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Introduction: Sovereignty and the Globalization of Intellectual Property, Symposium

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Introduction

Sovereignty and the Globalization of Intellectual Property

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We live today literally in the midst of an information revolution, reflected by the increasing prevalence of computers, computer networks, and digital information in business, government, education, and entertainment. Institutions and individuals alike are flocking to the World Wide Web, the most ubiquitous of all information networks, making it the fastest-growing medium in human history. Digital media of all forms—software, CDs, DATs, DVDs, HDTV, digital cable and radio—are proliferating. Information services and products now constitute the world's and the United States' largest and fastest growing economic sectors. The businesses which create, manipulate, and transmit information far exceed the economic value of other industries, and they contribute significantly toward a positive U.S. trade balance.

The extraordinary role of information products and services and their transforming effect on virtually all aspects of human activity are not limited to the United States. Digital information is the ultimate example, and a significant cause, of globalization. Whether in a floppy disk or compact disc, transmitted by wire or optical fiber, or beamed from a satellite or microwave dish, information, particularly electronic information, is ubiquitous: it respects no boundaries.

As a result of its inherently global character, information has been the subject of some of the earliest multinational agreements, treaties, and organizations. Binational postal treaties were concluded as early as 1601 between France and Spain and 1670 between France and England.¹ The Postal Congress of Berne in 1874 established a multinational postal regime—administered today by the Universal Postal Union (UPU)—seventy-

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1. Ludwig Weber, *Postal Communications, International Regulation*, 5 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 238 (1983).

four years before the General Agreement on Tariffs and Trade (GATT) was opened for signature.² This global framework is so comprehensive and the practical difficulty of separating domestic and international mail so great, that UPU regulations today set the terms for domestic as well as international service.³ Electronically transmitted information also prompted multinational agreements almost immediately upon its commercial deployment. The telegraph was first employed commercially in the early 1840s, and by 1849 bilateral and multinational agreements were in place to facilitate and regulate its transnational use.⁴ In 1865, Napoleon III called an international conference in Paris to address technical standards, codes, and tariffs for the telegraph.⁵ The twenty countries attending negotiated the first International Telegraph Union, which later combined with the Radiotelegraph Conference to form the International Telecommunication Union. In short, by the time the telephone appeared on the scene in 1876, there already existed an eleven-year-old structure for dealing with multinational electronic communication.⁶

The economic significance and inherently global nature of digital information pose extraordinary challenges to the power of national governments to regulate its ownership and use. Unlike a truckload of steel or a freight train of coal, information being communicated is difficult to pinpoint and almost impossible to block by either legal or technological means. Digital information not only ignores national borders, but also those of States, territories, and even individual institutions. Moreover, information in one jurisdiction may pose substantial legal and practical issues in another, especially if that information is a trade secret or the subject of patent or copyright law protection. As a result, governments are finding it increasingly difficult, and in some cases impossible, to regulate information effectively, at the very time that the economic power of information is increasing the political pressure for them to do so. The globalization of information may be rendering the traditional concept of the sovereignty of the nation-state obsolete.

Multinational legal obligations are assuming an increasingly prominent role in the regulation of information. For example, the early "Great Conventions"

2. *Id.*; General Agreement on Tariffs and Trade, *opened for signature* Jan. 1, 1948, 55 U.N.T.S. 188.

3. Weber, *supra* note 1, at 241.

4. Alfons Noll, *International Telecommunication Union*, 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 177 (1983); Peter Malanczuk, *Telecommunications, International Regulation*, 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 367 (1986).

5. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 38 (2d ed. 1989).

6. See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 11-13 (1997).

on intellectual property law—the Paris Convention for the Protection of Industrial Property of 1883⁷ and the Berne Convention for the Protection of Literary and Artistic Works of 1886⁸—merely established limited minimum requirements that an acceding State must adopt into domestic law. Professor J.H. Reichman has written: “What mattered was that member states strictly observed national treatment in the application of such laws, and not that the laws themselves, as implemented, fulfilled the spirit of the Convention.”⁹ As a result, these treaties were highly deferential to national law, provided that such law was applied evenly to nationals and foreigners alike.

