domain,\textsuperscript{29} a movement that has been compared to the nascent environmental movement in the 1950s.\textsuperscript{30} As a result, some have expressed the hope that public opinion may make it more difficult for Congress to enact similar extensions in the future.\textsuperscript{31}

\textsuperscript{25} See, \textit{e.g.}, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (holding that shrinkwrap license accompanying database on CD-ROM is enforceable and was not preempted by the Copyright Act). For a contrary view, see Mark A. Lemley, \textit{Intellectual Property and Shrinkwrap Licenses}, 68 S. CAL. L. REV. 1239 (1995).


\textsuperscript{27} 537 U.S. 186 (2003).

\textsuperscript{28} \textit{Id.} at 199-208. Dissenting, Justice Stevens found the majority opinion inconsistent with the history and theory of U.S. copyright law, \textit{id.} at 223-40, while Justice Breyer demonstrated that the present value of an extended copyright is now virtually equivalent to that of a perpetual copyright, \textit{id.} at 253-57. The Court's holding in \textit{Eldred} was mitigated somewhat by the subsequent unanimous ruling in \textit{Dastar Corp. v. Twentieth Century Fox Film Corp.}, 123 S. Ct. 2041 (2003), which held that the Lanham Act could not be used to hinder the distribution of a formerly copyrighted work that had entered the public domain by requiring attribution to the former copyright owner. For background on the case, see Tyler T. Ochoa, \textit{Introduction: Rights of Attribution, Section 43(a) of the Lanham Act, and the Copyright Public Domain}, 24 WHITTIER L. REV. 911 (2003) and Tyler T. Ochoa, \textit{Brief Amici Curiae of Intellectual Property Law Professors in Support of Petitioner}, 24 WHITTIER L. REV. 931 (2003).

\textsuperscript{29} See Symposium, Panel II: Mickey Mice? Potential Ramifications of Eldred v. Ashcroft, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 771, 795-96 (2003) (remarks of Wendy Seltzer) ("[T]he Eldred case is important because it helped to catalyze a movement, a movement that builds upon . . . the ideas of James Boyle and environmentalism for the Net.").


\textsuperscript{31} See Symposium, \textit{supra} note 29, at 792 (remarks of Wendy Seltzer) ("[W]hat I see as an immediate ramification of the Eldred case is that [it] will not happen again. Now we have a public watching what is happening in the copyright arena, [a] public concerned about the expansion of copyright and the trend toward copyright as property and as control, and a public that will be fighting these battles beyond Eldred.").
In its other opinions in the past two decades, the Court has issued
major pronouncements on ownership of copyrighted works,\textsuperscript{32} on the
renewal and termination provisions,\textsuperscript{33} on importation of gray market
goods,\textsuperscript{34} and on remedies for infringement.\textsuperscript{35}

II. COPYRIGHT AND COMPUTER SOFTWARE\textsuperscript{36}

One year after enactment of the Copyright Act of 1976, the first
highly successful mass-produced personal computer, the Apple II,
was introduced.\textsuperscript{37} It was followed by the IBM Personal Computer in
1981,\textsuperscript{38} and the Apple Macintosh in 1984.\textsuperscript{39} By 1984, courts had

\textsuperscript{32} See New York Times Co. v. Tasini, 533 U.S. 483 (2001) (Section 201(c) did not give
newspaper publishers privilege to include individual articles in electronic database without the
permission of individual authors); Community for Creative Non-Violence v. Reid, 490 U.S. 730
(1989) (construing “work made for hire” provisions of Copyright Act of 1976). See also Colby
Times Co. v. Tasini, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 341 (2002). For a
comparative law perspective on the Tasini case, see Giuseppina D’Agostino, Copyright
Treatment of Freelance Work in the Digital Era, 19 SANTA CLARA COMPUTER & HIGH TECH.

