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Of World Music and Sovereign States, Professors and the Formation of Legal Norms

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Of World Music and Sovereign States, Professors and the Formation of Legal Norms

*Justin Hughes**

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I. INTRODUCTION

It is a heady time to be working in intellectual property and Internet issues. The legal developments have been fast and furious, with something of what must have been the feeling of working in civil rights law in the 1960s and '70s, in environmental law in the '70s and '80s, or railroad law in the '80s—I mean the 1880s. Like environmental law, there is a sense with the Internet that our decisions are fraught with unforeseen consequences and path dependency—that we are making choices now that we are unlikely to turn back no matter how suboptimal the situations become. And like civil rights law, there is a feeling in intellectual property law that issues are being decided that will have a huge impact on democracy, free expression, and the kind of civil society we are going to live in.

Recently, there were some posters around our law school asking students to participate in a student bar association survey. The tag line was, “And like one of your law school exams, there are no wrong answers.” Being fairly new to the ranks of professors, no one told me about this. There are supposed to be no wrong answers? There are lots

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of wrong answers and in the early Internet age, professors, law and otherwise, have been providing plenty of them—estimates and guesses, tomes and talks, plodding prose, and glistening sound bites that are frequently *less correct* than we would have liked.

All these *not wholly correct* guesses have been a very good thing. It is a testament to these heady times—and the willingness of legal academics to jump into the issues—that *we have gotten so very much wrong*. Let us consider three ways in which legal academics may have missed the mark. The first, discussed in Part II, bears on the formation of copyright norms for the Internet domestically—and how legal scholars appear to have *overestimated* the receptivity of courts to certain arguments. Part III then discusses the formation of transnational legal norms and the ways in which American professors appear to have *underappreciated* how the Internet is prompting a round of deeper transnational legal harmonization than we have seen in the past.

Finally, Part IV poses a question about a different meta-norm: What is the proper norm or role for professors, law and otherwise, in these ongoing policy debates? Even if there is no “right” answer to this question—one in which we can all believe—surely the question is worth asking for the sake of “the process of intellectual openness itself.”¹

II. RAILROAD LAW VERSUS CIVIL RIGHTS LAW

The comparison of law grappling with the Internet at the end of the twentieth century and law grappling with the railroads in the nineteenth century is not new.² In the nineteenth century, railroads stitched together our national economy, producing a quantum leap in the amount of economic and social interaction among Americans. The Internet appears to be producing another quantum leap in communications and the delivery of information goods. And the economic effect of railroads at the end of the nineteenth century and the Internet at the end of the twentieth century are similar in another respect: in each case, irrational exuberance led to overbuilding, with enormous losses for investors, but

1. ROBERT NOZICK, INVARIANCES: THE STRUCTURE OF THE OBJECTIVE WORLD 6 (2001) (“Belief is not the only coin of the philosophical realm. There are new classifications and analyses and understandings, and there is the process of intellectual openness itself.”).

2. See Dorsey D. Ellis, Jr., *Legal Education: A Perspective on the Last 130 Years of American Legal Training*, 6 WASH. U. J.L. & POL’Y 157, 170 (2001) (noting that nineteenth century “society was transformed by the railroad, ours by the Internet”); Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 312 (2002) (“Like cyber-technology, the railroads stretched the law and tested its ability to address both new and developing issues.”).

with valuable infrastructure created for the rest of us, whether or not these are consumers or new businesses that will thrive on what has been created.³

In drawing this multiple comparison to civil rights, environmentalism, and railroad law, one thing is for sure: the literature of practicing lawyers—bar publications and the trade press—has focused on the economic impact—the *railroad law* aspects of the Internet—while the “cyberlaw” literature of legal academics has tended to view Internet law with the idealism of the first two areas. Law professors have often thought of intellectual property and Internet issues with an almost civil rights law mentality—a *grand struggle to establish rights, reshaping society and the balance of power between corporations and individuals*.

There is nothing surprising in this—professors are supposed to think in terms of the broad concerns of society; practicing lawyers must resolve, on a daily basis, the problems of their clients. But somewhere along the way, the legal academic community began making arguments that have had near zero influence with the judiciary—the people who are supposed to be thinking both about the specific issues brought before them *and* the broader concerns of society. You want the best indicator of how an American court will decide a major intellectual property case in the Internet era? Look for the amici or parties’ brief with the dozens of law professors—those theories are how the court will *not* decide the case.

Each of the recent cause celebre copyright cases—*Napster*,⁴ *Aimster*,⁵ *Reimerdes*,⁶ *Eldred*,⁷ and *Grokster*⁸—must be explained on its own terms, and law professors filed amici briefs in only *some* of the cases, but for the intellectual property “low protectionist,” these cases are a cumulative track record worthy of General McClelland. Ten times before the bench resulted in nine losses for the low-protectionist side.

3. See, e.g., J. Bradford DeLong, *Profits of Doom*, WIRED, Apr. 2003, at 90 (comparing the benefits to the economy of money-losing railroads in the late 1880s with the dot-com and telecom bubble of late 1990s).

4. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d*, 239 F.3d 1004 (9th Cir. 2001).

5. *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003).

6. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

7. *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999), *aff’d sub nom. Eldred v. Ashcroft*, 123 S. Ct. 186 (2003).

8. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

The judicial body count is not much better: low-protectionist arguments were made to twenty-six judges and carried the day with only four.⁹ One could add or subtract various cases for various reasons,¹⁰ but the wave washes over us the same way.

A low protectionist could look back on this with the darkly poetic phrase of an old warrior, “it was a glorious war, every battle lost.” But surely it is better to try to understand what happened. When one looks at the losing arguments in *Reimerdes*, *Napster*, and *Eldred*, they are arguments that saw much more constitutional structure in the copyright system (particularly the Copyright and Patent Clause) than courts have been willing to entertain. When courts unpack the copyright system, they do find elements reflecting—and working in synch with—our free expression system. But the judges have found nowhere near the theoretical mother lode that law professors envisioned.

To some degree, law professors responded to the information age explosion of the 1990s with an *information jurisprudence*,¹¹ which often included a highly elaborated vision of (a) how law should and should not channel information flows, and (b) how organic law—constitutional law—required information flows to be channeled. A huge theoretical edifice—or constellation of edifices—was constructed, one that courts have largely declined to embrace. But all this work was not simply a wrong guess executed in groupthink. Perhaps the greatest miscue as to the courts’ receptivity to such a jurisprudence was the

9. The *Grokster* case is currently on expedited appeal before the Ninth Circuit, so the head count of judges could suddenly improve modestly to 22 to 7.

10. For example, one might want to subtract the *Aimster* decision because it seemed to follow largely from the *Napster* decision, but if we did that, we should also take the *Grokster* decision off the list—the one time when a federal district court adopted low-protectionist reasoning. And one might want to add *Bowers v. Baystate Technologies, Inc.*, where the Federal Circuit maintained, against the arguments in an amicus brief filed by a group of law professors, that contract law could be upheld to prevent reverse engineering that would otherwise be permissible under copyright law. *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1326 (Fed. Cir. 2003); Brief of Amici Curiae in Support of Petition for Panel Rehearing and Rehearing en Banc of Defendant-Appellant Baystate Technologies, Inc., *Bowers* (Nos. 01-1108, 01-1109), available at <http://www.acm.org/usacm/Briefs/bowersVbaystatebrie.htm> (last visited Nov. 10, 2003).

11. The phrase was coined by several people, including Marci Hamilton. See Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 605, 613–14 (2000) (noting that the Supreme Court has not developed a “conscious information jurisprudence”); Marci A. Hamilton, *The Distant Drumbeat: Why the Law Still Matters in the Information Era*, 20 CARDOZO ARTS & ENT. L.J. 259, 264 (2002); see also Kimberly D. Krawiec, *Fairness, Efficiency, and Insider Trading: Deconstructing the Coin of the Realm in the Information Age*, 95 NW. U. L. REV. 443, 456 (2001) (describing an “information jurisprudence” in relation to insider trading laws); Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1341 (2001) (reviewing cases that illustrate “FTC information jurisprudence”).

Supreme Court's unanimous decision in the 1991 *Feist Publications, Inc. v. Rural Telephone Service Co.*¹²

Feist is now familiar to practically everyone who studies or works in intellectual property. The defendant, Feist Publications, had sought to create a regional telephone directory for northwest Kansas, encompassing telephone numbers from smaller areas served by eleven different local telephone companies.¹³ Rural Telephone was the lone holdout, refusing to license its telephone directory information for inclusion in Feist's larger work.¹⁴ Feist proceeded to copy Rural Telephone's entries—over 1,300 entries verbatim and an additional 3,600 entries in part.¹⁵ Rural Telephone sued, and the case eventually arrived at the Supreme Court, where the Court noted in almost deceptive modesty, "This case requires us to clarify the extent of copyright protection available to telephone directory white pages."¹⁶

Despite the extensive copying, Feist's final telephone book shared neither the same selection nor the same arrangement as Rural's: Rural's copyright claim rested solely on extensive copying of the factual entries themselves.¹⁷ The Court held that these entries—whether considered individually or en masse—were not protected because they were not within the meaning of the 1976 Copyright Act's "original works."¹⁸

If the Court had stopped there, Congress could have amended the Copyright Act to extend copyright protection to non-creative, "sweat-of-the-brow" works. Instead, the Court also held that facts could not be protected by copyright law as a *constitutional* matter.¹⁹ The Court reasoned that the Constitution's provision for protecting "writings" of "authors" *forbids* copyright protection of unoriginal works.²⁰

12. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

13. *Id.* at 343 ("The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings.").

14. *Id.*

15. *Id.* at 343–44.

16. *Id.* at 342.

17. *Id.* at 343–44.

18. *Id.* at 363–64.

19. *Id.* at 350–51.

20. *Id.* at 346. The Court said:

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U.S. 82 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)—

As an analysis of copyright law per se, the *Feist* decision was not on the most solid ground. The Court was interpreting statutory law and constitutional law, but both use copyright concepts derived directly from the common-law tradition: “original work” in the case of the U.S. copyright statute and “author” and “writing” in the case of the U.S. Constitution. As an interpretation of those concepts, *Feist* arguably is flawed. Subsequent decisions from courts in Australia, Canada, and India have implied as much.²¹ Just a year before *Feist*, the English *Magill* case made it clear that pre-E.U. Database Directive English copyright law afforded substantial copyright protection to comprehensive databases.²² So *Feist* could not be seen—and was not seen—as an exegesis on self-contained copyright concepts derived from the common law.

In *Feist*, the Court went much further than it had ever gone in prior cases in elaborating an “information flow” vision of the relationship between Congress’ power under the Copyright and Patent Clause and society’s constitutionally guaranteed interests in free expression. In prior opinions, particularly *Harper & Row, Publishers v. Nation Enterprises*,²³ the Court had told us that there were First Amendment aspects to both the fair use doctrine and the fact/expression (and idea/expression) dichotomies. But in *Harper & Row*, the copyright edifice turned back the First Amendment attack.²⁴ In *Feist*, the First Amendment concerns had bite. A doctrine that seemed to be the very

this Court defined the crucial terms “authors” and “writings.” In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

Id.

21. See *Desktop Mktg. Sys. Pty Ltd. v. Telstra Corp.* (2002) 199 F.C.R. 491 (reviewing *Feist* and subsequent cases in the United States and Canada), available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/112.html> (last visited Oct. 6, 2003); *CCH Canadian Ltd. v. Law Soc’y of Upper Can.*, [2002] 4 F.C. 213 (finding copyright in “sweat of the brow” works by law publishers), available at 2000 C.P.R. LEXIS 93. For an Indian case subsequent to *Feist*, see *Burlington’s Home Shopping Ltd. v. Chibber* (1995) Patent & Trademark Cases 278 (noted in Pravin Anand, “*Burlington’s Home Shopping Ltd v Chibber*,” 6 ENT. L. REV. 159 (1995), in which the Delhi High Court, not following *Feist*, held that a computer database of mail order customers (names, addresses, telephone and fax numbers) was protected as a compilation within the definition of literary work). See also Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 99–106 (1998) (discussing the “melding” of the concepts of originality and creativity).

22. See *Radio Telefís Éireann v. Magill T.V. Guide Ltd.* [1989] I.R. 554, 572 (Ir. H. Ct.) (finding copyright protection for BBC’s weekly television program schedules).

23. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

24. At least that is how the case is commonly understood. See, e.g., Kevin Georing, *Panel One Commentary*, 1999 ANN. SURV. AM. L. 193, 196 (2000) (“The Court in the *Harper & Row* case against *The Nation* rejected any First Amendment limitation other than as part of the general fair-use test.”).

embodiment of intellectual property's concern to create incentives for intellectual labor—the “sweat of the brow” doctrine—fell before the expression/fact dichotomy.²⁵ While the dichotomy is an internal regulatory mechanism of the copyright law, there is no question that it is a First Amendment instrument.²⁶ *Feist* taught us that copyright and the First Amendment must dance together—and that the First Amendment leads.

In retrospect, the *Feist* opinion's scrutiny of copyright through First Amendment lenses helped inspire a decade of law professors thinking and writing about how copyright could/should be made responsive to constitutional concerns. Some scholars addressed the general shape of limitations on copyright inherent in article I, section 8, clause 8.²⁷ Other work explored the specifics of protecting databases (which is what the telephone book in *Feist* was),²⁸ considered privacy and the attendant freedom of readers,²⁹ focused on the First Amendment as a trump on copyright,³⁰ or continued the pre-*Feist* discussion of how

25. The *Feist* case was not a great fact pattern for a tough decision between conflicting goals of information production and information dissemination. Rural Telephone did not need any economic incentive from copyright law to collect the facts; it generated the phone numbers and the databases as a function of being a operating telephone company. *Feist Publ'ns, Inc.*, 499 U.S. at 343 (“As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number.”). Nor did Rural Telephone need an incentive to publish the resulting database—state regulation mandated the publication of the phone book by whomever had the (lucratively profitable) local telephone service. *Id.* at 342.

26. As the Court noted in *Harper & Row*, “copyright's idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.’” *Harper & Row*, 471 U.S. at 556 (quoting *Harper & Row, Publishers v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir. 1983)).

27. See Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Restraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45 (2000); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359 (1999); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE. L.J. 1 (2002); Pamela Samuelson, *Economic and Constitutional Influences on Copyright Law in the United States*, 23 EUR. INTELL. PROP. REV. 409 (2001).

28. See Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Malla Pollack, *The Right To Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999).

29. See, e.g., Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” Systems in Cyberspace*, 28 CONN. L. REV. 981 (1996).

30. See Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147

copyright impacts democratic discourse and/or artistic development.³¹ Although the issues were very different, the *Eldred* case took the shape it did partly because of *Feist*.