The recent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁰ by contrast, imposes more extensive and more intrusive obligations on sovereign States. According to Professor Reichman:

Under the TRIPS Agreement, in contrast, adopting legislation that complies with international minimum standards becomes only the starting point. States must further apply these laws in ways that will stand up to external scrutiny . . . then they must adequately enforce them in compliance with detailed criteria concerning procedural and administrative matters, including remedies. Rights holders who cannot translate substantive victories into effective remedial action at the local level may eventually trigger the WTO’s [World Trade Organization’s] dispute-settlement machinery.¹¹

While the TRIPS Agreement responds to the need to “further the goal of adapting the international intellectual property system to the challenges of an integrated world market,” Professor Reichman has observed, “[f]ew things touch the delicate nerve of national sovereignty more than the autonomous

7. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305.

8. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention].

9. J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 VA. J. INT’L L. 335, 338-39 (1997).

10. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL TEXTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 83 (1994); Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL TEXTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 81 (1994).

11. Reichman, *supra* note 9, at 329.

capacity of states to administer their domestic laws in conformity with their own legal philosophies."¹²

Multinational organizations, for example, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), have not surprisingly assumed a more prominent role in the face of the increased globalization of information, yet there is substantial reason to question whether they are up to the task of creating and enforcing an effective and equitable global intellectual property regime. In fact, there is little agreement as to what either "effective" or "equitable" means in this context. As a result, national governments continue to seek to regulate intellectual property in uneasy tension with international organizations. In the United States, for example, the Clinton Administration sought enhanced protection for digital information, including collections of information, i.e., databases, from WIPO when Congress refused to pass national database legislation.¹³ When WIPO refused to enact much of the protection sought by the United States, including the proposal for a database treaty,¹⁴ the focus of legislative efforts returned to the U.S. Congress, which in the fall of 1998 considered, and ultimately rejected, expansive database

12. *Id.* at 339-40.

13. NII Copyright Protection Act of 1995, H.R. 2441, 104th Cong. (1995). Professor Pamela Samuelson writes:

The digital agenda that Clinton administration officials pursued in Geneva was almost identical to the digital agenda they had put before the U.S. Congress during roughly the same time period. Notwithstanding the fact that this digital agenda had proven so controversial in the U.S. Congress that the bills to implement it were not even reported out of committee, Clinton administration officials persisted in promoting these proposals in Geneva and pressing for an early diplomatic conference to adopt them. For a time, it appeared that administration officials might be able to get in Geneva what they could not get from the U.S. Congress, for the draft treaties published by WIPO in late August 1996 contained language that, if adopted without amendment at the diplomatic conference in December, would have substantially implemented the U.S. digital agenda, albeit with some European gloss. Had this effort succeeded in Geneva, Clinton administration officials would almost certainly have then argued to Congress that ratification of the treaties was necessary to confirm U.S. leadership in the world intellectual property community and to promote the interests of U.S. copyright industries in the world market for information products and services.

Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 373-74 (1997) (citations omitted).

14. The diplomatic conference refused to adopt the U.S. proposal for a database treaty, and instead agreed to a resolution calling for additional work to be done toward a possible treaty in this area. See *Proposal of the United States of America on Sui Generis Protection of Databases*, WIPO Doc. BCP/CE/VI/2 (May 20, 1996); *Recommendation Concerning Databases*, WIPO Doc. CRNR/DC/100 (Dec. 20, 1996).

protection as part of the Digital Millennium Copyright Act.¹⁵

As the issue of database protection demonstrates, the globalization and power of intellectual property challenges national sovereignty in another and more fundamental way than just undermining the effectiveness and enforceability of national laws. Although intellectual property, at least in some areas, is fairly uniform across nations, that protection is often based on very different underlying principles. In European countries, for example, national copyright laws protect authors' "moral rights," recognizing, rather than creating, certain rights in authors that predate the involvement of the State.¹⁶ As the late Professor Nathaniel Shaler of Harvard wrote almost a century ago:

[I]t will be clearly seen that intellectual property is, after all, the only absolute possession in the world. . . . The man who brings out of the nothingness some child of his thought has rights therein which cannot belong to any other sort of property. . . . The inventor of a book or other contrivance of thought holds his property, as a god holds it, by right of creation.¹⁷

The United States, on the other hand, provides no effective protection for "moral rights."¹⁸ Instead, copyright protection is based on a constitutional calculation that "secur[ing] for limited Times to Authors . . . the exclusive Right to their respective Writings" will have the effect of "promot[ing] the Progress of Science and useful Arts."¹⁹ The incentive for creation and dissemination of

15. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (to be codified at 17 U.S.C. Titles 5, 12, 13 (1998)). Title V of the House bill would have provided extensive database protection. H.R. 2281, 105th Cong. (1998).