A recurring related issue is ownership of copyright in faculty work product. See Roberta
Rosenthal Kwall, Copyright Issues in Online Courses: Ownership, Authorship and Conflict, 18
SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2001); Cory H. Van Arsdale, Note, Computer
Programs and Other Faculty Writings Under the Work-For-Hire Doctrine: Who Owns the

\textsuperscript{33} See Stewart v. Abend, 495 U.S. 207 (1990) (owner of copyright in derivative work
created during initial term could not continue to exploit the derivative work during the renewal
term without permission of the owner of copyright in the source material); Mills Music, Inc. v.
Snyder, 469 U.S. 153 (1985) (assignee who licensed derivative works during initial term was
entitled by statute to continue to receive royalties from the exploitation of those works after
termination of the assignment by the author).

\textsuperscript{34} See Quality King Distrib., Inc. v. L’Anza Research Int’l, Inc., 523 U.S. 135 (1998)
(first-sale doctrine permits the reimportation of copies made in the U.S. and sold abroad). For
an overview of the problem, see Darren E. Donnelly, Comment, Parallel Trade and
International Harmonization of the Exhaustion of Rights Doctrine, 13 SANTA CLARA

Amendment requires right to jury trial on all issues concerning statutory damages); Fogerty v.
Fantasy, Inc., 510 U.S. 517 (1994) (prevailing plaintiffs and prevailing defendants must be
treated alike for purposes of recovering attorneys fees).

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Fantasy, Inc., 510 U.S. 517 (1994) (prevailing plaintiffs and prevailing defendants must be
treated alike for purposes of recovering attorneys fees).

\textsuperscript{37} See Michael Moritz, THE LITTLE KINGDOM: THE PRIVATE STORY OF APPLE

\textsuperscript{38} See James Chposky & Ted Leonsis, BLUE MAGIC: THE PEOPLE, POWER AND
POLITICS BEHIND THE IBM PERSONAL COMPUTER 110 (1988), at
largely disposed of the so-called “first generation” of software copyright cases, which established that computer software was copyrightable in both its source code and object code form, that operating system software was copyrightable, and that copyright for software was not barred by the idea/expression dichotomy as a “process, system or method of operation.”

During the next decade, copyright law would wrestle with the so-called “second generation” of computer software cases, which dealt with the much more difficult question of whether and how far copyright for computer software would extend beyond literal copying to protect the “structure, sequence and organization” of both source code and screen displays. A 1986 case, Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., took the position that the ultimate purpose or function of a program was its “idea,” and that everything


40. See Peter S. Menell, An Analysis of the Scope of Copyright Protection for Application Programs, 41 STAN. L. REV. 1045, 1048 (1989).


43. 17 U.S.C. §102(b)(2000); see Franklin Computer, 714 F.2d at 1249-52; Formula Computer, 725 F.2d at 523-25.

44. See generally Menell, supra note 40; Paul R. Lamoree, Expanding Copyrights in Software: The Struggle to Define “Expression” Begins, 4 SANTA CLARA COMPUTER & HIGH TECH. L.J. 49 (1988).

45. 797 F.2d 1222 (3rd Cir. 1986).
else contained in the program was "expression." While some cases took a more restrictive view, by 1991 a majority of decisions had taken a similar expansive view of the scope of copyright protection. The state of the law at this time was comprehensively summarized in a trio of articles in the Journal.

In 1992, however, the tide began to turn against expansive copyright protection for computer software. The Second Circuit's influential opinion in *Computer Associates Int'l, Inc. v. Altai, Inc.*, established a three-part abstraction-filtration-comparison analysis for assessing the scope of copyright protection in computer programs. Also in 1992, the Ninth Circuit held that copying committed in the course of reverse engineering a computer program in order to determine how it functioned was a fair use. In 1994, the Ninth

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46. *Id.* at 1236-40.