The arguments made in law professors' briefs in the big 2000-2003 copyright cases mentioned above reflected that rich body of 1990s theoretical ideas about the relationship of copyright to civil society, democracy, and personal autonomy. In the *Reimerdes* case, over forty-five law professors supported a brief arguing two issues: (a) that the limitations inherent in the Copyright and Patent Clause forbade Congress from writing the anti-circumventions of the Digital Millennium Copyright Act ("DMCA") in the broad terms in which they were crafted, and (b) that the First Amendment independently would limit permissible copyright protection from extending to broad anti-circumvention laws.

The amicus brief in the *Eldred* case—signed by fifty-three law professors of all political persuasions—made a similar bifurcated attack on the twenty-year extension of copyright at issue in the case. In both cases, the professors' filings made straightforward, precedential arguments; these were not overly-theorized, scholarly articles converted into the format of a brief. There was, perhaps, only one inadvertent sign about how self-contained the scholarly work of the 1990s had become: unlike most briefs, the law professors' brief in *Eldred* cited more law review articles than cases (forty-four to forty-one).³²

(1998); Neil Weinstock Netanel, *Locating Copyright in the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

31. For other important literature exploring the need for copyright to encompass concerns of democracy, civil society, and individual self-development, see Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Netanel, *supra* note 30. This literature had begun well before the *Feist* decision. See Rosemary J. Coombe, *Objects of Property and Subjects to Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

32. The professors' brief in *Reimerdes* did not suffer from this problem: it cited fifty-seven cases and fourteen scholarly sources. Brief Amicus Curiae of Intellectual Property Law Professors in Support of Defendant-Appellants, Supporting Reversal, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (No. 00-9185), available at 2001 WL 34105194. In the *Eldred* case, to make a comparison with the professorial amicus brief, the *Intel* amicus brief—itsself principally a policy argument—cited nine cases and only two pieces of copyright scholarship (one being the Nimmer treatise). Brief of Amicus Curiae Intel Corporation in Partial Support of Petitioners, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618), available at 2002 WL 1041860. The petitioners' reply brief in *Eldred* cited thirty-three cases and eleven intellectual property scholarly works (including two treatises). Reply Brief for the Petitioners, *Eldred* (No. 01-618), available at 2002 WL 31039334. In fairness, the extensive citations to legal scholarship in the law professors' *Eldred* brief probably reflected inclusive impulses—that the thoughtful work of as many of the signatories as possible be shown.

What will happen next? Of course, there will be an initial flurry of *Eldred* postmortems, most emphasizing the life raft Justice Ginsburg's *Eldred* opinion threw at, if not to, the opponents of increasingly strong copyright. In turning back the First Amendment attack on the twenty-year term extension, Justice Ginsburg noted that when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary"³³—a phrase causing many to wonder what those "traditional contours" are. But after those postmortems, I think there will be a decline in the number of articles on the civil society/democracy/personal autonomy ramifications of intellectual property. In Judge Posner's recent and somewhat biting observation, "Disputes over intellectual property, as the Supreme Court just reminded us, are not profitably conducted in the idiom of the First Amendment."³⁴ Copyright has shown itself fairly resistant to free expression claims—not just in the United States, but also in Europe.³⁵ In fact, a few people drawn to intellectual property by these concerns may peel off, moving into other areas of the law.

That does not mean that there are no constitutional arguments to be made about copyright and the Internet. In a recent article, Pam Samuelson lays out a variety of constitutional issues regarding expanded copyright laws that are still unsettled.³⁶ Some are democracy/personal autonomy arguments that have already had an unsuccessful trial run in lower courts (such as a facial challenge to the DMCA's anti-circumvention provisions as being beyond the scope of Congress' copyright power),³⁷ while other issues are completely open. For example, Congress' treaty power in relation to the express grant of power in the Copyright and Patent Clause (to restore copyright in works that fell into the public domain) is a completely untilled field. So too, by definition, would be the constitutionality of any substantially new

33. *Eldred*, 123 S. Ct. at 774.

34. *McKevitt v. Pallasch*, 339 F.3d 530, 534 (7th Cir. 2003).

35. See, e.g., P. Bernt Hugenholtz, *Dutch Copyright Law 1995–2000*, 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR 110, 149 (2001) (reviewing a 1999 Netherlands court of appeals decision, *Anne Frank Foundation v. Het Parool*, which held that the freedom of expression guaranteed in Article 10 of the European Convention on Human Rights did not override the copyright in Anne Frank diary pages). See generally P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe* (describing developments in the conflict between copyright and freedom of expression laws in Europe), in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 343, 346–60 (Rochelle Cooper Dreyfuss et al. eds., 2001), available at <http://www.ivir.nl/publications/hughenholtz/PBH-Engelberg.doc> (last visited Oct. 6, 2003).

36. Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2003) (manuscript on file with author).

37. *Id.*

attempt by Congress to establish extra-copyright protection of databases.³⁸

But in light of *Eldred*, if there is going to be any significant new reaction from mixing copyright and First Amendment, it will come at us after an “information flow” jurisprudence is more filled out *outside* intellectual property. A constitutionally grounded “information flow” jurisprudence is still in formation, the Court’s 2001 *Bartnicki v. Vopper* decision being a case in point.³⁹ While the *Bartnicki* opinion signals that this body of information jurisprudence is going to be built slowly and cautiously,⁴⁰ it is worthwhile to read and reread *Bartnicki* with problems like DeCSS—and copyright doctrine in general—in mind.

The copyright decisions in the past few years declined to embrace the vision of many legal academics because, perhaps, they had become *too* visionary. In this sense, in the intellectual property area, activist legal academics have not enjoyed as much influence in the formation of domestic legal norms for the Internet as they might have. Where law professors have been inclined to see civil rights and issues that need to be resolved as a matter of society’s organic law, judges have been inclined to see railroad law—questions of regulating economic forces best left to legislators.⁴¹

III. GLOBAL RAILROAD LAW

If the problem described above was one of legal academics reaching too far, the next story is one of legal academics initially not reaching far enough.

Because the initial wave of immigrants to cyberspace was overwhelmingly American—both natural and juridical persons—novel legal issues about the Internet have usually been tested first in American

38. *Id.* See generally Benkler, *supra* note 28 (analyzing congressional power to regulate information production and exchange); Pollack, *supra* note 28, at 40–89 (discussing the constitutional limits on database protection). For my own views of the constitutionality of different kinds of database protection in light of *Feist*, see Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 209–14 (2002).

39. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

40. Discussing prior information disclosure cases and the present dispute, the majority noted that “[o]ur refusal to construe the issue presented more broadly is consistent with this Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.” *Id.* at 529. Of course, the Court *has* ruled that “truthful publication” may be “punished.” See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

41. Indeed, the one low-protectionist victory, the *Grokster* decision, amounted to the judge concluding that the record companies’ arguments needed to be addressed to the legislation, which could change the contours of contributory liability. *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003).

courts between American actors. Not surprisingly—and despite the “global” rhetoric—when American academics began paying attention to the Internet, it felt like a wholeheartedly American institution.⁴² The Internet was “global” in the way *Star Trek* was inter-galactic: for being distant planets, all the sets looked surprisingly familiar and, despite the funny costumes, everyone spoke with American accents—and concepts.

Whether by accident or an invisible hand of intellectual selection, the initial wave of legal scholars drawn to the Internet was mainly experts in American constitutional, criminal, commercial, and copyright law. I have often wondered what the first years of “Internet law” scholarship would have looked like if the first people on the scene had been scholars established in international or comparative law, not experts in U.S. contract and constitutional law.⁴³

Even today, a novel cyberlaw problem is statistically likely to happen first in the United States or, more broadly, in a common-law jurisdiction. Survey information for 2002 puts Americans at 42.65% of Internet traffic, dwarfing number two China (6.63%) and number three Japan (5.24%).⁴⁴ Add Commonwealth jurisdictions and a majority of Internet traffic still occurs among English-speaking children of the common law.⁴⁵ If American legal scholars have been too Americentric about the Internet (and there certainly have been exceptions), this is a good explanation for the myopia.

The United States will remain the single largest, monolingual, legally-integrated economy on the Internet for a few years, but only a few. By one estimate, by as early as 2005, Americans will only be one quarter of all Internet users.⁴⁶ By another estimate, Chinese speakers

42. This also caused, in some countries, the perception of the Internet as yet another American intrusion into local or national societies. See, e.g., ANDRÉ LUCAS, *DROIT D'AUTEUR ET NUMÉRIQUE* 7 (1998) (noting “a little polemical debate” in France over whether the Internet is a “vehicle for American thinking”).

43. A point made in Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 360–61 (2003) [hereinafter Hughes, *Persistence of Law*].

44. *China Second to US in Web Traffic: Study*, SIDNEY MORNING HERALD, <http://www.smh.com.au/articles/2002/08/01/1028157806643.html> (Aug. 1, 2002).

45. Together, the United States, United Kingdom, and Canada are a bare majority of Internet traffic: 50.52%. *Id.* A reader may quibble that much Canadian traffic is Québécois and, therefore, French and civil-law oriented; but then one would add Australia, New Zealand, Singapore, Ireland, Kenya, Nigeria, India, and South Africa (the last four being common-law countries with English being the vastly dominant language of Internet users).

46. Michael Pastore, *Global Internet Population Moves Away from US*, CYBERATLAS, at http://cyberatlas.internet.com/big_picture/geographics/article/0,,5911_558061,00.html (Jan. 11, 2001).

will be a majority of Internet users by 2007.⁴⁷ As a sign of things to come, the presidency of the Internet Corporation for Assigned Names and Numbers (“ICANN”) passed in 2003, for the first time, to a non-American.⁴⁸

This emerging reality of the Internet appears to be forcing more express consideration of how national legal systems resolve similar problems differently. Generally speaking, transnational economic actors have an interest in having such differences smoothed away, while a range of other players have varying stakes, pro and con, in such “harmonization.” Recently, in discussing intellectual property, French commentators Michel Vivant and Agnès Maffre-Baugé have made a similar observation. Seeing the tension between private actors that want to circulate goods and services freely via the Internet and nation-states that still rely on territorial control, Vivant and Maffre-Baugé conclude:

This gives an indispensable characteristic to the adoption of rules that are convergent, if not common, whenever possible. In truth, this means of harmonization has, for a long time, been relied upon by States. But the “Internet phenomenon” seems to make alternative formulae emerge which one will need to consider for a moment.⁴⁹

But two points should be noted. First, this will be far from complete convergence; convergence is not “indispensable” if important constituencies learn to live with—and perhaps even seek to maintain—specific differences among national systems. Second, there are both different ways to think about this convergence and different ways this convergence is occurring.

American legal academics are increasingly turning to the international and transnational legal aspects of the Internet, but they have generally done so well *after* policymakers were already grappling with its transnational characteristics. Perhaps this is because, for a certain time, many academics and intellectuals were caught up in a heady ethos of the Internet being *immune* to law or requiring a wholly

47. Frances Williams, *Chinese to Become Most-Used Language on Web*, FIN. TIMES, Dec. 7, 2001, available at 2001 WL 31428030.

48. Australian Paul Twomey replaced American Stuart Lynn. See Declan McCullagh, *ICANN Names New CEO*, CNET NEWS.COM, at http://news.com.com/2100-1028_3-993390.html?tag=st_rn (Mar. 19, 2003); see also James Pearce, *New ICANN Chief Open to Change*, CNET NEWS.COM, at http://news.com.com/2100-1032-993451.html?tag=fd_top (Mar. 20, 2003).

49. Michel Vivant & Agnès Maffre-Baugé, *Internet et la Propriété Intellectuelle: Le Droit, l'Information et les Réseaux*, LES NOTES DE L'IFRI 59 (Institut Français des Relations Internationales, Paris, June 2002); see also LUCAS, *supra* note 42, at 13 (recognizing that a comparative law approach is necessary to the minimal harmonization of law needed on the Internet).

reconceptualized system of rule-governance. Elsewhere, I have called these the “no law Internet” and the “kingdom of the Internet” visions.⁵⁰ It was hard to resist visions like this when social scientists and commentators all around us were opining pearls such as “[c]yberspace is Platonism as a working product”⁵¹ and “[t]he Net wires the world for Hegelian *Geist*.”⁵²

While much popular and intellectual writing explored these visions, Congress, companies, and diplomats were busily engaged in a more pragmatic project of translation—bringing laws, sometimes kicking and screaming, into the Internet environment. This project of translation or transposition of law⁵³ was not undertaken because these people are hostile to utopian visions, but because transposition of laws into the Internet environment was what constituencies and litigants were demanding. Children were getting unprecedented access to pornography and libeling, if not threatening, school administrators; political dissidents were getting unprecedented access to information—and libeling, if not threatening, their regimes. People were trading, selling, and “sharing” things—music, antiques, trade secrets, Nazi paraphernalia—often things they did not have or did not have the authorization to sell, trade, or share. The effects of cyberspace first spilled into meatspace. It was then that reality—law—bit back.

Consciousness of the transnational legal issues triggered by the Internet has now taken better hold among American academics, particularly with hot topics like copyright law and jurisdiction.⁵⁴ Internet “governance” is another such area, principally in the form of ICANN,⁵⁵ although it merits pointing out that ICANN is itself a creature of American policymakers confronting a problem first: how to

50. Hughes, *Persistence of Law*, *supra* note 43, at 364–72.

51. Michael Heim, *The Erotic Ontology of Cyberspace* (comparing Plato’s well known story of the cave to cyberspace), in *CYBERSPACE: FIRST STEPS* 64 (Michael Benedikt ed., 1991).

52. MARK C. TAYLOR & ESA SAARINEN, *IMAGOLOGIES: MEDIA PHILOSOPHY*, at Simcult 2–3 (1994) (referring to the way in which the Internet’s global span has created a medium that could give rise to absolute knowledge).

53. Here I use “transpose” in the musical sense of writing or performing a composition in a key other than the one in which it was originally written or in the linguistic sense of translation, not in the sense of reversing the order or words—something that could have deleterious effects on most laws.

54. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 346–47 (2003).

55. See, e.g., A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93 (2002) (criticizing U.S. government efforts to devolve control of the domain-name system “root” as intended to keep ultimate control while maximizing the government’s deniability and distance); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000) (same).

devolve control of the Internet away from the U.S. government and toward the international community.⁵⁶

Yet to date, we have seen very little discussion—or meta-discussion—about the mechanisms of convergence of law that the Internet has triggered. Let me present a simple taxonomy of five ways legal norms are converging (or not)—that is, transnational legal norms are forming—via the economic and social force of the Internet. “Convergence” itself is a term and concept enjoying popularity across a wide range of commentary and scholarship, used to describe business practices, biology, and epistemology—not to mention the idea of “convergence” in electronics and communications.⁵⁷ That last use is most relevant to our discussion here because as different media and technological systems converge, legal systems often must be melded, harmonized, or “converged.”

In a recent paper, I presented an earlier version of this taxonomy of four (ontologically ambiguous) “ways” that legal norms are being formed.⁵⁸ But we might also think of this as a taxonomy of *narratives*, with more than one narrative having explanatory power vis-à-vis the development of a particular legal norm. There may be a few different, equally credible ways to tell the story of the development of any particular legal norm.