16. These "moral rights" differ from country to country, but generally include: the right of integrity (protecting the work from mutilation or distortion); the right of withdrawal (the right to withdraw, modify, or disavow a work after publication); the right of paternity (the right to be identified as the work's creator); and the right of disclosure (the right to decide when and in what form the work will be made public). MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.25[A] (1989).

17. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421, 426 (1983).

18. In 1990, Congress amended the 1976 Act to create certain "moral" rights of attribution and integrity for creators of visual art. Pub. L. No. 101-650, § 804, 104 Stat. 5136 (codified at 17 U.S.C. § 106A). The narrowness of the new rights indicates the disfavor accorded moral rights in U.S. law. For example, the rights apply only to works of fine art that exist in a single copy or in signed, numbered editions of fewer than 200 copies. Congress exempted from the new rights virtually all significant commercial uses. And the rights, unlike the other exclusive rights, expire with the death of the creator. *See id.*

19. U.S. CONST. art. I, § 8, cl. 8.

expression is the justification for granting “rights” to creators and marks the constitutional limit of those rights. Moreover, the United States has stressed that copyright protection is limited to expression, not the information expressed. “The most fundamental axiom of copyright law is that ‘[n]o author may copyright his ideas or the facts he narrates. . . .’ [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”²⁰ As a result, copyright law will not even protect expression if that expression provides the only means of conveying an idea, concept, or fact, or is essential to the execution of an idea or concept. Under the doctrine of “merger,” courts withhold copyright protection from original, fixed expression if that expression “must necessarily be used as incident to” the work’s underlying ideas or data.²¹ The doctrine of merger highlights the importance of preventing copyright law from ever protecting a fact or idea: it is preferable to exclude otherwise protectable expression from copyright law’s monopoly rather than to allow that monopoly to extend to any fact or idea.²²

Reconciling the “moral rights” and “incentive” systems of copyright protection is more than a matter of statutory amendment; it reflects a fundamental, foundational disagreement over why and to what extent the State should protect intellectual property in the first place. No commitment to multilateralism or to a global intellectual property regime will overcome the constitutional limits placed on copyright law in the United States. Efforts to exceed those limits, for example, by protecting collections of information, no matter how strongly justified by the global economic importance of information, are constitutionally suspect.

The globalization of information challenges sovereignty in still another way, namely, the extent to which the growing effort to globalize intellectual property protection inhibits the ability of nations to pursue other objectives with their intellectual property laws. Many countries, particularly less-developed countries, have sought to protect the rights and interests of citizens either to “borrow” protected intellectual property or to share in the profits resulting from

20. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344, 349 (1991).

21. *Baker v. Selden*, 101 U.S. 99, 104 (1879).

22. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (explaining that when an “‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’”); *Merrit Forbes & Co. v. Newman Inv. Serv.*, 604 F. Supp. 943, 951 (S.D.N.Y. 1985) (stating that “where an underlying idea may only be conveyed in a more or less stereotyped manner, duplication of that form of expression does not constitute infringement, even if there is word for word copying”).

the commercialization of intellectual property from within that country. The move toward global standards for intellectual property protection is a comparatively recent one. For more than a century the United States resisted participating in any multinational copyright structure. The nation was, in the words of Professor David Nimmer, a copyright "island."²³ In fact, until 1891, copying a non-U.S. work was not even prohibited by U.S. law.²⁴ Then, in 1952, the United States joined the Universal Copyright Convention,²⁵ while refusing to participate in the older, more powerful, and more encompassing 1886 Berne Convention for the Protection of Literary and Artistic Works.²⁶