Other countries were also wrestling with these issues during the same time period. *See, e.g.,* Daniel A.D. Hunter, Protecting the "Look and Feel" of Computer Software in the United States and Australia, 7 *Santa Clara Computer & High Tech. L.J.* 95 (1991); Henry Hong Liu, Legal Aspects of Software Regulation in China: The Computer Software Protection Regulations, 9 *Santa Clara Computer & High Tech. L.J.* 469 (1993).
Circuit rejected a claim that Microsoft's Windows operating system infringed the "look and feel" of the screen displays of the Apple Macintosh and Lisa operating systems.\(^3\) And in 1996, an equally-divided U.S. Supreme Court affirmed the controversial First Circuit ruling in *Lotus Development Corp. v. Borland International, Inc.*,\(^4\) that the entire "menu command hierarchy" of the Lotus 1-2-3 spreadsheet program was an uncopyrightable "method of operation."\(^5\)

The 1990s also saw a reversal in policy concerning the patentability of computer software. Initially, both the U.S. Patent and Trademark Office (USPTO)\(^6\) and the U.S. Supreme Court\(^7\) had indicated that software was not patentable subject matter\(^8\), causing software developers to rely primarily on copyright protection. In 1995, however, under the influence of the U.S. Court of Appeals for the Federal Circuit,\(^9\) the USPTO reversed course, announcing "that computer programs embodied in a tangible medium, such as floppy

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\(^{7}\) See Gottschalk v. Benson, 409 U.S. 63 (1972) (method of programming a general-purpose digital computer to perform certain mathematical algorithm was not patentable subject matter); see also id. at 72 (quoting Report of the President's Commission on the Patent System (1966)); Parker v. Flook, 437 U.S. 584, 595 (1978) ("Difficult questions of policy concerning the kinds of [computer] programs that may be appropriate for patent protection and the form and duration of such protection can be answered by Congress. . .").

\(^{8}\) An important qualification was that a process could be patented even if some of steps included the use of a programmed general-purpose digital computer. See Diamond v. Diehr, 450 U.S. 175 (1981); Examination of Patent Applications on Computer Programs, 33 Fed. Reg. at 15,610.

\(^{9}\) See, e.g., In re Alappat, 33 F.3d 1526 (Fed. Cir. 1994) (holding that a programmed general-purpose computer could be patentable subject matter).
diskettes, are patentable subject matter." These changes, coupled with the courts' increasing skepticism of broad copyright protection for computer software, led to a sharp decline in software copyright litigation and a sharp increase in the number of software patents issued and litigated during the past decade.

III. COPYRIGHT AND THE INTERNET

The rapid commercialization of the Internet in the early 1990s led to the first suits for making copyrighted works available over the Internet. The first such reported case was a criminal prosecution of an MIT student who set up an electronic bulletin board and posted computer software for others to download for free. The court dismissed the charges, because the defendant had not acted (as the statute then required) "for purpose[s] of commercial advantage or private financial gain." In response, Congress enacted the No


61. See supra notes 50-55 and accompanying text.

62. Although the history of the Internet can be traced back to the 1960s, two key dates roughly coincide with the founding of the Journal: January 1, 1983, the date on which computers connected to ARPANET were required to adopt the TCP/IP protocols; and 1984, when the domain name system was introduced, replacing numeric Internet addresses with alphanumeric domain names. See JANET ABBATE, INVENTING THE INTERNET 140-42, 189-90 (1999); CHRISTOS J.P. MOSCHOVITIS, ET AL., HISTORY OF THE INTERNET: A CHRONOLOGY, 1843 TO THE PRESENT 109-118 (1999).

63. Between 1989 and 1991, Tim Berners-Lee of CERN (Conseil European pour la Reserche Nucleaire, or European Organization for Nuclear Research) invented the World Wide Web by defining the standards for Hypertext Markup Language (HTML), the Hypertext Transfer Protocol (HTTP), and Uniform Resource Locators (URLs). See TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR 21-51 (1999); JAMES GILLIES & ROBERT CAILLIAU, HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB 180-221 (2000). In April 1993, CERN's directors announced that WWW technology could be freely used by anyone without charge, leading to its widespread adoption. See BERNERS-LEE, supra at 74; GILLIES & CAILLIAU, supra at 261. Because of its relative ease of use, the World Wide Web opened the doors to commercialization of the Internet in a way that had not previously been possible.