A. *Top-down Convergence: Treaty-based Development of Legal Norms*

The most familiar form of convergence is the “top-down” kind in which a multilateral treaty is negotiated and countries ratify, then implement, the new legal norms of the treaty regime. Perhaps the best example of top-down convergence of Internet-related laws has been the World Intellectual Property Organization (“WIPO”) copyright treaties crafted in December 1996—the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).⁵⁹

56. Properly put, the problem was and still is how to devolve control of the Internet away from the U.S. government and toward the international community (a) while avoiding existing U.N. and multilateral structures that Americans find to be a morass, and (b) in a method that, once it began, the U.S. government could still control the pace and extent.

57. See, e.g., Ken Belson, *65 and Just Itching for a Little Convergence*, N.Y. TIMES, Apr. 3, 2003, at C1 (describing Sony’s president as “an undaunted preacher for convergence in music, movies, games and communication in all forms”), available at LEXIS, News Library, The New York Times File; Mark Landler, *Sony Is Selling Convergence, but Will Europe Buy It?*, N.Y. TIMES, Sept. 8, 2003, at C1, available at LEXIS, News Library, The New York Times File.

58. Hughes, *Persistence of Law*, *supra* note 43, at 363.

59. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT], available at <http://www.wipo.int/treaties/ip/wct/> (last visited Oct. 4, 2003); World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996,

The WCT and WPPT protections are principally intended to make three basic additions to international norms of copyright law. These three new legal norms of international copyright law are: (a) generalizing existing rights of distribution, broadcast, and public performance into more generic rights to “make available to the public” or “communicat[e] to the public”;⁶⁰ (b) creating obligations about the protection of “rights management information”;⁶¹ and (c) creating obligations vis-à-vis “technological measures” that copyright owners use to control access to and use of their works.⁶² The last of these has been by far the most contentious, the debate spilling over into the fourth narrative I will describe below.

Top-down convergence for Internet legal norms may have reached its apogee in the 1990s, when the international bureaucratic community was flush with the successful negotiation of the Marrakesh Agreements establishing the World Trade Organization (“WTO”).⁶³ There was a certain amount of public and private expertise (lobbyists) in the United States and Europe which had ramped up for those negotiations: after 1995, that community of experts was in need of work. People are perhaps more sanguine now. For example, one commentator, looking at the fast pace of developments on the Internet and the eight years needed to negotiate the WTO Agreements, concluded that “harmonization of legal standards is not a realistic solution for global information issues.”⁶⁴

Of course, that kind of statement assumes that top-down convergence is the principal—or *only*—way to harmonization, a mistake too easily made. Top-down convergence is arguably the most transparent formation of transnational legal norms. That may make it the easiest to study and chronicle. Top-down convergence is also arguably the method of forming transnational legal norms that allows well-organized activists to exert the most pressure with the least resources—for that reason, it might come to be disfavored by those with *more* resources. A great example of this was the burst of activism that scientists and researchers released against database protection at the 1996 WIPO

36 I.L.M. 76 [hereinafter WPPT], available at <http://www.wipo.int/treaties/ip/wppt/> (last visited Oct. 4, 2003).

60. WCT, *supra* note 59, arts. 6, 8.

61. *Id.* art. 12.

62. *Id.* art. 11.

63. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 2 (1994).

64. Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 577 (1998).

Diplomatic Conference, thereby stopping that subject from being included in the WIPO copyright treaties that emerged.⁶⁵

B. Model-based Emergence of Legal Norms

In contrast to negotiation of a binding multilateral treaty, there is a “soft” form of top-down formation of transnational legal norms for the Internet: the development in an international forum of a model law or set of principles that gain widespread adoption. An extremely successful example of this has been the Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) for addressing disputes between domain-name (“DN”) registrants and trademark holders.⁶⁶ Another, arguably less successful example has been the 1996 United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Electronic Commerce.⁶⁷

The problem of the relationship between trademarks and domain names emerged early in the legal consciousness of the Internet. The classic “cybersquatting” situation arises when one party controls a domain name that is substantially the same as another party’s trademark. Typically, the domain-name holder registers and/or maintains control of the domain name with either an intent to sell the domain name to the trademark holder or an intent to profit from Internet traffic that would come to a domain name that is a famous trademark. Courts have been consistently and uniformly unsympathetic to such cybersquatters, but to reach reasonable results, judges—whether American, French, Chinese, or Australian—often stretched traditional trademark doctrines⁶⁸ or applied other doctrines.⁶⁹

65. See, e.g., J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 81 (1997); Justin Hughes, *Political Economies of Harmonization: Database Protection and Information Patents* (July 8, 2002) (paper presented at the Institut Français de Relations Internationales, June 10, 2002), available at <http://papers.ssrn.com/abstract=318486> (last visited at Oct. 6, 2003).

66. See, e.g., ICANN, UDRP, at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last updated Feb. 2, 2002).

67. *UNCITRAL Model Law on Electronic Commerce*, G.A. Res. 162, U.N. GAOR, 51st Sess., Annex I, U.N. Doc. A/Res/51/162 (1996), available at www.uncitral.org/english/texts/electcom/ml-ecomm.htm (last visited Oct. 6, 2003).

68. See *Porsche Cars N. Am. Inc. v. Porsche.net*, 302 F.3d 248, 261 (4th Cir. 2002) (“[T]he enactment of the ACPA [Anticybersquatting Consumer Protection Act] eliminated any need to force trademark dilution law beyond its traditional bounds in order to fill a past hole”); *Sporty’s Farm L.L.C. v. Sportsman’s Mkt.*, 202 F.3d 489, 497 (2d Cir. 2000) (the ACPA “was adopted specifically to provide courts with a preferable alternative to stretching federal dilution law when dealing with cybersquatting cases”); see also GAUTIER KAUFMAN, NOMS DE DOMAINE SUR INTERNET: ASPECTS JURIDIQUES 122–23 (2001) (noting that some courts “artificially” treated the domain name as a good or service in order to apply French trademark counterfeiting law); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J.

In 1999, WIPO produced a report on how to handle these disputes in the generic top-level domains (“gTLDs”). That report became the basis for ICANN’s UDRP, a mandatory but non-binding administrative arbitration procedure for all domain names in the .com, .net, or .org environments.⁷⁰ Under the UDRP, a trademark holder can recover a domain name in one of these gTLDs by showing that (a) the domain name is similar to the trademark, (b) the domain-name holder lacks any intellectual property or legitimate business rights in the name, and (c) there has been bad faith in the registration and use of the domain name.⁷¹ The UDRP then provides a non-exhaustive list of evidence for and against “bad faith” registration and use.⁷² While the UDRP is triggered by a domain name being “identical or confusingly similar” to a trademark, the bad faith requirement means, as Graeme Dinwoodie observed in his remarks at the Symposium, that unfair competition, not consumer confusion, is the agreed foundation for the UDRP.

Although the UDRP continues to suffer from the occasional poorly reasoned decision⁷³ and is often charged with some degree of pro-trademark holder bias, it is the most powerful example of *lex Internet* through a model law to date. Officially created only for the three large, unrestricted top-level domains or gTLDs—.com, .net, and .org—the

1687, 1701 (1999) (“Courts have also stretched trademark doctrine to accommodate the extreme case involving Internet domain names and ‘cybersquatters.’”); Preston M. Torbert, Commentary on *Inter IKEA Systems v. International Network of Information Co.* (July 11, 2000) (describing Chinese judges’ stretching trademark law to rule against a cybersquatter of an IKEA trademark), available at <http://www.bmck.com/ecommerce/china-cybersquat.doc> (last visited Oct. 6, 2003).

69. For example, in *CSR Ltd. v. Resource Capital Australia Pty Ltd.* [2003] F.C.A. 279 (Fed. Ct. Austl.), available at 2003 WL 1790032, the court applied the Trade Practices Act to rule against a cybersquatter in possession of CSRSugar.com.au. *Id.* ¶ 42. The court noted that there would be “a real difficulty in relief being given under the Trade Marks Act” because it could not be said that the defendant, through mere registration of the domain name, had “used the domain name as a trademark in relation to goods or services in respect of which CSR had registration or for that matter closely related to either goods or services referred to in the CSR registrations.” *Id.* As long as the domain name was simply warehoused, the Australian Trade Marks Act did not seem to apply. *Id.*

70. See THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN), UNIFORM DOMAIN NAME DISPUTE-RESOLUTION POLICY, at <http://www.icann.org/udrp/udrp-policy-29sept99.htm> (Sept. 29, 1999) [hereinafter UDRP].

71. *Id.* art. 4(a)(i)–(iii).

72. *Id.* art. 4(b).

73. See ANDRE R. BERTRAND, *LE DROIT DES MARQUES, DES SIGNES DISTINCTIFS ET DES NOMS DE DOMAINE* 578–83 (2002) (noting “the numerous contradictory decisions rendered on identical facts” [les nombreuses décisions contradictoires rendues a propos de faits identiques] and the very broad definition of “trademark” used by WIPO UDRP panels); Laurence R. Helfer & Graeme Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2002); see also A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy”—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 (2002) (offering a critical assessment of UDRP’s development and early cases).

UDRP's principles have quickly been adopted for new generic TLDs⁷⁴ and, much more importantly, have become the basis for dispute resolution standards in over thirty country-code TLDs ("ccTLDs"). Some, like Mexico and Venezuela, have adopted the actual UDRP mechanisms *and* arbitral institutions⁷⁵—a phenomenon explained, in part, by the economies of scale involved in handling these disputes. Some, like Japan and Singapore, have adopted the UDRP verbatim or almost verbatim.⁷⁶

Other economies on the Internet have shown themselves to be under the UDRP's soft influence. Britain's .uk TLD formulates its policy in terms of "abusive registration" of a domain name, but the list of factors bearing on this question bears a strong resemblance to the UDRP and the Anticybersquatting Consumer Protection Act ("ACPA").⁷⁷ Malaysia uses a two-part test, mimicking UDRP's article 4(a)(i) and (ii),⁷⁸ but does not really leave out 4(a)(ii); instead, the domain-name holder may prove its registration and use "was not in bad faith by establishing . . . rights and legitimate interests in the Domain Name."⁷⁹ In India, the National Centre for Software Technology ("NCST"), the authority for the .in ccTLD, has promulgated domain-name rules that replicate UDRP Article 4(a)(i) and (a)(ii), and then replace the general "bad faith" provision of 4(a)(iii) with some specific examples of bad faith—including attempting to sell the domain name or warehousing it

74. For example, paragraph 4(a) of the Start-up Trademark Opposition Policy (STOP) for the .biz gTLD repeats the UDRP three part test. NEULEVEL, INC., START-UP TRADEMARK OPPOSITION POLICY AND RULES FOR .BIZ, at <http://www.neulevel.biz/ardp/docs/stop.html> (revised Sept. 19, 2001).

75. BERTRAND, *supra* note 73, at 579 (also counting Romania, the Philippines, the Bahamas, and Cyprus as countries that have adopted UDRP arbitration at WIPO for their country TLDs); see also KAUFMAN, *supra* note 68, at 177–78 (listing names of countries adopting arbitration).

76. When Singapore adopted dispute resolution procedures to deal with claims of cybersquatting in the .sg space, the Singaporeans adopted ICANN's Uniform Domain-Name Dispute-Resolution Policy almost whole cloth, but added a distinct mediation procedure. See SING. NETWORK INFO. CTR. (SGNIC), SINGAPORE DOMAIN NAME DISPUTE RESOLUTION POLICY, at <http://www.nic.net.sg> (Nov. 2001) [hereinafter SINGAPORE DRP]. The Singaporeans did, however, add a mediation process: paragraph 4(e) provides that the parties will be invited to consider whether they wish to have the dispute mediated by the Administrative Panel before the Administrative Panel is called upon to decide the dispute, then sets out procedures for such mediation. *Id.* para. 4(e).

77. NOMINET.UK, DISPUTE RESOLUTION SERVICE POLICY arts. 3–4, at <http://www.nominet.org.uk/ref/drs-policy.html> (last visited Oct. 4, 2003).

78. MALAY. NETWORK INFO. CTR. (MYNIC), DOMAIN NAME DISPUTE RESOLUTION POLICY art. 5.2(i)–(ii), at http://www.mynic.net.my/mydrp/MYDRP_apr03.PDF (2003).

79. *Id.* art. 7.

for one year or more.⁸⁰ While the NCST's provisions can be criticized as being ambiguous and potentially failing to cover all genuine cybersquatting situations,⁸¹ the influence of the UDRP is evident.

China has experienced a two-step process of moving toward the UDRP standards. In August 2000, the Beijing Higher People's Court promulgated guidelines to lower court judges⁸² stating that "[b]ad faith registration and preemption of other people's well-known trademarks are acts . . . to which the General Principles of the Civil Law apply and which the Unfair Competition Law regulates."⁸³ The Beijing Court guidelines then, in effect, reproduced the UDRP examples of "bad faith."⁸⁴

This decision still forced international entities facing cybersquatting in the .cn TLD with recourse only to Chinese courts. In September 2002, this changed with the establishment of a "Domain Name Dispute Resolution Policy" by the China Internet Network Information Centre ("CNNIC"), which administers the .cn domain-name registry. The new CNNIC Domain Name Dispute Resolution Policy ("DRP") applies to both Roman character and Chinese character names in the .cn environment (including .com.cn, .org.cn, and .net.cn). Some commentators have called the standards in the CNNIC system "reminiscent" of the UDRP,⁸⁵ but that is an extreme understatement. A complaint under the CNNIC DRP requires the following conditions to be proved:

80. NAT'L CTR. FOR SOFTWARE TECH., INDIAN INTERNET DOMAIN NAME DISPUTE RESOLUTION POLICY § 7, at <http://domain.ncst.ernet.in/disputepolicy.php> (last modified July 16, 2003) [hereinafter IDNDRP].

81. The IDNDRP is ambiguous because section 7 does not make it clear that 7(a) [parallel to UDRP 4(a)(i)] and 7(b) [parallel to UDRP 4(a)(ii)] are conjunctive—both conditions should be fulfilled, while 7(c) through 7(f) should be disjunctive—any one condition should provide the foundation for a domain-name dispute. *Id.* The IDNDRP is further ambiguous in that 7(e) says "[a] complaint for cybersquatting has been received" without specifying what "cybersquatting" is or whether the complaint can be something that was filed in an Indian court. It appears that India's new trademark law does *not* provide any further guidance on cybersquatting. See Ashu Thakur & Ketki Shah, *Domain Names and Protection of Trademarks—The Indian Trademarks Act, 1999, and Other Dispute Resolution Avenues*, 7 LEGAL EYE (A.R.A. Law Advocates & Solicitors, Mumbai, India, Nov. 2002) (on file with author) (describing the status of Indian Trademark and domain-name law).

82. See *Guidelines Set Forth for Hearing Cybersquatting Cases*, CHINA PAT. AGENT (H.K.) LTD. NEWSL., at www.cpahkltd.com/Newsletter/DomainCase.html (last visited Nov. 14, 2003) (translating the Beijing Higher People's Court's August 2000 guideline for hearing cybersquatting cases (also translated as Guidelines for "Vicious Domain-Name Registration")).