In 1988, Congress finally enacted those basic changes necessary for the United States to accede to the Berne Convention; the United States joined eighty other countries which were signatories of the Berne Convention.²⁷ Much of the impetus for this move came from U.S. intellectual property owners who desired the broad multinational protection afforded by membership in Berne.²⁸ In short, the United States stayed out of the premier multinational copyright protection regime until the benefits of membership (primarily experienced by producers of intellectual property) outweighed the value (primarily experienced by consumers of intellectual property) of not complying with the major multinational norms of copyright protection. Other nations which are still primarily consumers of intellectual property may be less convinced that their national interest, protected by sovereignty, is well-served by compliance with new multinational initiatives to restrict the uncompensated use of intellectual property. Similarly, nations which supply the raw materials that scientists in other countries use to create patented drugs, seeds, and other products are questioning whether high levels of multinational intellectual property protection benefit all nations equally.

For all of these and other reasons, we are witnessing a globalization of intellectual property regulation in a near futile effort to keep pace with the globalization of information, with significant ramifications for national sovereignty. These developments are of far more than just theoretical interest,

23. See David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211 (1992).

24. 1891 saw passage of the International Copyright Act of 1891, commonly known as the Chace Act, ch. 565, 26 Stat. 1106.

25. See Universal Copyright Convention, revised July 24, 1971, 6 U.S.T. 2731, 93 U.N.T.S. 178.

26. Berne Convention, *supra* note 8.

27. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101).

28. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 987 n.5 (1983).

as the bulk of the global economy shifts towards information products and services which are regulated in the first instance by the regime of intellectual property protection. Moreover, as the previous examples suggest, questions about the globalization of intellectual property law have wide-ranging implications far beyond those industries concerned with the creation and use of intellectual property. Like the information revolution itself, these questions permeate all realms of human endeavors.

To address this vital and complex topic, the Information Law and Commerce Institute of the Indiana University School of Law—Bloomington invited eight leading intellectual property scholars to a three-day face-to-face roundtable. Participants in the roundtable were: Professor Keith Aoki from the University of Oregon School of Law; Professor Rosemary J. Coombe from the University of Toronto Faculty of Law; Professor Kenneth Crews from the Indiana University Schools of Law—Indianapolis and Library and Information Science; Professor Trotter Hardy from the Marshall-Wythe School of Law at the College of William & Mary; Professor Chris Reed from the Centre for Commercial Law Studies at Queen Mary and Westfield College in London; Professor Jerome H. Reichman from the Vanderbilt University School of Law; and Professors Marshall Leaffer and David Fidler from the Indiana University School of Law—Bloomington.

The Information Law and Commerce Institute was created to examine a wide range of information law issues confronting business today. Through intensive workshops, publications, its World Wide Web site (www.ilci.org), and close collaboration among attorneys, industry executives, policymakers, and academics, the Institute facilitates real world problem solving, scholarly research, and innovative teaching in the rapidly expanding field of information law. For this project, the Institute asked each participant to contribute a presentation on a subject of his or her own choosing, addressing the broad question: “Does the globalization of intellectual property threaten traditional notions of sovereignty?” Each presentation was followed by a substantive discussion from which the participants drew when crafting their contributions to this volume. Rather than the typical conference with formal presentations and comments delivered before a non-participating audience, this was a truly interactive roundtable. Everyone present participated. In a very real sense, each of the Articles that follows reflects not merely the efforts of an individual author, but rather the contributions of all of the participants. Although prior commitments prevented some of the participants from contributing their own articles to this volume, the significant work of all of the participants is reflected

in the pages that follow.

The roundtable was funded by a substantial grant from Citibank, N.A., which helped develop the topic because the company sees the immediate and significant challenges presented to global business by the globalization of intellectual property, but which otherwise played no role in selecting the participants or the individual Article topics. The Law School, the Institute, and the *Indiana Journal of Global Legal Studies* are grateful for the generous support of Citibank and of its general counsel for technology and intellectual property, P. Michael Nugent, Esq.

Finally, we are most indebted to the participants in the roundtable, many of whose contributions are contained in the volume. They were selected because they were identified as being the leading scholars in their respective fields. However, as their energetic (and uncompensated) participation in the roundtable and in this volume have demonstrated, they are also dedicated colleagues with extraordinary commitment to the study and resolution of the issues they research and teach.