For a sample of the legal issues raised by the Internet and the World Wide Web, see Sheldon Burshtein, Surfing the Internet: Copyright Issues in Canada, 13 SANTA CLARA COMPUTER & HIGH TECH. LJ. 385 (1997); Lisa M. Byerly, Comment, Look and Feel Protection of Web Site User Interfaces: Copyright or Trade Dress?, 14 SANTA CLARA COMPUTER & HIGH TECH. LJ. 221 (1998).


Electronic Theft Act, which permitted criminal liability to be imposed based on the retail value of the works copied.

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act, which granted a limited right of public performance to sound recording copyright owners for the first time. That same year, Santa Clara student Adam Segal wrote a prescient article analyzing both the potential for authorized distribution and the risks of unauthorized copying of digitized music on the Internet. Although Segal’s article was published when MIDI was the standard format for computer sound recording playback, much of what he anticipated came to pass when free software based on the MP3 compression format became available in 1998. “Ripping” software enabled individuals to copy their CDs to the hard disks of their computers and to covert those files into MP3 format for faster transfer over the Internet. Portable MP3 players allowed people to download songs from their computer and to carry those music files


71. See Segal, supra note 70, at 103. MIDI stands for Musical Instrument Digital Interface. Id. at 103 n.24.


MP3 is short for Moving Picture Experts Group, Audio Layer III. The MP3 compression algorithm was patented in Germany in 1989, but the first successful MP3 player, the AMP MP3 Playback Engine, was not released until 1997. Later, a Windows interface was added to create Winamp. “In 1998, when Winamp was offered up as a free music player, the MP3 craze began: Music fiends all over the world started MP3 hubs, offering copyrighted music for free.” Christoper Jones, MP3 Overview, Behind the Music: The History of MP3, at http://hotwired.lycos.com/webmonkey/00/31/index3a.html (July 27, 2000).

with them. Then, in 1999, Napster, a website offering software and an indexing and search capability for peer-to-peer file sharing, came online. When sued by the record industry, Napster claimed the benefit of the *Sony* doctrine on the ground that it was capable of substantial noninfringing uses; but ultimately it was enjoined on grounds of contributory infringement and vicarious liability.

Napster’s demise barely left a dent in the phenomenon of peer-to-peer file sharing as other programs rose to take its place. Some, like Aimster, were based on similar technology and were enjoined; but others, like Grokster, Morpheus and KaZaA, do not maintain their indexes on a central server, making them both more difficult to shut down and arguably bringing them within the *Sony* doctrine. In the meantime, the popularity of peer-to-peer file sharing has pushed the recording industry to begin to adopt new business models for authorized distribution of copyrighted recordings over the Internet.

**IV. THE DIGITAL MILLENNIUM COPYRIGHT ACT**

In 1995, a Clinton Administration Task Force issued a “White Paper” summarizing how copyright law could be applied to the Internet and recommending certain changes to increase copyright protection. The Task Force’s conclusions and recommendations were highly controversial and were initially rejected by Congress.

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74. *See* Recording Indus. Ass’n. of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999) (holding that Diamond Rio portable MP3 player did not violate the Audio Home Recording Act).


76. *Napster*, 239 F.3d at 1020.

77. Id. at 1019-24. *See also* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) (affirming modified preliminary injunction ordering Napster to disable its service).

78. *See In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (affirming preliminary injunction).


In 1996, however, the Clinton Administration took its proposals to the Diplomatic Conference of the World Intellectual Property Organization, and succeeded in getting some of them included in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. New legislation "implementing" the two treaties was then introduced in Congress, and was enacted in 1998 (together with a number of other measures) in the Digital Millennium Copyright Act.

Title I of the DMCA added several new causes of action to Title 17 of the United States Code, in addition to the action for infringement provided in the Copyright Act itself. Section 1201(a)(1) prohibits the circumvention of technological protection measures (such as encryption and password protection) used to control access to a copyrighted work. Section 1201(a)(2) prohibits manufacturing, importing, offering, providing or trafficking in any product or service designed, produced or marketed for the purpose of circumventing such measures or that has only limited uses other than circumvention; and Section 1201(b) similarly prohibits products or services that circumvent copy-protection technology. To date these provisions have been upheld against constitutional challenge on the ground that they violate the First Amendment.