83. *Id.* art. IV.

84. See Hughes, *Persistence of Law*, *supra* note 43, at 379–80.

85. Gabriela Kennedy & David Taylor, *Prepare for China's Domain Name Explosion*, 128 MANAGING INTELL. PROP. 35, 37 (2003).

- i. the disputed domain name is identical with or confusingly similar to the Complainant's name or mark in which the Complaint [sic] has civil rights or interests;
- ii. the disputed domain name holder has no right or legitimate interest in respect of the domain name or major part of the domain name;
- iii. the disputed domain name holder has registered or is being used [sic] the domain name in bad faith.⁸⁶

In short, China is using the same standards for .cn that apply to the .com environment with the exception that the *conjunctive* condition of the UDRP's third element (registered and is being used in bad faith) has been changed to a disjunctive standard (or)—a pro-trademark owner amendment that one commonly sees in the most recent wave of UDRP descendents.⁸⁷ As with the UDRP, CNNIC chose to permit different entities to serve as arbitral authorities in overseeing the CNNIC DRP, with at least two independent institutions already appointed: the Hong Kong International Arbitration Centre and the China International Economic and Trade Arbitration Commission (“CIETAC”) in Beijing.⁸⁸ Both institutions have records in arbitrating claims between Chinese and non-Chinese entities,⁸⁹ increasing the transparency of and confidence in the CNNIC system.

Arguably, the United States is the principal outlier in all of this, having passed its own ACPA in 1999. It would be too Panglossian to claim that the ACPA *reflects* the UDRP standards; the relationship between the two systems for handling trademark/domain name is more complex. One perspective—what I think should be the dominant perspective—is that the ACPA and the UDRP are both manifestations of the same ideas formulated circa 1999 about what everyone could agree upon as the “bad faith” that constitutes “cybersquatting.” Thus, the ACPA's nine-factor test for bad faith hones close to the UDRP's understanding of the conditions that should trigger a domain-name

86. H.K. INT'L ARBITRATION CTR., CNNIC DOMAIN NAME DISPUTE RESOLUTION POLICY, at http://dn.hkiac.org/cn/cne_policy.html (Sept. 30, 2002).

87. The same change from the UDRP appears in Singapore's dispute resolution procedure. See SINGAPORE DRP, *supra* note 76, para. 4(a)(iii).

88. Kennedy & Taylor, *supra* note 85, at 38.

89. See, e.g., Justin Hughes, *Foreign Lis Alibi Pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration*, 13 ARB. INT. 63 (1997) (describing the first CIETAC arbitration with a non-Chinese majority arbitral tribunal).

transfer.⁹⁰ Where the ACPA now arguably seems to be in conflict with the UDRP is in the ACPA's in rem procedures.⁹¹

*C. Invisible Hand Convergence: Environment-based
Emergence of Legal Norms*

In the next narrative of convergence, legal norms for the Internet emerge without any intervention by international bureaucrats. In this story, convergence occurs because of market (or environmental) forces: either the economy adopts new legal norms within a very limited spectrum of possibilities *or* the economy will not enjoy significant development of the Internet (as its technology presently exists). One example of this is basic legal treatment of electronic signatures and documents; another example is limitations on Internet service provider ("ISP") liability for third party conduct.

Contract law, particularly concerning consumers, is highly developed, highly localized law, but there are some baseline components of contract law where parallel convergence can be expected. These are legal uncertainties that must be solved before there will be widespread electronic contracting; for instance, what do we do in the Internet environment when contract law requires a "document," a "writing," a "signature," and "delivery" of one or more of those things. It was self-evident from the beginning that the digital, networked environment either *failed* to meet these requirements⁹² or could *not* be assumed to meet these requirements. And as with many areas of law, an uncertain legal environment could dampen activity as much as a certain, hostile legal environment.

90. The ACPA has a non-exhaustive nine-factor test, 15 U.S.C. § 1125(d)(1)(B)(i) (2000 & West Supp. 2003), which is very similar to the conditions of UDRP article 4(a) and (b) together.

91. This conflict is all the more irrational because the United States "arguably stands to lose the most from the segmentation of the domain name system [and] should pursue international coordination of domain name regulation, rather than the extensive assertion of jurisdiction found in the ACPA." Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticyber-Squatting Consumer Protection Act*, 17 BERKELY TECH. L.J. 989, 993 (2002). For just these reasons, the Clinton Administration had opposed passage of the ACPA in 1999. See Anne Gallagher, *Senate Lawmakers Target Cyberspace*, Wash. Tech., Aug. 30, 1999, available at http://www.washingtontechnology.com/news/14_11/federal/754-1.html (last visited Dec. 31, 2003) (observing that "[w]hile cybersquatting bills might be making their way through Congress with ease, the Clinton administration is not all that pleased. It is opposed to becoming a referee for domain names and wants disputes settled in the courts instead.").

92. See, e.g., Andrew D. Murray, *Entering into Contracts Electronically: The Real W.W.W.* (concluding that a "digital document" would have failed to meet document requirements under United Kingdom law in the late 1990s), in *LAW AND THE INTERNET: A FRAMEWORK FOR ELECTRONIC COMMERCE* 17, 19–20 (Lilian Edwards et. al. eds., 2d ed. 2000).

The solutions most likely not to be wrong are those that are minimal, general solutions to the uncertainty. The obvious answer is the adoption of “equivalence” rules,⁹³ i.e., that, under certain conditions, electronic files, electronic “signatures,” electronic delivery, etc., are legally sanctioned as equivalents to their meatspace counterparts. This can be achieved by statutory provisions on “legal effect” that are increasingly common. For example, the EU’s 2000 E-Commerce Directive establishes among European countries an obligation to allow “contracts to be concluded by electronic means”—an obligation that is achieved by prohibiting any “legal requirements applicable to the contractual process” that would “result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.”⁹⁴

Similarly, the Uniform Electronic Transaction Act (“UETA”) in the United States provides that “[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”⁹⁵ Pakistan’s new law on e-commerce succinctly states that “the requirement under any law for affixation of signatures shall be deemed satisfied where electronic signatures . . . are applied,”⁹⁶ while Philippine law now provides that:

Electronic documents shall have the legal effect, validity or enforceability as any other document or legal writing, and

. . . Where the law requires a document to be in writing, that requirement is met by an electronic document if the said electronic

93. *Id.* at 20. As early as 1996, UNCITRAL advocated such a “functional equivalence” approach. See UNCITRAL, GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE paras.15–16 (1996) (explaining “functional equivalent approach”), available at www.uncitral.org/english/texts/electcom/ml-ecom.htm (last visited Oct. 6, 2003).

94. Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular, Electronic Commerce, in the Internal Market, art. 9, § 1, 2000 O.J. (L 178) 11 [hereinafter E-Commerce Directive], available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf (last visited Oct. 4, 2003).

95. UNIF. ELEC. TRANSACTION ACT § 7(a) (1999). As of December 2003, forty-four states and the District of Columbia had adopted the UETA. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS (NCCUSL), A FEW FACTS ABOUT THE UNIFORM ELECTRONIC TRANSACTION ACT, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Dec. 30, 2003); see, e.g., CAL. CIV. CODE § 1633.7(a) (West Supp. 2003). Section 1633.7(b) similarly provides that “[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.” *Id.* § 1633.7(b).

96. The Pakistani Electronic Transactions Ordinance 2002 was promulgated on September 11, 2002. *Electronic Transactions Ordinance Promulgated*, DAWN, Sept. 12, 2002, available at <http://www.dawn.com/2002/09/12/top15.htm> (last visited Nov. 3, 2003).

document maintains its integrity and reliability and can be authenticated so as to be usable for subsequent reference⁹⁷

The Philippine law further provides conditions under which “[a]n electronic signature on the electronic document shall be equivalent to the signature of a person on a written document”⁹⁸ and under which “[w]here the law requires information to be presented or retained in its original form, that requirement is met by an electronic data message or electronic document.”⁹⁹

Many of these equivalence laws bear some relationship to the UNCITRAL model law and, to that degree, could also be placed within the “soft law” model law narrative.¹⁰⁰ I put e-contracting equivalence convergence here because of an admittedly unproven belief that this type of convergence would have occurred at roughly the same pace with or without the UNCITRAL model. Perhaps a “purer” example of invisible hand convergence are limitations on ISPs’ liability for the actions of their subscribers. The problem of liability of ISPs for actions by ISP users was one of the earliest legal issues for the Internet. Serious libel got to the Internet long before serious e-commerce. In addition to defamation, ISPs quickly confronted liability issues for third party copyright infringement, trademark infringement, disclosure of trade secrets, and violations of privacy rights.

Once it was accepted that ISPs do not themselves “communicate” content to the public,¹⁰¹ there were a variety of ways to conceptualize ISP exposure to third party liability for what Internet users send through the system. At one extreme, ISPs could be held to the strict liability

97. Electronic Commerce Act of 2000, Republic Act No. 8792, § 7 (Phil.), available at <http://www.pinoylaw.com/e-commerce.htm> (last visited Oct. 7, 2003).

98. *Id.* § 8. See also § 5(e), which states that:

“Electronic signature” refers to any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedures employed or adopted by a person and executed or adopted by such person with the intention of authenticating or approving an electronic data message or electronic document.

99. *Id.* § 10(1).

100. They bear “some relationship” because it is difficult to tell how much each country was influenced by the UNCITRAL model or whether the UNCITRAL model provides some political justification to modify laws in the direction that the European Union and the United States have moved.

101. See Agreed Statement Concerning the WIPO Copyright Treaty, Dec. 20, 1996, available at http://www.wipo.org/eng/diplconf/distrib/96dc.htm#a_8 (last visited Oct. 7, 2003) (“It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.”); see also P. Bernt Hugenholtz, *Caching and Copyright: The Right of Temporary Copying*, 22 EUR. INTEL. PROP. REV. 482, 489 (2000).

standard of a publisher.¹⁰² At the other extreme, the ISPs could be regarded as the equivalent of a telephone company or the postal service—not responsible for the illegal materials that they carry on behalf of third persons. Intermediary standards and analogies were also available.

But market economics do point toward a choice among the competing standards of liability. With the present state of technology, a country that imposes strict liability on ISPs for third party defamation and intellectual property infringement will drive ISPs either (a) out of business or (b) into highly restricted business models (in order to contain the otherwise enormous policing costs to keep defamatory and/or infringing material off their system).¹⁰³

Barring improbable technology developments,¹⁰⁴ market forces will force countries to move toward legal systems that either (a) completely shield ISPs from such liability or (b) enable ISPs to shield themselves from most liability through reasonable, affordable self-policing. This is the result one sees over and over again; so much so that Professor Michael Geist recently noted, “the rules for ISPs [are] increasingly settled.”¹⁰⁵

102. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (finding strict liability as the publisher of defamatory comments made by an unidentified party on one of Prodigy’s bulletin boards). In the same spirit, the U.S. Department of Commerce’s early analysis of copyright and Internet issues concluded that ISPs should be analogized to publishers, putting substantial liability on them for third party infringements. U.S. DEP’T OF COMMERCE, *THE WHITE PAPER: INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* 235 (1995). The “White Paper,” as it was called, was directed principally by then Assistant Secretary Bruce Lehman. See also *Godfrey v. Demon Internet Ltd.*, 4 All E.R. 342 (Q.B. 1999) (discussing an ISP as a publisher). The *Godfrey* case was not a strict liability holding, as *Demon* had been put on notice of the defamation. The United States soon moved away from the *Stratton Oakmont* approach, as evidenced by limitations on ISP liability in 47 U.S.C. § 230. See *infra* notes 106–11 and accompanying text.

103. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (stating that strict liability for ISPs “would chill the use of the Internet because every access provider or user would be subject to liability when a user posts an infringing work to a Usenet newsgroup”); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 348 (1995) (arguing that imposing liability will restrict the flow of information).

104. Improbable because all information moving through the Internet is (a) sufficiently fixed to be eligible for copyright and (b) potentially defamatory. It is hard to see how automated screening could overcome these law-produced characteristics of Internet “content.”

105. Michael Geist, *Internet ‘Choke Points’ Put the Squeeze on Content*, TORONTO GLOBE AND MAIL, July 11, 2002, at B11, available at <http://www.globeandmail.com/servlet/ArticleNews/printarticle/gam/20020711/TWGEIS> (last visited Dec. 28, 2003).

An example of the first choice—solid shielding from liability—is the United States’ Communications Decency Act of 1996, 47 U.S.C. § 230, interpreted as addressing the problem of Internet defamation. Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁰⁶ The shield is complete as long as the provider of “an interactive computer service” is not responsible “for the creation or development of [the] information,”¹⁰⁷ a provision that has been interpreted generously by American courts.¹⁰⁸

As to the second approach, the United States, China, Japan, and the European Union all have laws of some type shielding ISPs from liability for third party data transfers when the ISP: (a) does not create or control the third party’s content, (b) does not control who gets the content, (c) does not retain the content any longer than reasonably necessary, and, critically, (d) *does not know about the illegal nature of the content*. Typically, when the ISP does learn of the illegal nature of the data transfer, the protection from liability is premised on prompt elimination of the content from the Internet.

This is the general formula in the United States’ DMCA, which establishes ISP “safe harbors” from contributory and vicarious liability for copyright infringement.¹⁰⁹ It is also the formula embodied in the EU’s 2000 Electronic Commerce Directive concerning liability for third party defamations and intellectual property infringements.¹¹⁰ Both the

106. 47 U.S.C. § 230(c)(1) (2000).

107. *Id.* § 230(f).

108. *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (holding that § 230 immunized “AOL from liability for information that originate[d] with third parties”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 47, 51 (D.D.C. 1998) (finding that § 230(c) shielded AOL from defamation liability by Matthew Drudge, even where Drudge was paid by AOL to provide content to AOL users).

109. 17 U.S.C. § 512 (2000).

110. *See* E-Commerce Directive, *supra* note 94, arts. 12–14; *see also* Electronic Communications: The Electronic Commerce (EC Directive) Regulations 2002, arts. 17–19, available at http://www.dti.gov.uk/industry_files/pdf/regulations.pdf (last visited Oct. 4, 2003). Among EU members, some had already passed statutes or had court decisions limiting ISP liability. Luxembourg’s Law of 14 August 2000 limits ISP liability to conditions very similar to the DMCA, but for all bases for liability. *See* Veronique Hoffeld & Sara Delbecq, *Luxembourg*, in *ONLINE SERVICE PROVIDERS: INTERNATIONAL LAW AND REGULATION* Binder I, at Lux-7 (Dennis Campbell ed., 2003). In a 2000 case, the Italian Supreme Court held that an ISP would not be held liable for defamation by one of its users absent the requirements of “conspiracy” in the Italian penal code being met. Francesco Portolano & Eugenio Prosperetti, *Italy* (reporting on Corte de Cassazione, Decision No. 1141 of October 27, 2000), in *ONLINE SERVICE PROVIDERS*, *supra*, at ITA-17–19. A December 2002 Law Commission report in the United Kingdom recommended that, if anything, European law on liability for third party

DMCA and the E-Commerce Directive have discrete provisions applying the liability shielding conditions to the three main ISP functions: transmission, caching, and hosting information materials. The DMCA also extends its safe harbor concepts to “information location tools,”¹¹¹ a provision intended to protect search engines.

Early Internet defamation cases in Japan followed the same general trend,¹¹² and, more recently, Japan has adopted similar statutory standards to shield ISPs from third party copyright infringements.¹¹³ India, however, shows only a limited movement in this direction to date. India’s Information Technology Act of 2000 provides some shelter for ISPs based on a combined knowledge and diligence standard—protecting a person from liability “for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.”¹¹⁴ It is unclear whether this covers only transmission services or also extends to hosting.¹¹⁵ With no case law to date

defamations should be moved closer to the United States’ § 230 standard, further protecting ISPs. See Owen Gibson, *Report Backs ISP Libel Law Claims*, THE GUARDIAN, <http://media.guardian.co.uk/newmedia/story/0,7496,862226,00.html> (Dec. 18, 2002).

111. 17 U.S.C. § 512 (d).

112. Interim Report by the Copyright Council of Japan. [First Sub-Committee—Experts’ Working Group], Regarding the Issue of ISP Liability (Dec. 2000) (reporting on 1997 and 1999 Tokyo District Court cases) (unofficial translation on file with author).

113. See *Japan: New Law on ISP Liability*, INTERNATIONAL IT AND NEW MEDIA UPDATE (Freshfields Bruckhaus Deringer, London, U.K.), Spring 2002, at 4 (noting that under the new Provider Liability Law, ISPs in Japan are held liable for infringing material if “[1] it is technically possible to prevent transmission of the material; and [2] the provider knows of the existence of the material and (i) knows that it is infringing; or (ii) it is reasonably possible to know that it infringes”), available at <http://www.freshfields.com/practice/ipit/publications/newsletters/ip-update/2855.pdf> (last visited Dec. 29, 2003); see also Experts Working Group, First Sub-Committee, Copyright Council of Japan, Interim Report (On Recourse and Punishment) (Dec. 2000) (recommending that Japanese copyright law adopt similar standards for ISP liability as those used in defamation law, which were similar to the DMCA’s approach).

114. Information Technology Act 2000, ch. 12, art. 79 (India), available at http://www.stpi.soft.net/itbill2000_12.html (last visited Oct. 4, 2003). Article 79 is captioned *Network Service Providers Not to Liable in Certain Cases*. It provides:

For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Id.

115. The statutory language “third party information made available” could suggest either transmission or hosting (or caching, for that matter). *Id.* Article 79 further defines “third party information” as “any information dealt with by a network service provider in his capacity as an intermediary,” which does not help clarify the ambiguity. *Id.*

interpreting this provision, it *appears* to move India some, but only some, steps toward the convergent standards for ISP liability described here.

D. Helping Hand Convergence: Viewing “Market”-based Emergence as the Result of Well-orchestrated Lobbying

It would be remiss to omit an alternative narrative to all of the above: that various areas of convergence are actually the result of well-orchestrated lobbying by transnational private actors. In this story, large corporations and trade associations with a presence in multiple Organization for Economic Co-operation and Development (“OECD”) countries lobby in a coordinated manner. They find the friendliest government to their particular cause and achieve the desired legislative change there; then they move onto other OECD (and developing) countries, arguing that to remain “competitive” these other countries must also adopt the legislative reform in question.

There is nothing inherently sinister about this process—in fact, it is exactly what one would expect rational actors that cross national boundaries to do. And this account of convergence is not necessarily incompatible with each of the others. Take the example discussed immediately above: convergence toward norms shielding ISPs from liability for information transfers by ISP users. What can be explained as market forces may also be explained as AOL and other Internet companies forging common ground and lobbying in coordination with national and regional ISPs, all of whom would benefit from liability-limiting legislation. To the degree this actually happened, it does not undermine the model of invisible hand, market forces convergence. It only explains the instrumentality—in the same way a series of gory battles between competing species might be the instrumentality for what, at a greater distance, looks like inevitable evolution.

To return to the example of the 1996 WIPO copyright treaties, the treaties require signatories to provide “effective legal remedies against the circumvention of effective technological measures that are used by authors” in the exercise of their copyright rights.¹¹⁶ In other words, there are *effective legal remedies* against “digital lock picks” that can be used to disrupt or circumvent encryption, scrambling, watermarks, and passwords used by copyright owners to protect their works.

116. WCT, *supra* note 59, art. 11; see also WPPT, *supra* note 59, art. 18.

This new legal standard has been the subject of tremendous debate—from the theoretical question of whether it is a *copyright* legal norm¹¹⁷ to the practical—indeed, critical—problem of interpreting the ambiguous phrase “effective legal remedies against circumvention.”¹¹⁸ Does that require prohibiting the act of circumvention (only)? Or does it require prohibiting circumvention devices, such as illicit descramblers, password breakers, etc.? Or must a country provide both? Must a country provide criminal sanctions against circumvention in order for the legal remedies to be *effective*?

Interpreting the ambiguous legal norm in article 11 of the WCT predictably became an area of intense jockeying by interested parties, as dominant national implementation of the WCT/WPPT provision would provide substance to what was expressed in the treaties as a very general standard.¹¹⁹

E. Enduring Divergence in Legal Norms

Like evolution—or erosion—convergence is a continuing process, so that even in areas described above as being subject to Internet-triggered convergence, there may remain enormous diversity. For example, while the UDRP approach to cybersquatting is having powerful, convergent influence, several economies with substantial Internet presences have yet to settle on a jurisprudence to balance the interests of domain-name and trademark holders.¹²⁰

In contrast to the four narratives above, there are some areas of law where the most appropriate description is non-convergence; divergence in the dominant norms in national legal systems will endure. The most visible of these is the law of free expression. The shielding of ISPs from liability to *other private actors* stands in marked contrast to attitudes toward making ISPs liable to follow the commands of the

117. 3 MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT § 12A.18[A] (2003) (discussing the effects of the WIPO copyright treaties).

118. WCT, *supra* note 59, art. 11.

119. And properly so, not just for practical reasons (there is no dispute settlement mechanism for the WCT as there is for TRIPS), but because the content of international legal norms can depend on their interpretation and implementation by nation-states. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340, 8 I.L.M. 679, 691 (stating that in interpreting a treaty, account shall be taken of “any subsequent practice in the application of the treaty which establishes the agreements of the parties regarding its interpretation”), available at <http://www.un.org/law/ilc/texts/treatfra.htm> (last visited Oct. 7, 2003).

120. France and Australia are two examples. See *Buchanan Group Pty. Ltd. v. Sorgetti* [2002] F.C.A. 1646 (Fed. Ct. Austl.) (issuing injunction against domain name on behalf of trademark holder, but recognizing that legal issues remained unsettled), available at 2002 Aust FEDCT LEXIS 850.

public authorities on what materials will and will not flow through the Internet.

There is no better poster child for the disparate views of free expression in the Internet than the *LICRA v. Yahoo!* dispute.¹²¹ Confronted with Nazi paraphernalia being *visible* in France through Yahoo! auction pages, a Paris court in 2001 found that it had jurisdiction to order both Yahoo!'s French operation and Yahoo! in the United States to take technological measures to stop Internet users on French territory from receiving these visual images of Nazi paraphernalia over the Internet. The French court subjected the companies to hefty fines for any failure to comply.¹²² Less than a year later, a U.S. district court granted Yahoo! (U.S.) summary judgment, on First Amendment grounds, against any possible enforcement of the Paris court's ruling.¹²³

European (and Canadian) laws on "hate" speech¹²⁴ are not only substantively antithetical to our notion of free speech but also would probably fall before our First Amendment jurisprudence on grounds of vagueness and overbreadth. Thus, the disagreement between the United States and other western countries runs deep. Courts on both sides have been clear: their principles on free or limited expression flow into the Internet,¹²⁵ despite tomes and e-tomes having said that cyberspace is a different place.

121. *League Against Racism & Antisemitism v. Yahoo*, Interim Order, T.G.I. Paris, Nov. 20, 2000, No. RG 00/05308, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visited Dec. 28, 2003).

122. *Id.*

123. *Yahoo! Inc. v. Ligue Contre le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

124. See, e.g., *J'Accuse v. General Communications*, T.G.I. Paris, Oct. 30, 2001, No. RG 01/57676 [hereinafter *J'Accuse*] (finding that the contents of "Front 14" web site hosted by SKYNETWEB in the United States violated French hate speech law), available at <http://www.foruminternet.org/telechargement/documents/tgi-par20011030.pdf> (last visited Nov. 15, 2003); Associated Press, *Rare Case Has Norwegian Man Convicted of Racism on the Web* (Apr. 24, 2002) (describing a Norwegian conviction for racist speech and a March 7, 2002, judgment in Sweden against a tabloid that allowed racist comments on its Internet chat site), available at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ2CYEE0D> (last visited Nov. 15, 2003); BBC News, *German Faces Jail for 'Ironic' Remark*, at <http://news.bbc.co.uk/2/hi/europe/2636211.stm> (Jan. 7, 2003) (describing German accused of "glorification of a criminal act" who made a posting "congratulat[ing] . . . the murderers of 11.09.01"); see also *Schnell v. Machiavelli & Assoc. Emprize Inc.*, File No. T594/5200 (Can. Human Rights Tribunal, Aug. 20, 2002) (finding that web pages would likely expose gay and lesbian persons to hatred and contempt in contravention of Canadian law), available at http://www.chrt-tcdp.gc.ca/search/files/t595_5300de.pdf. (last visited Nov. 3, 2003)

125. On the United States side, *Reno v. ACLU*, 521 U.S. 844 (1997), established the broad principle that the First Amendment is at least as strong in cyberspace as in the physical world. Courts have followed this up by applying a wide range of free expression-related principles,

Western hate speech laws—both present and proposed¹²⁶—are meager impairments of free expression compared to the law in countries like China, Saudi Arabia, Iran, and Zimbabwe. Saudi Arabia, China, and Singapore are the best known examples of countries that deploy firewalls and other blocking technology¹²⁷ of varying degrees of seriousness in order to keep out undesirable thoughts.¹²⁸ China has recently succeeded in imposing tough regulations on cybercafes and “self-regulation” on ISPs—a move that at least one French judge seems to eye longingly.¹²⁹ China and Zimbabwe have both shown a willingness to move more directly against individual Internet speakers

doctrines, and laws to the Internet. See, e.g., *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002) (applying Georgia’s libel retraction statute to shield Internet publisher from punitive damages).

126. For example, presently before the European Union, there is a “Proposal for a Council Framework Decision on Combating Racism,” which would require EU countries to move toward “approximation of laws and regulations . . . involving racism and xenophobia.” Commission of the European Communities, Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at http://europa.eu.int/eur-lex/en/com/pdf/2001/com2001_0664en01.pdf (Nov. 28, 2001). Article 4(a) prohibits both “public incitement to . . . hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned,” while 4(b) prohibits “public insults . . . for a racist or xenophobic purpose.” *Id.* art. 4(a)–(b). The article 3 definition of racism or xenophobia is quite broad. See *id.* art. 3. The European Commission recently proposed a “law to ban sexist television programmes and advertising” which has created an uproar among media companies. See George Parker & Tim Burt, *EU Push for Law Against Sexism Draws Fire*, FIN. TIMES, June 25, 2003, at A2 (discussing reaction to the proposed law), available at 2003 WL 57314256.

127. The 2002 Chinese crackdown on cybercafes has included the installation of software that records attempts by café users to access banned sites. See Erik Eckholm, *Taboo Surfing: Click Here for Iran and Here for China*, N.Y. TIMES, Aug. 4, 2002, § 4, at 5 (describing China’s policing of Internet content), available at LEXIS, News Library, The New York Times File; Agence France-Presse, *China Announces ‘Self-Discipline’ Scheme for Internet Providers* (July 5, 2002) (announcing China Internet Association’s self-imposed ban on producing harmful content), available at 2002 WL 23551634.

128. For a very good discussion of the variety and seriousness of technology used by different countries, see Taylor C. Boas, *Weaving the Authoritarian Web: The Control of Internet Use in Non-Democratic Regimes* (2003) (unpublished manuscript presented at China & the Internet: Technology, Economy, and Society in Transition, Conference at University of Southern California, May 30-31, 2003) (on file with author). For an in-depth look at technology used by Chinese authorities, see MICHAEL CHASE & JAMES MULVENON, *YOU’VE GOT DISSENT: CHINESE DISSIDENT USE OF THE INTERNET AND BEIJING’S COUNTER-STRATEGIES* (2002).

129. In the October 2001 *J’Accuse* decision, the Paris court declined to hold French ISPs responsible for a hate-speech site hosted in the United States and accessible in France, but noted that “it will not be possible to delay the debate on a more active participation by all Internet participants, . . . including access providers.” *J’Accuse*, *supra* note 124 [[Q]u’il ne sera pas possible de différer longtemps encore le débat sur une participation plus dynamique de l’ensemble des acteurs d’internet . . . en ceux compris les fournisseurs d’accès.]. Judge Gomez’s remarks come despite a 1996 ruling from the French Constitutional Court holding an earlier law on ISP liability unconditional on structural grounds, but with some emphasis on free expression concerns. See Cons. const., July 23, 1996, No. 96-378, Recueil 99, J.O., July 27, 1996, p. 11400; JCP 1996, I, 675, available at <http://www.conseil-constitutionnel.fr/decision/1996/96378dc.htm> (last visited Oct. 8, 2003).

or *users* when they deem the messages at issue sufficiently dangerous or destabilizing. In 2002, Li Dawei, a forty-year-old former policeman, became the first individual Chinese citizen sentenced to prison for downloading from the Internet materials deemed politically unacceptable.¹³⁰ Vietnam recently followed suit, sentencing a dissident to thirteen years of prison for posting articles on democracy.¹³¹

Prospects for convergence in this realm seem qualitatively dimmer than in areas of law described above (and many others). “Regime change” in China—*legal* regime change, at least—would be the single biggest factor in whether any convergence here is possible. On a more jurisprudential plane, there will be some key elements to watch. For example, European laws may move closer or further away from American notions of free expression as the jurisprudence of the European Convention on Human Rights is filled out more fully.¹³² On the other hand, the United States views of free expression could become an increasingly isolated position if multilateral agreements against hate crimes or denials of genocide, like elements of the Convention on Cybercrime, gain more traction.¹³³

It should be remembered that non-convergence need not be limited to issues where there are heartfelt, deeply-embedded national differences. Non-convergence can remain the state of affairs when established national differences cause only tolerable losses in efficiency. Indeed, in such situations the main forces for convergence will probably be bureaucrats, diplomats, and lobbyists looking for something to do. Where the costs of diverse norms to transnational business are minimal, it may be *irrational* for corporate interests to press for convergence.