83. Id. at 369-70, 430.
88. See 17 U.S.C. § 501(a)(2003). In addition to the three causes of action mentioned in the text, Title I of the DMCA also added two causes of action for knowingly providing false "copyright management information," 17 U.S.C. § 1202(a), and for removing or altering copyright management information, 17 U.S.C. § 1202(b).
91. Id. § 1201(b).
Title II of the DMCA enacted a limitation of liability for Internet service providers. Title II adopted and modified the approach taken in Religious Technology Center v. Netcom On-Line Communication Services, Inc., in which the court held that Netcom was not liable for direct infringement, despite the fact that its servers had in fact been used to disseminate messages containing excerpts of the works in question. The court ruled that the automated technical processes that made the Internet possible would not be subject to strict liability for copying, instead, such conduct would be judged according to established standards for contributory infringement and vicarious liability. Concerned that the Netcom standards would result in excessive liability, ISPs lobbied Congress to adopt four "safe harbors" for Internet service providers, codified at 17 U.S.C. §512. The four "safe harbors" cover reproductions made in the course of transitory network communications; system caching; storage of material for third-parties; and providing information location tools (such as search engines and hyperlinks). In order to qualify for two of the safe harbors, however, the service provider must not have actual or constructive knowledge that the material or activity in question is infringing, and in order to qualify for three of them, the service

94. Id. at 1372-73.
95. Id. at 1368-69.
96. Id. at 1368-70.
97. Id. at 1373-75.
98. Id. at 1375-77.
99. For a detailed analysis of the legislative history of these provisions, see Irina Y. Dmitrieva, I Know It When I See It: Should Internet Providers Recognize Copyright Violation When They See It?, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 233, 244-53 (2000).
101. Id. § 512(b).
102. Id. § 512(c).
104. Dmitrieva, supra note 99, at 242. This article analyzes in detail what type of evidence will be sufficient to demonstrate actual or constructive knowledge on the part of an Internet service provider. Id. at 253-61.
provider must immediately disable access to material claimed to be infringing before the alleged infringer is given notice and an opportunity to be heard.105

V. INTERNATIONAL COPYRIGHT.

Another important trend during the past two decades has been the degree to which U.S. copyright law has been integrated into the world community.106 The United States had refused to join the Berne Convention, the major international treaty concerning copyright protection, for more than a century after its adoption in 1886.107 It was not until March 1, 1989, that the United States finally acceded to the Berne Convention.108 In order to comply with the Convention's prohibition on the imposition of formalities,109 the Berne Convention Implementation Act110 eliminated the registration requirement for most works of foreign origin111 and eliminated the notice requirement altogether.112 In 1990, Congress partially implemented Article 6bis by providing very limited moral rights for the first time in the Visual


107. See PAUL GOLDESTEN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 23(Oxford U. Press 2001). The major obstacles to U.S. adherence were the Berne Convention's prohibition on formalities (such as notice, deposit and registration) and its minimum duration of life-plus-50-years, which the U.S. did not adopt until January 1, 1978.


109. See Berne Convention for the Protection of Literary and Artistic Works, 1971 Paris Text, art. 5(2) ("The enjoyment and exercise of these rights shall not be subject to any formality").


111. See Joint Explanatory Statement on Amendment to S. 1301, 134 CONG. REC. S14549-01 (Oct. 5, 1988) (explaining the proposed "two-tier" system of registration). This provision was later generalized to include all works other than those first published in the United States or those works by U.S. authors first published in a foreign nation with whom the U.S. does not have copyright relations. See 17 U.S.C. § 411(a) and § 101 (2003)(definition of "United States work"). However, the U.S. continues to require registration as a prerequisite for the recovery of both statutory damages and attorney's fees. 17 U.S.C. § 412 (2003).