130. Reuters, *China Jails Politically Incorrect Net User 11 Years* (Aug. 5, 2002), available at <http://in.tech.yahoo.com/020805/64/1t8eh.html> (last visited Nov. 14, 2003).

131. Vietnamese ‘Cyber-Dissident’ Jailed, AUSTRALIAN IT, at <http://australianit.news.com.au/articles/0,7204,6620154%5E15330%5E%5Enbv%5E15306-15319,00.html> (June 19, 2003); see also Geoffrey Robertson, *Mugabe Versus the Internet*, THE GUARDIAN, June 17, 2002, at 18 (describing trial of a *Guardian* journalist for a crime of “abusing journalistic privilege” with an Internet article), available at <http://www.guardian.co.uk/comment/story/0,3604,738813,00.html> (last visited Nov. 10, 2003).

132. See, e.g., *Lehindeux & Isinori v. France*, 30 Eur. Ct. H.R. 665 (2000) (concluding that French law against Nazi and collaborator justification was an abridgement of the free expression guaranteed in European Convention on Human Rights), available at [http://sim.law.uu.nl/sim/caselaw/hof.nsf/\(title\)?openview](http://sim.law.uu.nl/sim/caselaw/hof.nsf/(title)?openview) (last visited Nov. 13, 2003).

133. See Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Jan. 28, 2003, Council of Europe, ETS No. 189 (barring material from the Internet that “denies, grossly minimises, approves, or justifies acts constituting genocide or crimes against humanity”), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited Nov. 3, 2003).

Let me give an example of what *may be*, from one perspective, non-convergence and, from another perspective, arguably market forces convergence: legal protection of large, comprehensive databases. The problem of protecting the investment in large, comprehensive databases arose from court decisions in the United States and Europe in the early 1990s that appeared to denude these databases of copyright protection.¹³⁴ In response, the European Union promulgated a directive in 1996 establishing a strong intellectual property right specific to databases (the “Database Directive”).¹³⁵ The EU put the issue on the negotiating table for the WIPO Diplomatic Conference to be held in December 1996, and the United States initially signaled its willingness to accept something along the Directive’s model, presumably in exchange for EU concessions in other areas.¹³⁶ But in the months that followed, awareness of and opposition to the Database Directive grew among scientists, researchers, and educators in the United States.¹³⁷ The result was that database protection had to be taken off the agenda of the 1996 diplomatic conference.¹³⁸ In other words, an early attempt at “top-down” convergence failed.

The court decisions in the United States, Belgium, France, and the Netherlands curtailing copyright protection of databases had come just as a new period of production and networked distribution of massive databases was dawning—it would still be five years before the word “Internet” appeared in a United States Supreme Court case (1996).¹³⁹ So, one might have expected quick convergence or re-convergence toward norms of protection. Yet after a brief flirtation in 1998, database

134. For an exhaustive account, see Justin Hughes, *Political Economies of Harmonization: Database Protection and Information Patents* (July 8, 2002) (paper presented at the Institut Français des Relations Internationales) [hereinafter Hughes, *Political Economies*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=318486 (last visited Oct. 8, 2003). The cases in question were *Feist Publications, Inc. v. Rural Telephone Service Corp.*, 499 U.S. 340 (1991), and *Van Romme/Van Dale Lexicograpffie*, HR 4 januari 1991 (Neth.), translated in PROTECTING WORKS OF FACT 93 (Egbert J. Dommering & P. Bernt Hugenholtz eds., 1991). Beginning in 1989, French courts also delivered a series of decisions denying copyright protection to factual compilations on the grounds that they did not reach “au rang de création intellectuelle” or constitute an “apport créatif et intellectuel.” See LUCAS, *supra* note 42, at 40 n.79.

135. Council Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77), available at <http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html> (last visited Oct. 8, 2003).

136. See U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 50-51 (1997), available at <http://www.copyright.gov/reports/> (last visited Dec. 31, 2003) (noting brief discussions of the European proposal for database protection occurring during meetings in February, May, and August of 1996).

137. *Id.* at 54-55.

138. *Id.* at 55.

139. *Denver Area Educ. Telecomms. Consortium Inc. v. FCC*, 518 U.S. 727 (1996).

protection legislation has floundered in the U.S. Congress.¹⁴⁰ There are many reasons for this, including the well-orchestrated opposition of academics and key Internet companies AOL, Yahoo!, and AT&T. Meanwhile, opposition among developing countries seems to have grown politically attached to a belief that the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) Agreement and the WIPO structures are already biased in favor of wealthy nations.¹⁴¹

If the United States does not adopt new legal norms for extra-copyright protection of databases, it can be considered an example of abiding, enduring non-convergence. But what makes this abiding non-convergence bearable? If such protection is really needed—as the European Commission claimed—for appropriate levels of investment in large, comprehensive databases, then U.S. information industries should, *ceteris paribus*, fall behind. There is no indication of that as yet. In a 2001 study, Maurer, Hugenholtz, and Onsrud concluded that commercial database production in Europe rose sharply following the 1996 Directive, but then fell off again, so that any post-Directive growth in Europe’s database industry has been minimal.¹⁴² But in my view, it

140. For details, see generally Hughes, *Political Economies*, *supra* note 134; Hughes, *Extra-Copyright Protection*, *supra* note 38, at 167–70, 194–95 (describing bills before Congress in 1998 and 1999).

141. For example, a WIPO-organized Asian regional meeting on database protection officially reported, “consensus that the need for additional protection whether at the national, regional, or international level had not been established at this point. A variety of concerns were raised including those related to scientific and educational fields and as to whether protection should extend to data in the public domain.” WIPO, Statement Adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, WIPO Doc. SCCR/3/6, at 3, para 9 (Aug. 30, 1999), available at http://www.wipo.int/eng/meetings/1999/sccr_99/sccr3_6.htm (last visited Oct. 10, 2003). Representatives at the parallel WIPO meeting in Africa similarly “expressed their concern about the possible impact of a new legal protection . . . on access to information in the fields of education, science, and research in African countries.” WIPO, Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, WIPO Doc. SCCR/3/2, at 2, para. 5 (July 30, 1999), available at http://www.wipo.org/eng/meetings/1999/sccr_99/sccr3_2.htm (last visited Oct. 10, 2003); see also PHILIP KÜBLER, RECHTSSCHUTZ VON DATENBANKEN (EU-USA-SCHWEIZ) 316 (1999) (listing the United States, Singapore, Senegal, India, Honduras, Ghana, China, Benin, and Belarus as opposed to database protection or insistent on exceptions).

142. Stephen M. Maurer, P. Bernt Hugenholtz & Harlan J. Onsrud, *Europe’s Database Experiment*, 294 *SCIENCE* 789 (Oct. 26, 2001). The *Science* article builds on a larger study presented by Maurer at an Industry Canada conference in 2001. See Stephen M. Maurer, *Across Two Worlds: Database Protection in the U.S. and Europe* 6 (2001) (unpublished manuscript for Canada’s Conference on Intellectual Property and Innovation in a Knowledge-based Economy, May 23-24, 2001) (on file with the author) [hereinafter Maurer, *Across Two Worlds*].

would be irrational to expect any meaningful incentive effects from the Database Directive as yet.¹⁴³

Even if the Database Directive is a positive instrument in Europe for prompting long-term investment in information products, the trans-Atlantic difference in law may be tolerable for another reason: the “legal market” has already “reconverged,” producing similar levels of protection in different legal clothing. While American courts have generally enforced the Supreme Court’s conclusion that copyright no longer protects large, comprehensive databases, U.S. database owners more often than not emerge victorious through contract law,¹⁴⁴ state law misappropriation, violation of federal laws protecting information on networked computers, and an old common-law cause of action: trespass to chattels.

The last of these is the most interesting. Since 2000, the trespass to chattels cause of action has emerged, new and mutant, as a powerful device to protect online databases from unauthorized data “scrapers” and aggregators.¹⁴⁵ Without judging the wisdom of this wave of trespass to chattel cases,¹⁴⁶ a quirky kind of parallelism seems to be present. Back in the early 1990s, the experts and bureaucrats working the Database Directive were concerned about electronic databases as being the most vulnerable to misappropriation; from 2000 onward American courts morph an old common-law cause of action to protect electronic, online databases from what amounts to unauthorized appropriation.

143. If the Directive only repackages the levels of copyright protection and/or catalog rule protection offered in Britain, Ireland, Sweden, Finland, and Denmark, then there is no reason to expect *any* impact *ever* in those countries. Moreover, for example, the Directive was not implemented in Italy until 1998 (Law Number 128 of April 24, 1998) and not in Luxembourg until 2001 (Law of April 18, 2001, *Mémorial A*, No. 50). It would be an amazingly optimistic model of business decision-making that predicts an intellectual property law will be understood by business people and affect their investment decisions *before* it is implemented.

144. The leading contract law case is, of course, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

145. Leading trespass to chattels cases include *Am. Airlines v. Farechase, Inc.*, No. 067-194022-02 (D.C. Tex. Mar. 8, 2003), available at http://www.eff.org/Cases/AA_v_Farechase/20030310_prelim_inj.pdf; *Register.com, Inc. v. Verio Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000); *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000); and *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000), amended by No. CV 99-7654, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. Aug. 10, 2000).

146. For critical analysis of this new version of an old cause of action, see Dan L. Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000); Maureen O'Rourke, *Shaping Competition on the Internet: Who Owns Product and Pricing Information?*, 53 VAND. L. REV. 1965, 1994-97 (2000); see also David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 360-66 (2003) (raising additional complexities as to why the trespass cause of action should arguably be modified for these chattels).

So perhaps extra-copyright protection of databases is an area where, formally speaking, there is stabilized non-convergence and, practically speaking, there has been some stealth re-convergence, different legal systems finding different ways to produce protection of the investment in databases. The remaining differences in legal coverage may be sufficiently tolerable to the parties involved that no one ramps up massive lobbying for change.

In some cases, the tolerability of legal divergence in an increasingly global, networked economy will partly depend on technological developments. Consider the imposition of local sales tax on Internet transactions. Taxing Internet transactions and remitting the funds to state, municipal, and local authorities will be possible when we have some *combination* of (a) local sales taxes being harmonized or standardized, and (b) database technology that permits vendors (or their intermediaries) to impose differing tax rates easily. Complete resolution of (b) would allow continued divergence in tax rates; complete harmonization (as unlikely as that is) would obviate the need for technological improvements.

The point is that there has been, perhaps, a tendency to overestimate the harmonizing effects of globalization on meatspace practices,¹⁴⁷ and we should avoid that same mistake when pondering the fate of law on the Internet.

IV. OF PROFESSORS AND PROPHETS

One of the remarkable things about the period from conclusion of the TRIPS Agreement until now has been the tremendous policy activism of academics in the overlapping fields of intellectual property and “Internet law.” This has principally been from legal academics, but has also included the scientific research community. Such policy activism is not unique. We thankfully have had such professorial activism in a wide range of areas, whether it be environmental protection in the late twentieth century or abolition of slavery in the early and mid-nineteenth century.

When a professor becomes such an activist, she typically abandons, to some degree, her role of *observing* a problem. In policy advocacy, the professor typically starts making very public *predictions* of what will happen with or without the proposed legislation, issuing dire warnings on what will happen if we do not cut greenhouse gas

147. See generally MAURO F. GUILLÉN, *THE LIMITS OF CONVERGENCE: GLOBALIZATION AND ORGANIZATIONAL CHANGE IN ARGENTINA, SOUTH KOREA, AND SPAIN* (2001) (describing how business practices in Argentina, South Korea, and Spain are not converging).

emissions, or fail to curb the violence in video games, or cluelessly permit publishers to impose unreasonable contractual terms on the use of information products.

It is important to recognize such predictive activities for what they are. We seem to be past the time of magic and miracles; what we once would have judged to be possession and witchcraft, we now diagnose as Obsessive-Compulsive Disorder and other psychoses.¹⁴⁸ But public prophecy is still with us. It comes from pundits, politicians, and think tanks; sometimes it comes from professors.

Perhaps a few scholars make public pronouncements about the future for the pleasure of being (publicly) right, but many are aiming to produce *self-defeating prophecies*. This is hardly a new technique; it is part of what made oracles interesting. Around 547 BC, the Oracle of Delphi told Croesus, King of Lydia, that if he crossed a river, a great kingdom would fall. The kingdom turned out to be his own, not the Persians on the other side of the river Halys. But if properly interpreted, the Oracle's prophecy would have been self-defeating. By all accounts, Croesus did not cross the river to commit auto-regicide. Professorial predictions of the future, like oracle prophecies, offer the prospect of *changing* the future by *predicting* it. The prophesy is typically intended to cajole us to avert the danger that the academic sees on the horizon.

Some will reject out of hand a comparison between ancient prophets and modern day professors. But the comparison should not be dismissed because of our stylized, if not cartoonish, understanding of the ancient prophet. The recent work of my colleague Suzanne Last Stone explores the richness and complexity of prophecy in the rabbinic tradition.¹⁴⁹ While the unifying and "crucial feature of prophecy" in these Talmudic stories "is a special privileged access to God,"¹⁵⁰ Professor Stone explores how the stories raise difficult questions about the role of human agency and judgment in relation to divine message—issues that have a striking similarity to aspects of evidence law, constitutional law, and, for my mind, copyright.

For example, Professor Stone explores the story of the 400 prophets who, called before Kings Ahab and Jehosaphat, "prophecy in unison

148. Michael Singer, *Six Illnesses Stumbling Toward a Cure*, N.Y. TIMES, March 16, 2003, § 6 (Magazine), at 30–31 (describing how Obsessive-Compulsive Syndrome was originally treated as the "Devil's work"), available at LEXIS, News Library, The New York Times File.

149. Suzanne Last Stone, *Prophecy, Trust, and Authority* (unpublished manuscript, on file with author) [hereinafter Stone, *Prophecy, Trust, and Authority*]. For an earlier version of her vision of the relationship between revelation and human cognition/decision-making, see Suzanne Last Stone, *Tolerance Versus Pluralism in Judaism*, 2 J. HUM. RTS. 105, 112 (2003).

150. Stone, *Prophecy, Trust, and Authority*, *supra* note 149, at 1.

success in battle.”¹⁵¹ This prophetic chorus is false because true prophetic speech conveys the mediation of the individual human prophet. The parallels to collusive testimony are obvious: we expect that human agency and cognition will intervene between receipt of the sensory (or spiritual) impressions and communication of the story to us. When all the stories sound much alike, we are reassured. When all the stories sound *exactly* alike, we are concerned that something is amiss. Authenticity requires “[o]riginality of thought and expression.”¹⁵²

Professor Stone describes a variety of false prophets found in the scriptures, including “people who offer accommodating oracles to those who solicit them and are paid for their services”—an apt description of many of the “reports” and dossiers produced by Washington lobbyists—and “people who do no more than simply use their imagination.”¹⁵³ In Jeremiah, false prophets are described as “those who mistake their imagination for a divine message” and “even Jeremiah was not sure at times whether this or a competing prophet’s message was true or false.”¹⁵⁴ Stone emphasizes the *responsibility* that emerges: “[T]he prophet himself, who may be seduced by a lying spirit or gripped by his imagination, must choose whether to utter his prophecy or suppress it.”¹⁵⁵

It is against this kind of understanding of ancient prophecy that we should consider the responsibility of modern day visionaries—people given the education, the time, and the luxury of disengagement from daily struggles to envision the future. Modern scholarship in the social sciences, economics, law, and the physical sciences has always been a kind of predictive activity—how materials will react under physical conditions; how the courts will handle a new and strange legal issue;

151. *Id.* at 13.

152. *Id.* at 19 (“Originality of thought and expression, a critical moral voice, and iconoclasm thus become the outstanding features of the true classical prophets, a conception of prophecy familiar in Western political thought.”); *see also id.* at 22 (“[A]n identifying mark or divine insignia of a true prophetic message is the individual variation in the prophet’s speech . . . Individual speech is a mark of genuine divine-human partnership.”). For any intellectual property professor or practitioner, the connection to copyright doctrine should be evident: many people may share the same idea just as many prophets may share the same vision, but originality of *expression* is the benchmark for a protectable copyright interest. In contrast, too much similarity in expression betrays a copyist, with no protectable interests and subject to liability. *See, e.g., Ty, Inc. v. GMA Accessories Inc.*, 132 F.3d 1167, 1170 (7th Cir. 1997) (explaining that “a similarity that is so close as to be highly unlikely to have been an accident of independent creation is evidence of access”); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

153. Stone, *Phrophecy, Trust, and Authority*, *supra* note 149, at 4–5.

154. *Id.* at 5.

155. *Id.* at 6.

how the economy will perform under certain assumptions; what we should see if a particular quantum theory holds; how rational actors will behave under certain conditions—whether a psychologists' game, a game theorist's game, or a change in the tax laws. But there are two important aspects of this predictive activity.

First, these predictions—filling academic journals and conference proceedings—are almost always cautious, very tentative, and highly detailed in the conditions and limitations from which future events are extrapolated. Some are cynical about this aspect of scholarship: results are tentative because no one provides further funding for *conclusive* research. But to me this is integral to the “liberal outlook” and the mission of academia. The liberal outlook begins with—and emphasizes—what Bertrand Russell called the “virtue” of “suspended judgment.”¹⁵⁶ And even when judgments are made, “[t]he essence of the liberal outlook lies not in *what* opinions are held, but in *how* they are held: instead of being held dogmatically, they are held tentatively, and with a consciousness that new evidence may at any moment lead to their abandonment.”¹⁵⁷

Second, these predictions are made in a relatively small world. Not quite private, but definitely not front-page “public.” For better or for worse, academic discourse is largely scholars talking among themselves. One of the “better” aspects of this is that peer understanding of the process means a certain, greater freedom of thought and comment. The circle of scholars that considers one's proposals and predictions understands that they are tentative, that they are meant to *sketch*, to *outline*, to *suggest*, and to *try out* ideas about the future.¹⁵⁸

Taking the stage—or being forced upon the stage—for public prophecy seems a bit different. My concern here is not the same as in the recent debates over legal scholars participating in the public discourse about President Clinton's impeachment¹⁵⁹ or the *Bush v. Gore*

156. BERTRAND RUSSELL, UNPOPULAR ESSAYS 27 (1950) (“To endure uncertainty is difficult, but so are most of the other virtues. For the learning of every virtue there is [a] . . . discipline, and for the [virtue] of suspended judgement the . . . discipline is philosophy.”).

157. *Id.* at 15.

158. For an example of an academic's tentative ideas getting into the press, causing a stir, and then turning out to be wrong, see Daniel Altman, *It Looked Good on Paper*, N.Y. TIMES, July 27, 2003, §3, at 1 (describing economist Michael J. Boskin's calculations of a \$12 trillion dollar unaccounted surplus but “after his ideas were discussed on TV, he quietly notified his colleagues that his equations contained an error”), available at LEXIS, News Library, The New York Times File.

159. E.g., Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999); Stephen M. Griffin, *An Exchange of Views:*

case.¹⁶⁰ Those debates largely concerned whether the law professors were qualified to offer public opinion on the constitutional issues involved. In contrast, almost all the legal scholars involved in the intellectual property debates of the past decade have been magnificently qualified as thinkers *in intellectual property*. My concern is the nature of effective public prophecy and advocacy—and how that nature relates to the role of the professor. I have no claim about the “correct” relationship between the two, only a belief that we in “Internet law” and intellectual property should ponder the issue more.

These days, being a public prophet is less risky than it used to be—from a bodily harm point of view—but perhaps more risky from the point of view of credibility. The nice thing about Delphic prophecies¹⁶¹ was that they could come true one way or another: “cross that border river with your army and one kingdom or another is going to lose big time.” But such vague prophecies don’t mesh well with our sound bite system of popular communications. Perhaps it’s not a question of size—Chinese fortune cookies can pack a lot of ambiguity into a sound bite. But it does seem to be a question of the market for attention. It is hard to be colorful without a clear position. Certainty sells, as does drama.

This market for certainty and drama means that even before we get to prophecies that are *intended to fail* by rallying people for change, *reported* modern prophets may tend to have bad batting averages. Thus, in 1996, beloved eternal computer wunderkind Steve Jobs said, “I don’t see most people using the Web to get more information. We’re already in information overload,”¹⁶² while just a couple years earlier, science fiction visionary Michael Crichton prophesized, “What we now understand as the mass media will be gone within ten years. Vanished, without a trace.”¹⁶³

Standards for Academics Advising Courts and Legislatures: Scholars and Public Debates: A Reply to Devins and Farnsworth, 82 B.U. L. REV. 227 (2002); Neal Devins & John McGinnis, *Sign Them Up*, LEGAL TIMES, July 24, 2000, at 62.

160. *Bush v. Gore*, 531 U.S. 98 (2000).

161. *See, e.g.*, WILLIAM GOLDING, *THE DOUBLE TONGUE* (1995) (Nobel prize winner’s enigmatic draft novel about the Oracle of Delphi).

162. Gary Wolf, *Steve Jobs: The Next Insanely Great Thing*, WIRED, Feb. 1996, *reprinted in* WIRED, Apr. 2003, at 131, *available at* <http://www.wired.com/wired/archive/4.02/jobs.html> (last visited Oct. 8, 2003).

163. Michael Crichton, *Mediasaurus*, WIRED, Sept./Oct. 1993, *reprinted in* WIRED, Apr. 2003, at 130, *available at* <http://www.wired.com/wired/archive/1.04/mediasaurus.html> (last visited Oct. 8, 2003). A decade later, the deployment of broadband and the embrace of the Internet by traditional media companies now seems likely to produce a two-tier Internet: one tier that is the beloved, decentralized world of e-mail and blogs; and one that is just like mass media,

And publicly reported prophecies at least have the sobering effect of social embarrassment when they turn out horribly wrong. The same cannot be said of the exaggerated claims made by D.C. lobbyists about how much impact each action by Congress will have. Lobbyists regularly prophesize virtual catastrophes if their legislation is not enacted—or their opponents' legislation is. This is as true of intellectual property lobbyists as any others. And perhaps it is not wholly their fault. Maybe hyperbole is required these days. In our entertainment, we're so used to seeing airliners destroyed, downtowns ripped apart, and whole cities levelled that it hardly seems worthwhile to send James Bond out for less than the risk of global conflagration. Averting economic disaster is the least we can expect from a piece of legislation.

In the case of intellectual property, there has also been a sense that during the 1990s, prophecy and proselytizing were very one-sided; that intellectual property owners were loudly prophesizing disaster unless increasingly strong protection was put in place. But the clamor did not include consumers and users of intellectual property. In the case of the scientific community entering the debates about database protection in the mid-1990s, its involvement was both idealistic and self-interested—members of the scientific community *are* database consumers. In the case of law professors entering the fray over copyright, patent, and trademark law expansion, the motive seems to have been more purely idealistic and other-regarding.¹⁶⁴

But in both cases, the need to counter what was seen as one-sided hyperbole may have contributed to the public commentary of scholars being less nuanced and less tentative than their statements in more reflective environments. Thus, the activist professor can be drawn into a role that is in deep tension with her professorial role. Whether a biologist or a business school guru, the professor is an individual who society intentionally secludes from the daily demands of commerce and custom *in order that she might view things from a position of disinterest, and of some kind of "objectivity."* Scholars are supposed to

but through a broadband pipe. See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 442–43 (2000).

164. But elsewhere I have raised the question whether law professors are especially concerned about things like "derivative work" rights because they (subconsciously) recognize that their own works are so derivative. See Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 958 (1999).

come from and reflect what Justice Felix Frankfurter called “the tradition of disinterested inquiry, instead of predetermined results.”¹⁶⁵

There is no doubt that this is what people expect of academics. In early 2003, with a growing on-campus rift over Iraq between more liberal professors and a more conservative student body, an undergraduate posed a simple, albeit rhetorical question to his professors: “There comes a point when you wonder are you fostering a discussion or are you promoting an opinion you want students to embrace or even parrot?”¹⁶⁶ Scholars have a traditional social role¹⁶⁷ of neutrality, which will be affected, good or bad, by the nature of their activism.

Is this just an old-fashioned, hopelessly un-postmodern view of the professor and the university? As David Rabban and many others have noted, many scholars “no longer share the epistemological assumptions” that underpinned defenses of academic freedom since the early twentieth century.¹⁶⁸ Instead, we now *know* that assumptions infect observations, that statements of fact are themselves value-laden, and that our personal ideologies color our perspectives 24/7.¹⁶⁹ As an intellectual comments in Andrew Miller’s novel *Oxygen*, “We take on a certain view when we are young then spend the rest of our lives

165. FELIX FRANKFURTER, *The Profession of Law*, in *OF LAW AND LIFE AND OTHER THINGS THAT MATTER* 146, 155 (Philip B. Kurland ed., 1965).

166. Kate Zernike, *With Current War, Professors Protest as Students Debate*, N.Y. TIMES, Apr. 5, 2003, at A1 (quoting Jack Morgan, a sophomore at Amherst College), available at LEXIS, News Library, The New York Times File.

167. Adverse public reaction to advocacy or overly strong advocacy by actors and musicians may tell us a great deal about expected “roles.” For example, our musicians are *expected* to make social and political commentary in their music; we treat them very much as modern poets. But sometimes they cross invisible lines and become targets of criticism for the same behavior. In 2003, the musical message in Madonna’s album *American Life* was blasted as being too much sanctimonious preaching. See, e.g., Greg Kot, *Madonna, Don’t Preach—You’re Still Material Girl*, CHI. TRIB., Apr. 20, 2003, §7, at 8, available at LEXIS, News Library, Chicago Tribune File. While, at the same time, one of the Dixie Chicks’ extra-musical statements criticizing President Bush brought death threats and sales boycotts upon her group. One cartoon of the period portrayed American troops talking to Iraqis with the first saying, “See, this is democracy. You’re now free to criticize your leaders,” and the second soldier saying, “Unless you’re the Dixie Chicks.” Cartoon by Mike Peters, DAYTON DAILY NEWS, reprinted in N.Y. TIMES, Apr. 27, 2003, § 4, at 4.

168. David M. Rabban, *Can Academic Freedom Survive Postmodernism?* 86 CAL. L. REV. 1377, 1381 (1998) (reviewing *THE FUTURE OF ACADEMIC FREEDOM* (Louis Menard ed., 1996)).

169. See HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS passim* (2002) (describing how modern philosophy and some modern economics recognize that description and evaluation infect each other); see also THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 1–2 (2d ed. 1970) (describing how data is often “seen” only if it fits the current theory for the phenomenon being considered).

collecting the evidence.”¹⁷⁰ True objectivity and truly disinterested inquiry are impossible to achieve. Judgment is not suspended; rather, as Kafka said, we live in “summary court in perpetual session.”¹⁷¹ If we are always in the process of advocacy and harsh judgments, why not be honest about it? Why not embrace it wholeheartedly?

The answer is really about one’s broader framework. That there is no *complete* objectivity is *not* an argument against there being *degrees* of objectivity.¹⁷² More fundamentally, even if one denies the classic inquiry-toward-truth epistemological justifications for academic freedom, suspended judgment is an ethical practice, warranted, if not demanded, by the role professors claim for themselves and the university.¹⁷³

If suspended judgment debilitates one from action, then at least there is still *how* we hold our beliefs, and we can insist on disciplined, yoga-like periods of *re*-suspended judgment in which one seriously entertains the possibility that one’s framework may be wrong. I am reminded of Professor James Boyle remarking at a conference in 2002 that, on reconsideration, he had found some of his most beloved theories “mugged by brutal facts.”¹⁷⁴ Professor Boyle was speaking in the spirit of a scholar’s cognizance of—and willingness to consider—countervailing evidence: the personal view, the *theory*, should be scrutinized, doubted, and sometimes modified. The committed partisan

170. ANDREW MILLER, OXYGEN 104 (2001).

171. FRANZ KAFKA, THE TRIAL (Willa Muir & Edwin Muir trans., definitive ed., 7th prtq. 1972) (1937) (“Only our concept of Time makes it possible for us to speak of the Day of Judgment by that name; in reality it is a summary court in perpetual session.”).

172. See, e.g., JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY 7 (1994) (“[T]ruths about the past are possible, even if they are not absolute, and hence are worth struggling for.”). Of course, this position on historical work is, epistemologically, still a variant on and related to a correspondence theory of truth. But it would be a mistake to think that the making of relative (or ordered) judgments about truthfulness or objectivity necessitates a foundation of absolute or complete truth or objectivity. See generally NOZICK, *supra* note 1, at 75–120 (discussing “dimensions of truth,” *id.* at 99, and arguing that “a partial ordering of things in terms of how objective they are” is possible, *id.* at 87).

173. See Rabban, *supra* note 168, at 1381 (describing the “ethical” view that in exchange for academic freedom, “[s]cholars owe a corresponding obligation to be honest, careful, and truthful”). See generally THE FUTURE OF ACADEMIC FREEDOM (Louis Menard ed., 1996).

174. Similarly, in discussing historians, Richard Rorty has identified ethical obligations to search for relevant documents and not to ignore evidence inconsistent with the historian’s personal view. See Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?*, in THE FUTURE OF ACADEMIC FREEDOM, *supra* note 173, at 21, 30. In the more ludic world of tasting foods, Calvin Trillin likes to posit what he calls the “Davis Conundrum”: “how to deal with information that may appear to call into question a tenet that is central to a system of belief.” CALVIN TRILLIN, FEEDING A YEN 121 (2003) (describing the problem for wine critics of people who cannot, in blind taste tests, tell some red wines from white wine).

typically has a different reaction to countervailing evidence: the *evidence* is doubted, discounted or modified (as in the joke about Trotskyism: “The proof of the farsightedness of Trotsky’s predictions is that none of them have yet come true.”).

In balancing the sometimes conflicting goals of suspended judgment and effective involvement in public affairs, law professors may have an easier time than other academics because law professors have an alternative social role: the *lawyer*. Strong, very one-sided advocacy is the nature of lawyering. (Modern-day lawyers are a bit like ancient samurai: they are reviled as a group for being manipulative, wily, and unproductive, yet at the same time, each person wants his or her own lawyer to be the wildest, most skillful fighter around.) A lawyer’s primary *public* job is to defend the interests of one side, not seek out the truth—so much so that one scholar has described lawyering as adhering to a standard of “nonaccountability.”¹⁷⁵ In many lawyering circumstances—contract negotiations, civil suits pressing undecided issues of law—it does not appear that any “truth” is at issue. In circumstances where (many of us believe) objective truth is at issue—as in a criminal trial’s proof of what happened—the *system*, not the individual lawyer, is given the primary truth-seeking function. In contrast, in the privacy of the client/attorney relationship, the lawyer is supposed to aim for an open-minded assessment of truth—indeed, a malpractice claim can come from not telling the client all the reasonably possible outcomes. The difference is one between *counseling* and *advocacy*.

Assuming we accept that advocacy role the lawyer has within the confines of the court or the conference room negotiation, the question is whether or how we use that advocate’s *role* for advocacy on public issues.¹⁷⁶ When called to speak in testimony or media on an issue of public importance, does the professor think of herself as *counseling* the public or *advocating* for one side?¹⁷⁷ Answers may vary: I suppose

175. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 7 (1988).

176. For a simple thought experiment, how many law professors, if called upon to testify on an issue where they had strong opinions, would be happy being identified in the record and in the press as “Lawyer X” instead of “Professor X”? (“X” is a placeholder, not Professor Charles Francis Xavier of the X-Men).

177. Of course, this glosses over a world of complexities. “Cause lawyering”—advocating social policy positions in which one believes deeply—is actually “destabilizing [to] the dominant understanding of lawyering as properly wedded to moral neutrality and technical competence” because in the dominant paradigm, the lawyer does what the client wants and has no personal views. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Authority*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Sarat

they *will* vary because, as Cass Sunstein noted, “The first problem is that there is no single way to be a law professor.”¹⁷⁸ But the question is still worth asking.

If the law professor has a couple roles to choose from, are there any similar tools available to the professor class generally? Following, again, the idea that one can advocate degrees of objectivity without judging things to be completely objective or subjective, let me suggest one way that an academic can engage meaningfully in policy discussions that is impeccable—without claiming that any other particular course of conduct is flawed. One unimpeachable course is to advocate a *demanding standard of proof needed to justify a change in the law and hold proponents accountable to that standard*. In the face of strong lobbying interests demanding government-mandated encryption standards in digital television or strong, extra-copyright protection of databases or Congressional meddling in the workings of ICANN, it can be both principled and effective to say to the proponents that they *have not made the case for a new law*. It should not be enough for a group of lobbyists simply to tell Congress that there is a disaster of some sort looming—and the lobbyists get what they want. It is academics, whether scientists or law professors, who can most effectively proselytize to legislators on questions of *proof* and *consistency*.

There is nothing new about this general idea. As Congressman Robert Kastenmeier and House of Representatives counsel Michael Remington noted following the passage of the 1984 Semiconductor Chip Protection Act,¹⁷⁹

[T]he consideration of intellectual property issues should be governed by standards and procedures that are understood in advance and applied uniformly from case to case. *At the outset, the proponents of change should have the burden of showing that a meritorious public purpose is served by the proposed congressional action.*¹⁸⁰

Let me draw some additional ideas from—and built upon—Kastenmeier and Remington’s “meritorious case” standard.

& Scheingold eds., 1998). In cause lawyering, the lawyer has overall goals that may be adverse to the wishes or tactical best interests of her client.

178. Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 199 (1999).

179. Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901–914 (2000).

180. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 439–40 (1985) (emphasis added). This demand for proof and consistency is kindred to seeking integrity in principles from the state as a whole. See RONALD DWORKIN, *LAW’S EMPIRE* 176–224 (1986).

First, the standard for the meritorious case should apply to both large and small reforms. But the grander the reform, the more burdensome the showing should be. Small reforms, tinkering around the edges, should require less justification. Large reforms should require a much stronger case. Second, the burden can be met empirically *or* theoretically, but the standards may vary between the two. Generally speaking, perhaps one needs a very good empirical case or a *very, very good* theoretical case for reform.¹⁸¹

A legitimate criticism of this approach, as Professor Rochelle Dreyfuss quickly pointed out to me, is that it strongly favors the status quo. And does so with *no principled reason for favoring the status quo*. Of course, she is right that there is no principled reason for favoring the status quo. But there are a couple practical reasons to do so—one structural, one strategic. Structurally, legislators have limited time, energy, and attention. For that reason, one should focus on the situations where the probability assessment of improvement is greatest (this would be something like the sought for/predicted improvement factored by the strength of the case that the improvement would occur). Proponents for replacing ICANN, extending the copyright term, accepting anything Internet-related in the Patriot Act II, making likelihood of dilution actionable, or mandating encryption standards to protect copyrighted works—they *all* need to be forced to make their case for reform. But so too must those who would further shield ISPs from third party liability or who would roll back business method patents. As Kastenmeier and Remington said, the standards should be “applied uniformly from case to case.”¹⁸²

But there is also a practical strategic reason for this approach, particularly with intellectual property. While this conservative approach applies equally to proposals to strengthen or weaken intellectual property, for practical purposes legislation has been ratcheting in one direction—toward law that is stronger and stronger on the books. Slowing down the process of legal reform in favor of the

181. I have advocated this double standard before. See Justin Hughes, *Goat Boy Roams the Halls?*, in PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT (F. Scott Kieff ed., forthcoming Oct. 2003); Justin Hughes, *Pressures on the Public Domain: Legal Pressures in Intellectual Property Law*, in THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN 95 (Esanu & Uhlir eds., 2003); see also James Boyle & Jennifer Jenkins, *The Genius of Intellectual Property and the Need for the Public Domain*, in THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN, *supra*, at 10, 12 (concluding that “fundamental tinkering in the absence of strong evidence that the tinkering is needed would not seem like the optimal strategy”).

182. Kastenmeier & Remington, *supra* note 180, at 440.

status quo looks, for the moment, to mean slowing down the strengthening of intellectual property laws.

Can raising questions and demanding support for a proposal be effective? Yes. Can it be *as effective* as countering one side's wild claims of impending disaster with wild claims of disaster on the other side? Maybe not, but it can be effective enough. On this count, the activism of scientists and law professors on database protection has been instructive. In the mid- and late 1990s, the scientific community—with considerable help from Professor J.H. Reichman of Duke University and Paul Uhlir from the National Research Council—was instrumental in slowing down proposals for strong extra-copyright protection of databases. After an initial effort to stop an international treaty mandating database protection, the scientific community's activism focused on organizing conferences, promoting studies, and raising questions about the costs and benefits of new intellectual property legislation in this area.

To be sure, the scientific community's insistence on "inquiry" has masked, sometimes not too subtly, a substantive point of view. As the discussion of database protection has dragged on, the scientific community has *not* done much of the kind of empirical work that would flow naturally from the concerns they express. For example, the National Science Foundation and the National Institutes of Health could easily gather data on "data cost" as part of their grant-making process. But, as far as I know, such an easy empirical study has not been proposed, designed, or implemented. Of course, such a study might show that the cost of purchasing access to pre-existing data is not particularly great for scientists *at present*—and that would only help proponents of additional database protection (giving opponents a strategic reason not to undertake the work).

But, in their defense, the scientists should not be obliged to *disprove* the need for new legislation. Again, the burden should be with the proponents of change. The European Commission feels a need to defend the strong sui generis protection of databases established in the 1996 EU Database Directive. To that end, they pepper their public statements with claims that the Directive is "working" and that the EU has seen increased commercial database production. But one Commission official admitted that claims of increased post-Directive

database production were based, at least in part, on counting “court proceedings . . . not corporations.”¹⁸³

By the meritorious case standard, the Commission would not need to defend what is now the status quo in the European Union—were it not for the fact that the Commission is strongly advocating adoption of Directive-level protection in scores of other countries. It is advocating legal change in other countries and, for that reason, it bears the burden of showing that lack of Directive-level protection creates the kind of market failure that intellectual property is intended to correct.¹⁸⁴

In North America, there is no evidence that database production has weakened in the post-*Feist* environment and, in fact, one of the major proponents of database protection announced plans in 2000 to sell \$2.5 billion worth of copyright-protected newspapers and put a substantial chunk of those proceeds into “expanding its electronic databases” in a program to make 80% of its revenue “come from the electronic distribution of information” within five years.¹⁸⁵ That does not sound like a business environment inhospitable to investment in databases. In the face of such weak “evidence” all around,¹⁸⁶ the scientific community is doing the right thing: a relentless beat that no case has been made for strong database protection.

In considering ancient prophecy, Professor Stone places it in a larger context: “All political communities face a version of this problem of

183. Interview by Stephen M. Maurer with Christian Auinger, European Commission official (Feb. 20, 2001) (transcript on file with author); see also Maurer, *Across Two Worlds*, *supra* note 142.

184. The same applies when the United States advocates that other countries adopt business method patents: the United States would have a meritorious case if it could show market failure in those countries because of the lack of such protection.

185. Timothy Pritchard, *Thomson Jumps Head First into an Electronic Future*, N.Y. TIMES, Feb. 21, 2000, at C11, available at LEXIS, News Library, The New York Times File. Similarly, Barry Diller’s InterActive company is “an Internet commerce conglomerate whose businesses include the Home Shopping Network, Expedia, Inc., and Hotels.com”—which means a bunch of businesses built on on-line databases. But when *The New York Times* ran an article about financial uncertainties surrounding the company, there was not a single word about lack of database protection. See Gretchen Morgenson, *Financial Disclosure, the Barry Diller Way*, N.Y. TIMES, Aug. 10, 2003, §3, at 1, available at LEXIS, News Library, The New York Times File.

186. For example, if one even accepted that court proceedings are a way to count economic activity, many—if not most—of the post-Directive database litigations are about databases that were already being gathered or produced before the Directive and, therefore, do not seem to need Directive protection as an incentive. These include telephone books, sports information databases, stock market information, and legal databases. For an exhaustive survey of case law under the EU Database Directive, see Inst. for Info. Law, Univ. of Amsterdam, The Database Right File, at <http://www.ivir.nl/files/database> (last updated July 25, 2003). There is no evidence that the Directive is working, but, to be fair, we really should not expect such evidence so early after its transposition into the various European national laws.

true and false prophecy. How does one distinguish in political life between the dangerous zealot, the misguided idealist, and the authentic visionary?"¹⁸⁷ The question here is when the scholar moves from the relatively private world of hypothesizing among his colleagues and enters the realm of public prophecy, how does he distinguish between his own idealism and "authentic vision." It is not easy. As one of Raymond Radiguet's characters observes, looking back at his earlier, youthful ideas, "My clarity of vision was nothing more than a more dangerous form of my naivete."¹⁸⁸ For anyone who is blessed with the uncertainty of suspended judgment, I suggest a simple, yet often effective standard to avoid the dilemma: demand that the proponents of change make a stronger case than we have typically allowed them to get away with.

V. CONCLUSION

We might be tempted to call making predictions about the future an occupational hazard of professors, were it not an integral part of the occupation. The same can be said of *simplifying* our views, visions, and arguments in order to make them clearer, more interesting, or more persuasive—that simplification would be a hazard to be avoided, if it were not part of the process.¹⁸⁹

In the area of copyright, American courts have declined to embrace a forceful vision of the relationship between free expression, democratic society, and intellectual property rights that law professors laid out in the wake of the Supreme Court's 1991 *Feist* decision. The law professors have been in the vanguard, but there has yet to be any guard to follow them. Whether for structural or accidental reasons, the same visionary impulse did not inspire American legal academics to foresee how much the Internet would propel issues of "convergence" or partial harmonization among the commercial laws of nations connected to the cyberspace. Policymakers and private actors found themselves ahead of the American academic community in reacting to the transnational nature of the Internet's legal issues.

187. Stone, *Prophesy, Trust, and Authority*, *supra* note 149, at 7.

188. RAYMOND RADIGUET, *LE DIABLE AU CORPS* 106 (1923) ("Ma clairvoyance n'était qu'une forme plus dangereuse de ma naïveté.").

189. This way of formulating the point comes from J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 38 (J.O. Urmson & Marina Sbisa eds., Harvard Univ. Press 2d ed. 1975) (1962) ("We must at all costs avoid over-simplification, which one might be tempted to call the occupational disease of philosophers if it were not their occupation.").

“Convergence” is a popular idea these days,¹⁹⁰ but the convergence in law being wrought by the Internet is not a wholly new kind of legal harmonization. Bilateral and multilateral trade treaties—stretching back centuries—represent a history of steps, sometimes very small steps, toward harmonization of law. To some observers, harmonization has not proceeded very far; to other observers, it has gone far indeed. Each side can mount its own evidence. Those emphasizing how little harmonization has actually occurred would point to the wide world of legal idiosyncracies that abide. Indian copyright law, for example, defines “performers” to include snake charmers.¹⁹¹

Those seeing significant harmonization would make the kind of presentation made in Part III above. Increasing economic globalization would have increased the pace of this convergence in law even without the Internet. But in keeping with the many observations that the pace of change on the Internet is significantly faster than in the physical world,¹⁹² the Internet may have pushed us into a higher trajectory of faster, *deeper* convergence.

As for our modern day prophets, professors are to be commended for their activism—both for its positive results and for their strength and courage to wade into these policy battles. Writing in a very different context, James Baldwin’s words aptly describe the courage simply in moving from the academic sidelines into policy activism: “To act is to be committed, and to be committed is to be in danger.”¹⁹³ Danger that one’s substantive views will be lambasted—as well as danger that one’s *role* will, as in these pages, come under scrutiny.

190. See, e.g., Edward Alden, *US Rediscovered Value of Transatlantic Link*, FIN. TIMES, June 25, 2003, at 3 (quoting American official who is “struck by a convergence in European and American thinking” about security issues), available at 2003 WL 57314251.

191. The Copyright Act of 1957 §2(q) (India), <http://www.naukri.com/lls/copyright/section1.htm#2> (amended 1994).

192. The example of business method patents comes to mind. One is the argument that business method patents over Internet applications should have a significantly shorter term of protection because “the software world moves five times faster than the industrial one that the patent system was designed to protect.” Damien Cave, *Patently Bezos*, SALON.COM, at <http://www.archives.salon.com/tech/feature/2000/03/16/patent/> (Mar. 16, 2000). How one would actually measure such a difference is a much more difficult problem.

193. JAMES BALDWIN, *THE FIRE NEXT TIME* 9 (1963).