Artists Rights Act; and in 1994, Congress implemented Article 18 by restoring the copyrights of works of foreign origin which had fallen into the public domain in the United States for failure to comply with various formalities.

Another aspect of the internationalization of copyright has been the degree to which copyright (along with other types of intellectual property) is now the subject of multilateral trade agreements. In 1994, at the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was adopted, making the provisions of the Berne Convention (except Article 6bis) enforceable between nations under the dispute-resolution mechanism of the World Trade Organization. In a supreme irony, in 2000 the United States, which had fought hard to bring intellectual property under the auspices of the WTO, became the first nation to be found in violation of the copyright provisions of TRIPS for adopting a provision that exempted most restaurants and bars from having to pay royalties for playing copyrighted music over the radio.

The internationalization of copyright is also implicated in the international reach of the Internet. Under existing law, the “country of origin” of a work (which may, in turn, depend on the country in which the work was first “published”) may affect both whether

116. See TRIPS Agreement, art. 9(1), art. 64. The exception concerning Article 6bis was insisted upon by the United States, for the obvious reason that we knew we were not in full compliance with Article 6bis. See Tyler T. Ochoa, Introduction: Rights of Attribution, Section 43(a) of the Lanham Act, and the Copyright Public Domain, 24 WHITTIER L. REV. 911, 926-27 (2003).
copyright protection is afforded and the ownership of the copyright.\textsuperscript{120} Similarly, the scope of copyright protection and questions of licensing and infringement often depend on the country in which the alleged use occurs.\textsuperscript{121} The ubiquity of the Internet, however, threatens to make distinctions based on national borders meaningless in an online world. When a work is posted on a website, where is that work "published"? What is the "country of origin"? Which countries' laws should apply? These questions were addressed by Professor Jane Ginsburg of Columbia University School of Law in the First Annual Distinguished Lecture in High Technology Law at Santa Clara in 1998. Her thoughts were subsequently committed to writing in an influential article that appeared in the Journal (and is reprinted in this 20th Anniversary Issue), \textit{The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World}.\textsuperscript{122}

VI. 1984 AND BEYOND.

In 1984, George Orwell imagined a world in which Big Brother was always watching what ordinary citizens did.\textsuperscript{123} While the Internet has not yet evolved into an omnipresent surveillance system, the Internet does make it possible to track the movements of individuals in cyberspace with relative ease. This was amply demonstrated in 2003 when the recording industry sought subpoenas from Internet service providers to identify individuals allegedly engaged in unauthorized peer-to-peer file-sharing,\textsuperscript{124} and then used those records

\textsuperscript{120} See, e.g., Berne Convention, art. 3(1); 17 U.S.C. §§ 104(b), 104A(b) (2003); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 84 (2nd Cir. 1998) (holding that "Russian law determines the ownership and essential nature of the copyrights alleged to have been infringed").

\textsuperscript{121} See, e.g., Itar-Tass, 153 F.3d at 84 ("United States law determines whether those copyrights have been infringed in the United States and, if so, what remedies are available."); Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679 (2nd Cir. 1993) (applying U.S. law to determine renewal rights of Brazilian parties, despite existence of contract between the parties written in Portuguese and executed in Brazil).


\textsuperscript{123} See GEORGE ORWELL, 1984 (1949).

to file the first wave of lawsuits against individuals who allegedly made large numbers of copyrighted works available to others.\textsuperscript{125}

Over the past twenty years, the authors and editors of the Journal have attempted to analyze and explain these and other significant developments in the law of copyright. As copyright law continues to evolve in response to technological developments and international influences, we can expect both scholars and practitioners to continue to turn to the pages of the Journal for guidance on emerging legal issues.

Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*

Originally Published:

15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347 (1999)

This Article discusses the transition and consequences of copyright exploitation's movement from a legal regime rooted in a territorially bounded analog world towards an unbounded digital world. In particular, this article discusses copyright ownership, nationality, infringement and licensing, and the ways each of these concepts were grounded on principles of territoriality.

Exemplary citations to the original article include:
