

# Artists and Copyright in the Digital Millennium

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The purpose of this paper is to describe, explain, and assess the most significant legislative changes in international copyright law over the past ten years, with a particular focus on the roles of authors and artists, understood as the actual creators of copyrightable works. My account is limited to those elements of copyright legislation that are generally perceived to have been enacted in response to the challenges posed by the emergence and the spread of digital technology and the deployment of global computer networks, in particular the Internet. While there were several other changes in

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statutory copyright law across the globe,<sup>1</sup> these changes were confined to specific jurisdictions and dealt with issues that were not directly related to technological advances, which places them outside the context of the "digital millennium" for the purposes of this paper. In view of the interdisciplinary nature of the conference for which this paper is written, I will take a rather broad and principled approach at the expense of the kind of detailed discussion that might be expected by a purely legal audience and that I have provided elsewhere.<sup>2</sup>

My analysis will proceed in three steps. *First*, I will review the most important legal innovation of the past ten years, namely the legal protection against circumvention of technological measures, which was introduced on the international level in 1996 as a result of the adoption of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>3</sup> *Second*, I will provide a speculative assessment of the wave of legislative reforms triggered by these two treaties from the point of view of artists by examining both the impact artists had on these reforms and how these reforms affect current and future artistic practices. *Third*, I will examine one of the concepts that underlies copyright legislation in the digital millennium, namely the idea that copyright is property. In the balance of this paper, I hope to facilitate the interdisciplinary discourse at the intersection of digital art and modern copyright law.

## I. COPYRIGHT LEGISLATION IN THE DIGITAL MILLENNIUM

The most significant substantive<sup>4</sup> innovation in international copyright law is the adoption of an international obligation to legally protect the use of technological measures employed by copyright owners to shield their works against unauthorized use.<sup>5</sup> The rationale typically advanced for this legal innovation is that the position of copyright owners should be strengthened in view of the potentially devastating effects of online copyright infringement resulting from the technological ease of copying and

<sup>1</sup> Examples include the enactment of the United States Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), the Australian Copyright Amendment (Moral Rights) Act 2000 (No. 159, 2000), and the new German Law Governing Copyright Contracts (Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern vom 22. März 2002, BGBl. I, 1155).

<sup>2</sup> See, e.g., Cyrill P. Rigamonti, *Eigengebrauch oder Hehlerei? – Zum Herunterladen von Musik- und Filmdateien aus dem Internet*, 53 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONAL [GRUR INT.] 278 (2004) (discussion of legal issues relating to the downloading of music and movie files from the Internet); Cyrill P. Rigamonti, *Schutz gegen Umgehung technischer Massnahmen im Urheberrecht aus internationaler und rechtsvergleichender Perspektive*, 54 GRUR INT. 1 (2005) (discussion of the legal issues arising from the protection of technical protection measures against circumvention).

<sup>3</sup> WIPO Copyright Treaty (WCT), adopted on December 20, 1996, WIPO Doc. CRNR/DC/94, 35 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty (WPPT), adopted on December 20, 1996, WIPO Doc. CRNR/DC/95, 36 I.L.M. 76 (1997).

<sup>4</sup> There is also a very significant procedural innovation, namely the establishment of an effective dispute settlement mechanism that is widely used by the member states of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), April 15, 1994, Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 81 (1994). See Understanding on Rules and Procedures Governing the Settlement of Disputes of April 15, 1994, Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1226 (1994).

<sup>5</sup> See Article 11 WCT and Article 18 WPPT. These two treaties also introduced an obligation to protect the integrity of copyright management information in Article 12 WCT and Article 19 WPPT. Given the fact that these rules are not particularly controversial, I will limit my discussion to the protection of technical measures.

distributing copyrighted works over the Internet. What was remarkable about the insertion of an obligation to protect technological measures into the WCT and the WPPT is the fact that this type of legal protection was new to everyone. There were a few rather remote precursors for such protection relating to computer programs,<sup>6</sup> digital audio tapes,<sup>7</sup> and satellite signals,<sup>8</sup> but no copyright statute contained similarly comprehensive rules calling for a general protection of technological measures. While most, if not all, international treaties in the field of intellectual property codify or reiterate pre-existing minimum protection rules, the legal protection of technical measures in the WCT and the WPPT is a prime example of the strategic use of international institutions and international law to further special interests that face considerable opposition on the national level.<sup>9</sup> It is no secret that the United States Government acted on behalf of select copyright industries when it asked for an international treaty that incorporated the legal protection of technological measures after its proposals for similar domestic legislation had been unsuccessful.<sup>10</sup> In other words, the legal protection of technological measures is largely the result of an international enterprise spearheaded by the United States and supported by the European Union, both acting in the interest of select copyright industries. The international adoption and subsequent national implementation of the legal protection of technological measures is also remarkable for another reason. As the following analysis reveals, the legislative model underlying the WIPO Treaties was turned into its exact opposite during the implementation process. While the WIPO Treaties relied on what may be called an enforcement model, the actual rules adopted in the United States and the European Union rely on a completely different understanding of the legal protection of technological measures and essentially rely on what may be called an expansionist model. Understanding this difference is crucial to understanding the controversy associated with the legal innovation that is the protection of technological measures. Consequently, I will divide my account into an international adoption phase (enforcement model) and a national implementation phase (expansionist model).

#### A. *The International Adoption Phase – The Enforcement Model*

The defining feature of the enforcement model is that the scope of the legal protection of technological measures and the scope of traditional copyright law is co-

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<sup>6</sup> See Article 7(1)(c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, 1991 O.J. (L 122) 42. This provision, in turn, derived from the original version of § 296 of the U.K. Copyright Designs and Patents Act of 1988 (c. 48), which has since been modified to implement the legal protection of technical measures.

<sup>7</sup> See Audio Home Recording Act of 1992 (AHRA), Pub. L. No. 102-563, 106 Stat. 4237 (1992), codified in part at 17 U.S.C. § 1002(c) (relating to the circumvention of the Serial Copy Management System).

<sup>8</sup> See Article 1707 of the North American Free Trade Agreement (NAFTA); see also 47 U.S.C. §§ 553(a)(2), 605(e)(4).

<sup>9</sup> On the increasing strategic use of international institutions to further specific corporate interests, see Silke von Lewinski, *Amerika. Ein Wintermärchen*, in Festschrift Adolf Dietz 583 (Peter Ganea at al. eds., 2001); Silke von Lewinski, *Rechtsangleichung auf bilateraler, regionaler und internationaler Ebene – ein Erfahrungsbericht*, in Festschrift Wilhelm Nordemann 475-76 (Ulrich Loewenheim ed., 2004).

<sup>10</sup> See, e.g., Thomas C. Vinje, *A Brave New World of Technical Protection Systems*, 18 *EUROPEAN INTELLECTUAL PROPERTY REVIEW [EIPR]* 431 (1996); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 *VA. J. INT'L L.* 369, 373-374, 429-430 (1997); Jessica Litman, *Digital Copyright* 128-29 (2001); William W. Fisher, *Promises To Keep* 91-94 (2004).

extensive. This alignment between copyright and anti-circumvention rules can be traced back to its origins in a proposal presented by a U.S. task force in 1995.

### 1. *The White Paper Proposal*

Shortly after his election in 1992, President Clinton established a task force – staffed with former copyright lobbyists for the music and computer industries<sup>11</sup> – to devise a strategy for the American commercialization of the Internet. The proposals of this task force were published in 1995 in what has come to be known as the "White Paper," which included a proposal for the introduction of rules designed to protect the use of technological measures by copyright owners.<sup>12</sup> The proposal was based on the idea that online copyright infringement could be significantly reduced if copyright owners could lock their works by using encryption technology and if the tools necessary for the decryption of their works were outlawed, so that copyright owners would have full control over who copies their works and on what conditions. Consequently, the White Paper proposed the adoption of the following rule:

No person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under section 106.<sup>13</sup>

What was characteristic about this proposal is that it was limited to the prohibition of circumvention *devices* and did not outlaw the actual *act* of circumvention. Furthermore, it tied the scope of the legal protection of technological measures to the scope of the underlying copyright by making sure that devices whose primary purpose or effect was to circumvent technical measures for legal purposes, such as fair use, would remain legal. Although this is not entirely clear from the wording of the provision cited above, this is what the White Paper claimed, when it said that "the proposed legislation prohibits only those devices or products, the primary purpose or effect of which is to circumvent such systems *without authority*. That authority may be granted by the copyright owner or by limitations on the copyright owner's rights under the Copyright Act" and that "if the circumvention device is primarily intended and used for legal purposes, such as fair use, the device would *not* violate the provision, because a device with such purposes and effects would fall under the 'authorized by law' exemption".<sup>14</sup> While this proposal for domestic legislation did not become law,<sup>15</sup> it became important during the international negotiations at the World Intellectual

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<sup>11</sup> JESSICA LITMAN, DIGITAL COYPRIGHT 90 (2001).

<sup>12</sup> See INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) (hereinafter "White Paper").

<sup>13</sup> White Paper, Appendix 1, § 1201.

<sup>14</sup> *Id.* at 231 (emphasis in original).

<sup>15</sup> See, e.g., Thomas C. Vinje, *The New WIPO Copyright Treaty – A Happy Result in Geneva*, 19 EIPR 230, 234 (1997).

Property Organization, because it was the United States which introduced the topic of technical protection measures during the preparatory expert committee meetings.<sup>16</sup>

## 2. *The Basic WIPO Proposal*

The U.S. proposal was combined with similar European proposals in the "Basic Proposal" that formed the primary basis for the negotiations ultimately leading to the adoption of Article 11 WCT and Article 18 WPPT.<sup>17</sup> Article 13(1) of the Basic Proposal read:

Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

This provision carried over the two characteristics mentioned above for the U.S. proposal, namely (i) the focus on circumvention devices as opposed to the act of circumvention and (ii) the identity of the scope of the legal protection of technological measures and the underlying substantive copyright law.<sup>18</sup> Following the objection of a number of countries that considered Article 13(1) of the Basic Proposal to be vague and potentially overbroad, the proposal championed by the United States and the European Union was replaced with an African proposal,<sup>19</sup> which focused on the act of circumvention rather than on the technology used to circumvent technological measures and which continued to tie the legal protection of technological measures to the scope of substantive copyright law.<sup>20</sup> This proposal was ultimately adopted, with two minor clerical amendments.<sup>21</sup>

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<sup>16</sup> See, e.g., Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 411 (1997); JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996*, Article 11 WCT, Note 28 (2002).

<sup>17</sup> Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference, WIPO Doc. CRNR/DC/4 (August 30, 1996) (hereinafter "Basic Proposal").

<sup>18</sup> See Note 13.05 of the Chairman's Explanatory Notes accompanying the Basic Proposal ("Contracting Parties may design the exact field of application of the provisions envisaged in this Article *taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain*") (emphasis added); accord JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996*, Article 11 WCT, Note 6 (2002); but see Jane C. Ginsburg, *Achieving Balance in International Copyright Law*, 26 COLUM. J.L. & ARTS 212 (2003).

<sup>19</sup> See WIPO Doc. CRNR/DC/56 (December 12, 1996) (Proposal of the African Delegation).

<sup>20</sup> On the background of the African proposal, see PETER WAND, *TECHNISCHE SCHUTZMASSNAHMEN UND URHEBERRECHT* 33-34 (2001).

<sup>21</sup> MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET*, Note 6.67 (2002).

### 3. *The WIPO Treaties*

Article 11 WCT<sup>22</sup> now reads:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

The wording of this rule makes it clear that the legal protection of technological measures is co-extensive with substantive copyright law. In other words, if a certain act is legal under copyright, it is also legal to circumvent any technological measures that have been applied to the work in question. More specifically, any limitations on the exclusive right of copyright owners that are recognized by the copyright statute trump any technological measures that these copyright owners may apply. This result is no coincidence. During the WIPO negotiations, the international community generally recognized that using technological measures to block the exercise of copyright limitations was undesirable.<sup>23</sup> The substantive connection between copyright and the legal protection of technological measures is essential to Article 11 WCT and Article 18 WPPT. Consequently, there is a broad consensus on this issue,<sup>24</sup> and the dispute in the literature is about whether contracting parties are allowed to alter this principle when implementing the WIPO Treaties.<sup>25</sup> Regardless of this controversy in legal scholarship, it is important to understand that the international legal protection of technological measures under the WIPO Treaties (and under all preceding drafts) rests firmly on the principle that this novel type of protection does not expand the boundaries of copyright law and that copyright limitations, such as fair use in the United States or the private use exemption in Continental Europe, take precedence over any technological measures that

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<sup>22</sup> Article 18 WPPT is virtually identical to Article 11 WCT and will not be further discussed in the remainder of this paper.

<sup>23</sup> See Summary Minutes, Main Committee I, WIPO Doc CRNR/DC/102 (August 26, 1997), Notes 518 (Korea), 519 (South Africa), 523 (Canada), 526 (Singapore), 529 (European Union), 535 (England), 536 (Austria), 537 (Norway); see also MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET*, Note C11.23 (2002).

<sup>24</sup> See, e.g., Thomas C. Vinje, *Copyright Imperilled?*, 21 EIPR 201 (1999); Jane C. Ginsburg, *Chronique des États-Unis*, 179 REVUE INTERNATIONALE DU DROIT D'AUTEUR [RIDA] 143, 151 (1999); Kamiel Koelman, *A Hard Nut to Crack – The Protection of Technological Measures*, 22 EIPR 272 (2000); PETER WAND, *TECHNISCHE SCHUTZMASSNAHMEN UND URHEBERRECHT* 44 (2001); Thomas Hoeren, *Access Right as a Postmodern Symbol of Copyright Deconstruction?*, in ALAI 2001, at 349 (2002); JÖRG REINBOthe & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996*, Article 11 WCT, Note 28 (2002); Alexander Peukert, *Technische Schutzmassnahmen*, in HANDBUCH DES URHEBERRECHTS § 33, Note 14 (Ulrich Loewenheim ed., 2003).

<sup>25</sup> The majority opinion is that the minimum protection rule derived from Article 19 of the Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, enables countries to expand protection for technological measures beyond the limits of substantive copyright law. I have argued that the scope of substantive copyright protection is the limit of how far the legal protection of technological measures can be expanded, otherwise one of the purposes of Article 11 WCT and Article 18 WPPT, namely the protection of third parties against the abuse of technological measures, would be defeated; see Cyrill P. Rigamonti, *Schutz gegen Umgehung technischer Massnahmen im Urheberrecht aus internationaler und rechtsvergleichender Perspektive*, 54 GRUR INT. 1, 5-7 (2005).

copyright owners might employ to protect their works. In short, if it is legal to copy, it is legal to circumvent.

#### 4. *The Concept of the Enforcement Model*

Conceptually, the international rule incorporates what may be called the "enforcement model" of anti-circumvention protection, which relies on the understanding that the challenge posed by digital technology and the Internet is not the scope of copyright, but its enforcement.<sup>26</sup> Indeed, the unauthorized distribution of copyrighted works over the Internet, such as the posting of the contents of a book on a Web site, was already illegal in most, if not all, countries prior to the adoption of the WIPO Treaties. Accordingly, it was clear that if the enforcement of copyright infringement was the problem, then a further expansion of copyright protection could not be the solution. If Internet piracy was the issue, as the representatives of the copyright industries claimed,<sup>27</sup> then it was important to have an enforcement mechanism that would make copyright infringement impossible. Technological protection measures held the promise of being such a mechanism, but it was obvious that the deployment of encryption-based online distribution networks for digital content could easily be undercut by technology companies selling software that would make it easy to decrypt encrypted digital works. Outlawing the sale of these tools as envisioned in the draft bills mentioned above or at least outlawing the act of circumvention as provided by the WIPO Treaties seemed to be the way to go. Therefore, the international legal protection of technological measures was not designed to expand copyright entitlements, but simply to reinforce pre-existing copyright entitlements by making sure that the envisioned technological delivery systems would remain sufficiently secure "to keep honest people honest."<sup>28</sup> However, by the time the WIPO Treaties reached the level of domestic implementation, the enforcement model of technological measures no longer seemed to go far enough for the copyright industries, and they lobbied for the adoption of a different model during the national phase, a model that required the further expansion of substantive copyright law.

#### B. *The National Implementation Phase – The Expansionist Model*

If the United States and the European Union had followed the model incorporated in the WIPO Treaties, the insertion of legal protection of technological measures into American and European copyright law would have hardly been controversial. However, as if the framework spelled out in Article 11 WCT and Article 18 WPPT did not exist, both the United States and the European Union departed from this model by resurrecting and modifying their respective digital agendas as they existed prior to the adoption of the WIPO Treaties.<sup>29</sup> The enforcement model was replaced by what may be

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<sup>26</sup> This has long been recognized as the primary problem posed by the Internet; *see, e.g.*, Reto M. Hilty, *Der Information Highway – eine Einführung in die Problematik*, in *INFORMATION HIGHWAY* 38 (Reto M. Hilty ed., 1996).

<sup>27</sup> *See, e.g.*, NII Copyright Protection Act of 1995, Hearings on H.R. 2441 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong. 22 (1996) (statement of Jack Valenti, Motion Picture Association of America).

<sup>28</sup> Dean S. Marks & Bruce H. Turnbull, *Technical Protection Measures – The Intersection of Technology, Law and Commercial Licenses*, 22 *EIPR* 198, 199 (2000).

<sup>29</sup> *See* JESSICA LITMAN, *DIGITAL COPYRIGHT* 134 (2001) (for the United States); Jörg Reinbothe, *Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft*, 50 *GRUR INT.* 741 (2001) (for the European Union).

called the expansionist model, because the legal protection of technological measures was no longer considered an enforcement mechanism to curb online copyright infringement, but rather a means for further expanding substantive copyright protection.

### 1. *Difficulties with the Enforcement Model*

The impetus for the conceptual change towards the expansionist model stemmed from the fact that the copyright industries had realized that copyright reform in the digital age was not about reducing Internet piracy, but about increasing control over the use of their works by private individuals,<sup>30</sup> in spite the fact the entertainment industry kept voicing its concerns in terms of piracy, a rhetoric that tends to resonate well with policy-makers.<sup>31</sup> To the extent that the spread of digital technology and high speed Internet access had enabled direct creator-to-consumer distribution of digital works at the expense of traditional intermediaries selling physical carriers of digital content, it became more and more clear that unless the copyright industries could strengthen their control over private copying, the very existence of their power base and ultimately of their commercial livelihood was at stake. However, since traditional copyright law accommodated a number of limitations and exceptions to the exclusive rights of copyright owners, most notably the fair use doctrine in the United States and the private use exemption in Continental Europe, copyright law did not bestow any exclusivity on copyright owners in the field of private copying. Technological measures could provide factual exclusivity in the absence of legal exclusivity, but technological systems were vulnerable to circumvention. The approach taken in the WIPO Treaties did not remedy this problem, precisely because it tied the scope of the legal protection of technological measures to the scope of substantive copyright law and because it placed the focus on the act of circumvention as opposed to circumvention technology. As a result, under the WIPO regime, it would be perfectly legal to circumvent technological protection measures without authority from the copyright holders if the purpose underlying the circumvention was to make a copy that was legal under the fair use doctrine, the private use exemption, or some other copyright limitation. Furthermore, the distribution of circumvention technology and the performance of circumvention services would also be legal for this purpose.

In this respect, the copyright owner's desire to fully control private copying by controlling circumvention technology bumped up against the *Betamax* decision<sup>32</sup>, according to which copying technology was legal as long as it had substantial noninfringing uses, even if it could be and was sometimes used for infringing purposes. Under this rule, the copyright owner's ability to establish full control over private copying depends on successful collaboration with technology and software companies, as in the case of the establishment of the DVD standard that incorporates a copy

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<sup>30</sup> See also Pamela Samuelson, *DRM {and, or, vs.} the Law*, 46 COMMUNICATIONS OF THE ACM 44 (2003) ("The main goal of DRM mandates is not, as the industry often claims, to stop 'piracy' but to change consumer expectations").

<sup>31</sup> See, e.g., WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 and H.R. 2280 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 105th Cong. 200 (1998) (statement of Hilary Rosen, Recording Industry Association of America); WIPO Copyright Treaties Implementation Act, Hearing on H.R. 2281 Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 105th Cong. 54-55 (1998) (statement of Steven J. Metalitz on behalf of the Motion Picture Association of America).

<sup>32</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). See also *Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255 (5th Cir. 1988).

protection scheme.<sup>33</sup> However, technology companies do not necessarily share the copyright owners' interest in full control of private copying, because the sale of their technology may actually be increased as a result of uncontrolled private copying. In sum, implementing the copyright owners' vision of perfect control would have required a change of the fair use doctrine and the *Betamax* rule in the United States and of the private use exemption and traditional third party liability rules in Continental Europe, which was virtually impossible to achieve as a practical matter by solely amending traditional copyright law.<sup>34</sup> The solution was to abandon the WIPO model and to push for an expansion of the legal protection of technological measures beyond the boundaries of traditional copyright law. The idea was quite simple. If digital works could be encrypted and if circumvention itself as well as the sale of circumvention technology were made illegal regardless of the purpose of the circumvention, then any statutory copyright limitation would be irrelevant, because copying would require circumvention, which would no longer be possible as a factual matter. In other words, the legal protection of technological measures looked like a convenient way to change the balance of interests enshrined in the copyright statute by simply adding a second and more comprehensive layer of rules on top of the pre-existing rules, without formally changing those pre-existing rules.<sup>35</sup> This is exactly what was done both in the United States and in the European Union.

## 2. *The American Approach*

The United States introduced the legal protection of technological measures in 1998 as part of the Digital Millennium Copyright Act (DMCA).<sup>36</sup> Its approach is characterized by three features. *First*, the statute distinguishes between access controls and copy controls, whereas the prohibition of acts of circumvention is limited to access controls.<sup>37</sup> *Second*, in addition to prohibiting the circumvention of access controls, it also outlaws "trafficking" in technology that enables the circumvention of access or copy controls. There are separate provisions for access and copy controls,<sup>38</sup> but they are virtually identical and – if combined and stripped of excess wording – would read something like this:

No person shall traffic in any technology that (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work or that effectively protects a right of a copyright owner; (B) has only limited commercially significant purpose or use other than to circumvent such measures; or (C) is marketed for use in circumventing such measures.

<sup>33</sup> See Bernhard Knies, *DeCSS – oder: Spiel mir das Lied vom Code*, 47 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 286 (2003).

<sup>34</sup> Whether the U.S. Supreme Court will modify the *Betamax* rule in its eagerly awaited decision in the peer-to-peer *Grokster* case remains to be seen. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. 04-480 (U.S. Supreme Court, oral argument heard on March 29, 2005).

<sup>35</sup> This second layer has also been called "paracopyright"; see Haimo Schack, *Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use*, 2002 U. ILL. J.L. TECH. & POL'Y 321, 324.

<sup>36</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>37</sup> 17 U.S.C. § 1201(a)(1)(A).

<sup>38</sup> 17 U.S.C. §§ 1201(a)(2), 1201(b)(1).

*Third*, the statute provides for a few exceptions<sup>39</sup> to the general prohibition of circumvention technology and the act of circumventing access controls, but these exceptions are formally separate from and substantively narrower than pre-existing copyright limitations.<sup>40</sup> More importantly, there is no exception for fair use,<sup>41</sup> which means that it is illegal to traffic in technology that is designed to circumvent technological measures in order to enable or facilitate the fair use of copyrighted works, even though fair use itself remains legal and despite the fact that the act of circumventing copy controls is also legal. It has been pointed out many times that this approach carries the risk of undermining the fair use defense altogether, because once the technological protection of digital works becomes the norm, copying without circumventing will no longer be possible and fair use will become merely symbolic. In sum, the DMCA expands the exclusive rights of copyright owners beyond the traditional boundaries of copyright law for works that are protected by technological measures, which is a clear departure from the enforcement model underlying the WIPO Treaties. The same is true for the European Union's implementation of its obligations under Article 11 WCT and Article 18 WPPT.

### 3. *The European Approach*

The European Union's Information Society Directive<sup>42</sup> does not distinguish between access and copy controls<sup>43</sup> and its rules do not apply to computer programs<sup>44</sup> and services based on conditional access.<sup>45</sup> The basic rules prohibiting both the act of circumvention and circumvention technology are quite similar to the ones enacted under the DMCA. For instance, the pertinent rule banning circumvention technology reads in part:

<sup>39</sup> 17 U.S.C. §§ 1201(d)-(j). The list of exceptions does not follow any coherent principle; see Thomas C. Vinje, *Copyright Imperilled?*, 21 EIPR 201, 205 (1999) ("Congress chose the approach of adopting an extremely broad prohibition, then granting an exception to any group powerful enough to lobby effectively for one. The breadth of the exception also turned on lobbying power").

<sup>40</sup> The DMCA also establishes a continuous administrative review process to monitor the effect of the prohibition of circumventing access controls and to provide exceptions if appropriate; see 17 U.S.C. § 1201(a)(1)(B)-(E). Currently, there are four very narrowly tailored administrative exceptions; see 37 C.F.R. § 201.40 (2004). For an argument that this mechanism might be unconstitutional, see Julie Cohen, *WIPO Copyright Treaty Implementation in the United States – Will Fair Use Survive?*, 21 EIPR 238 (1999).

<sup>41</sup> Deriving such limitation from 17 U.S.C. § 1201(c)(1), which says that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title", would theoretically be possible, but has been rejected at least implicitly by the courts on the grounds that Congress intended to enact a separate anti-circumvention regime. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 459 (2d Cir. 2001); *Paramount Pictures Corp. v. 321 Studios*, 69 U.S.P.Q.2d 2023 (S.D.N.Y. 2004). See also LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 187-88 (2001); but see Pamela Samuelson, *Intellectual Property and the Digital Economy – What the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 539-40 (1999).

<sup>42</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10 (hereinafter "InfoSoc").

<sup>43</sup> Article 6(3) InfoSoc.

<sup>44</sup> See Consideration No. 50 and Article 1(2)(a) InfoSoc; see also Article 7(1)(c) Computer Directive.

<sup>45</sup> See Article 9 InfoSoc and Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, 1998 O.J. (L 320) 54.

Member States shall provide adequate legal protection against the manufacture [...] of devices [...] or the provision of services which (a) are [...] marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed [...] for the purpose of enabling or facilitating the circumvention of, any effective technological measures.<sup>46</sup>

In terms of the relationship between traditional copyright limitations and the legal protection of technological measures, the European Union establishes a rather complex regime that differentiates between different copyright limitations. Two rules are particularly important in the context of the Internet. *First*, with respect to "works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them",<sup>47</sup> technological measures employed by copyright owners are absolutely protected, which means that they cannot be circumvented even if the purpose of the circumvention is to make a legal copy. This rule has been criticized by most legal scholars.<sup>48</sup> *Second*, the European Union leaves it to the discretion of the individual member states to determine whether or not the legal protection of technological measures trumps the private use exemption.<sup>49</sup> Germany has chosen to adopt a rule that prohibits circumvention of technological measures applied to digital works even if the circumvention in question serves to exercise the private use exemption,<sup>50</sup> which continues to be recognized in Germany.<sup>51</sup> The prohibition of the circumvention of technological measures in cases in which private copying is legal under traditional copyright law is considered ineffective by some German scholars as a matter of constitutional<sup>52</sup> and criminal<sup>53</sup> law. Furthermore, this discrepancy between the protection of technical measures and the private use exemption creates a series of intricate legal issues, because Germany, like other European countries, relies on a collective compensation system for private use that can only retain its legitimacy if consumers (who pay a levy on blank discs and on devices capable of copying that is meant to compensate authors for private copying) are still able to make private copies.

<sup>46</sup> Article 6(2) InfoSoc.

<sup>47</sup> Article 6(4) InfoSoc. According to Consideration No. 53 InfoSoc, the purpose of this rule is to "ensure a secure environment for the provision of interactive on-demand services".

<sup>48</sup> See, e.g., Thomas C. Vinje, *Should We Begin Digging Copyright's Grave*, 22 EIPR 557 (2000); Alexander Peukert, *Digital Rights Management und Urheberrecht*, ARCHIV FÜR URHEBER- UND MEDIENRECHT [UFITA] 707-08 (2002); Axel Metzger & Till Kreutzer, *Richtlinie zum Urheberrecht in der "Informationsgesellschaft"*, MULTIMEDIA UND RECHT [MMR] 140, 141 (2002); Jacques de Werra, *The Legal System of Technological Protection Measures*, in ALAI 2001, at 227 (2002); Séverine Dusollier, *Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise*, 34 INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW [IIC] 74-75 (2003).

<sup>49</sup> Article 6(4) InfoSoc.

<sup>50</sup> See § 95b(1)(6)(a) of the German Copyright Act of 1965, as amended.

<sup>51</sup> See § 53(1) of the German Copyright Act.

<sup>52</sup> See Bernd Holznapel & Sandra Brüggemann, *Das Digital Right Management nach dem ersten Korb der Urheberrechtsnovelle*, MMR 767 (2003); see also Oliver Spieker, *Bestehen zivilrechtliche Ansprüche bei Umgehung von Kopierschutz und beim Anbieten von Erzeugnissen zu dessen Umgehung?*, 106 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 480 (2004); Alexander Peukert, *Technische Schutzmassnahmen*, in HANDBUCH DES URHEBERRECHTS § 36, Notes 11-12 (Ulrich Loewenheim ed., 2003).

<sup>53</sup> See Tarek Abdallah et al., *Die Reform des Urheberrechts – hat der Gesetzgeber das Strafrecht übersehen?*, 48 ZUM 31 (2004).

In other words, the German rule carries with it a danger of double payment, once individually to the copyright owner employing technical measures, and once under the levy system.<sup>54</sup> The German legislature has addressed, but not yet satisfactorily resolved these issues.<sup>55</sup> In sum, the European Union has followed the United States in expanding the exclusive rights of copyright owners through the vehicle of the legal protection of technological measures.

### C. Result

The result of the substitution of the international enforcement model with an expansionist model is the increase of the copyright owners' legal control over copying beyond the control available to them under pre-existing copyright law.<sup>56</sup> As such, the "millennium legislation" just described may be viewed as a doctrinally complex instance of the continuing expansion of the rights of copyright owners in duration, scope, and jurisdictional reach.<sup>57</sup> This expansion has sometimes been described as a process of "propertization" in the sense of a progressive development of copyright towards an absolute property right.<sup>58</sup> Indeed, the property rhetoric of preventing "theft" and "stealing" on the Internet has been a central element in the public discussion leading to the adoption of the legal protection of technological measures. I will come back to the propriety of using a property analogy in copyright law after the following assessment of the effects of the legal protection of technological measures on artists and on artistic practices.

## II. ARTISTS AND THE PROTECTION OF TECHNOLOGICAL MEASURES

Assessing the actual effects of any piece of legislation is exceedingly complex and requires thorough empirical research of the kind that is rarely done by legal scholars. Nevertheless, it is not without merit to provide an overview of the range of plausible effects without any empirical claim as to the actual prevalence of any of these effects. After all, those affected by a particular piece of legislation often react to their *perception* of a particular change in law as opposed to the *empirical effects* that this change actually brings about. Therefore, the following is an admittedly speculative assessment of the effects of the legal protection of technological protection measures and the concomitant expansion of copyright on artists and their practices in the digital

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<sup>54</sup> See also Alexander Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, 47 ZUM 1050 (2003); Thomas C. Vinje, *Should We Begin Digging Copyright's Grave*, 22 EIPR 555 (2000); Till Kreutzer, *Herausforderungen an das System der Pauschalvergütungen nach den §§ 54, 54a UrhG*, 47 ZUM 1043-44 (2003).

<sup>55</sup> Essentially, the use of technological protection measures is to be taken into account when determining the amount of the levy to be paid to authors; see § 13(4) of the German Law on Collecting Societies ("Urheberrechtswahrnehmungsgesetz"). See also Article 5(2)(b) InfoSoc.

<sup>56</sup> See also Haimo Schack, *Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use*, 2002 U. ILL. J.L. TECH. & POL'Y 321, 327 ("The trick was to prevent access where copyright, for good reason, only prevents unauthorized use").

<sup>57</sup> This theme is explored in more detail by William W. Fisher, *Geistiges Eigentum – ein ausufernder Rechtsbereich*, in EIGENTUM IM INTERNATIONALEN VERGLEICH 265 (Hannes Siegrist & David Sugarman eds., 1999).

<sup>58</sup> See, e.g., Randal C. Picker, *From Edison to the Broadcast Flag – Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997).

millennium. The evaluation of the impact of the legal protection of technological measures on artists is complicated by the fact that artists often lack ownership of the copyright in their work, especially when the work is meant to be professionally marketed to the masses. I will first illustrate this lack of ownership before evaluating the effect that the enactment of legal protection of technological measures has on artists.

A. *The Issue of Copyright Ownership*

Copyright practice suggests that any ownership rights that authors may have by virtue of their creation are generally transferred to market intermediaries by contractual agreement, by statutory presumption, or as a result of some variant of the work made for hire doctrine.<sup>59</sup> In other words, it is not the directors, but instead the motion picture studios, not the musicians and composers, but instead the sound recording companies, not the individual programmer, but instead the computer industry, and not the writers, but instead the publishers, who hold the copyright and, therefore, who stand to gain or lose the most when it comes to changing the copyright statutes. The relationship between the motion picture industry and Hollywood film directors is a typical example of the pervasiveness of the aggregation of ownership rights into the hands of a few movie studios. Whatever rights a director may be able to negotiate in terms of credits and salary,<sup>60</sup> the universal rule is that the motion picture studios get the copyright, because directors are typically employed by the studios and their work falls under the work made for hire doctrine.<sup>61</sup> The fact that copyright statutes worldwide grant initial ownership of copyrightable works to authors makes it seem like the protection of the market intermediaries is derivative, while in practice it is just the opposite. The protection that artists or authors receive under this regime is derivative and contractual as opposed to original and statutory. Therefore, it is no surprise that a brief review of the international legislative process that led to the adoption of an international obligation to legally protect technological measures reveals that artists did not play any role. The legislative efforts were largely driven by lobbyists for the copyright industries, most notably the motion picture industry.<sup>62</sup> As a practical matter, this means that the expansion of copyright protection is primarily to the benefit of the market intermediaries as opposed to the benefit of the artists, because the expansion of copyright protection serves the copyright owners and not the actual creators of copyrightable works. In other words, only to the extent that artists and authors retain the copyright in their works and slip into the unfamiliar role of market intermediaries do they directly benefit from the expansionist legislation described above. This is not to say that having copyright entitlements concentrated in the hands of the market intermediaries is undesirable or inefficient or harmful, it is simply to say that the standard picture that the law seems to project is at odds with the real state of affairs,

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<sup>59</sup> See, e.g., the empirical study on academic publishing by Jane C. Ginsburg, *Copyright, Contracts, and the U.S. Professorate*, in *FESTSCHRIFT WILHELM NORDEMANN* 711 (Ulrich Loewenheim ed., 2004).

<sup>60</sup> While the Directors Guild of America has a collective bargaining agreement with the motion picture studios and the production companies, an additional director services agreement is negotiated for each film.

<sup>61</sup> See, e.g., *Derivative Rights, Moral Rights, and Movie Filtering Technology*, Hearings Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 108th Cong. 91 (2004) (prepared statement of Taylor Hackford, Directors Guild of America).

<sup>62</sup> See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 *VA. J. INT'L L.* 369, 410 (1997).

which must be taken into consideration when assessing the impact of the anticipated widespread deployment of technological protection measures on artists.

## B. *The Effects of the Legal Protection of Technological Measures*

The primary effect of the emergence and spread of digital technology and the Internet is certainly a significant reduction in the industrial costs of cultural production. This is the underlying background effect against which the legal protection of technological measures is to be evaluated. In doing so, it is useful to distinguish between two different aspects, one artistic, the other commercial.

### 1. *The Artistic Dimension*

In terms of artistic practices, the technological advancement just described holds the promise of resulting in increased creative activity and of drastically expanding access to creative material. Easy access to works of art in digital format also carries the potential of generating new forms of art, such as movie or photo mashups, that deliberately draw upon pre-existing works whose digital nature makes them particularly susceptible to manipulation, modification, and incorporation into other works, but also to distortion and deformation. These new art forms may be the product of human interaction with pre-existing works, but they may also result from the use of automated software to create new works of art. In legal terms, these activities implicate the copyright owner's right to create derivative works and the artist's moral rights, both of which are outside of the scope of this paper, because the legal issues arising from altering works are already well-known<sup>63</sup> and do not originate with the emergence of digital technology and the Internet. In addition to facilitating the creation of derivative works, the democratization of access to digital works also tends to further a new form of collaboration that draws on the convening power and the geographical reach of the Internet and which is sometimes labeled as "peer production."<sup>64</sup> The standard example for this mode of cultural production is the open source movement<sup>65</sup> that relies on the collaboration of volunteers who dedicate some of their time to creating and improving a specific piece of software that is not proprietary, in the sense that the source code is laid open to the public to see, experiment with, and improve.<sup>66</sup> In sum, the artistic dimension is probably best characterized as a potential for the increased collaborative creation of derivative works.

This potential may be undercut by the application of technological measures, especially if applied outside the boundaries of copyright law. Artists are not just producers, but also consumers and users of digital works. To the extent that access to these works is made impossible by technological measures or rendered unaffordable due to the financial conditions imposed for access to these works, the pool of works that may serve as artistic input for creators may be diminished. If they cannot circumvent

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<sup>63</sup> For a discussion of moral rights and modern technology, see, e.g., Guy Pessach, *The Author's Moral Right of Integrity in Cyberspace*, 34 IIC 240 (2003); Mira T. Sundara Rajan, *Moral Rights in the Digital Age*, 16 INT'L REV. L. COMP. & TECH. 187 (2002).

<sup>64</sup> See, e.g., Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

<sup>65</sup> See ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR* (rev. ed., 2001).

<sup>66</sup> Open source should not to be confused with the public domain, because the copyright in the specific work is not dedicated to the public, but it is retained and used to ensure that the project remains open, typically by requiring users to republish the source code that derives from the original source as part of the open source license.

the technological measures in order to gain access to protected works for legitimate uses, such as fair, transformative, or private use, the legal protection of technological measures may be detrimental. Some liken the tendency of extending the exclusivity of technological measures into the public domain and into areas in which the use of copyrighted works is legal without authorization from the copyright holder to the English enclosure movements of the early modern period and view it as a second enclosure movement that threatens the public domain and the creative process altogether.<sup>67</sup> The harm for artists is seen in the potential reduction of cultural material that could be put to transformative uses, such as parodies, and in the disruptive effects that this may have on the long-standing artistic practice of sequential creation. In other words, the expansion of copyright and the application of technological measures may disable or hinder some of the artistic practices that digital technology and the Internet enable or facilitate, in particular the collaborative creation of derivative works mentioned above. The open source movement mentioned above and the application of its principle of openness to digital content in the form of the creative commons project<sup>68</sup> are activist reactions to these concerns that may alleviate, but not solve the problem, should the adoption of technological measures turn out to be as pervasive as the critics of technological measures fear.

## 2. *The Commercial Dimension*

The commercial dimension is what the legal protection of technological measures is all about. It is for the most part a reaction to the insight that the reduction of production and distribution costs for digital works has a potentially corrosive effect on the business models of a number of copyright industries, in particular the music industry.<sup>69</sup> While the production of music required expensive equipment and an elaborate distribution network just a few years ago, professional sound recordings can now be produced with a laptop and free audio editing software and distributed to consumers directly over the Internet or through peer-to-peer networks. To the extent that the traditional market intermediaries are bypassed during this process, the power grip that they currently exert over many artists may be reduced, although it still appears to be necessary to achieve commercial success for composers and performing artists to have a physical compact disc produced and marketed by the record companies. It is unclear as of yet whether the role of market intermediaries will be significantly transformed in the near future or whether they will successfully adapt their business models to accommodate new technological opportunities.<sup>70</sup> For the moment, the cost-savings associated with digital technology and the convenient electronic delivery of

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<sup>67</sup> See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); for a critique of Boyle's approach, see Mark Rose, *Nine-Tenths of the Law – The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75 (2003).

<sup>68</sup> <http://creativecommons.org>; see also Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763 (2003).

<sup>69</sup> See, e.g., WILLIAM W. FISHER, PROMISES TO KEEP 18-24 (2004).

<sup>70</sup> One example for this shift is the iTunes online music store, which is based on a business model that is quite different from the traditional model of selling and distributing music. However, it is run by a technology company, not by the record companies, which simply license parts of their repertoire for online distribution. The iTunes business model relies heavily on the use of technological measures. For details, see BERKMAN CENTER FOR INTERNET & SOCIETY, *iTUNES – HOW COPYRIGHT, CONTRACT, AND TECHNOLOGY SHAPE THE BUSINESS OF DIGITAL MEDIA* (rev. ed., June 15, 2004).

works through the Internet have not yet triggered the tidal wave of change that some predicted ten years ago.<sup>71</sup>

Nevertheless, the copyright industries insist that increasing their control over the use of their works is necessary to enable and sustain viable business models from which artists can benefit.<sup>72</sup> However, it is questionable whether artists will financially benefit from the increase in control brought about by the legal protection of technological measures,<sup>73</sup> simply because, as explained above, artists typically do not own the copyright in their works, and even if they do, they may not have the financial means to implement technological protection measures.<sup>74</sup> Therefore, to the extent that artists do not market their works on their own and to the extent that they do not derive a direct benefit from third-party marketing by the owners of the copyright in their works, they cannot avail themselves of the monetary advantages that are supposed to come with increased copyright protection through technological measures. In other words, if the added benefit of technological measures is not passed on to the artists by the copyright holders in the form of increased revenue, the artists may not gain anything from the legal protection of technological measures after all. This is why some scholars in the United States propose a complete overhaul of traditional copyright law by establishing an alternative compensation system,<sup>75</sup> which is derived from Continental European levy systems established to collect revenue for the private use of copyrighted works by taxing the sale of blank recording media and copying equipment.<sup>76</sup> The goal of these proposals is to keep the Internet free from technological measures, to increase access to digital works, and to ensure just compensation for artists. However, given the fact that the implementation of these proposals would require significant amendments to the U.S. Copyright Act and that the European Commission is in favor of phasing out the existing European levy systems to the benefit of individual digital rights management systems,<sup>77</sup> it is unlikely that this ambitious plan will be adopted in the near future. In the meantime, technological protection measures will be employed, but it is too early to determine conclusively whether, on balance, the legal protection of these measures will have any of the potentially negative effects on artists mentioned above. It may well be that the new rules will be relegated to merely symbolic legislation if it turns out that technological protection measures do not bring the results that the copyright owners expect.

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<sup>71</sup> See John Perry Barlow, *The Economy of Ideas*, WIRED 2.03 (March 1994).

<sup>72</sup> Interestingly, the current lack of legal protection of technological measures in Switzerland did not prevent Apple from expanding its iTunes music downloading service to Switzerland on May 10, 2005; similarly, Sony launched its first downloading service in Switzerland on May 11, 2005; see TAGES-ANZEIGER No. 108 of May 11, 2005, page 12.

<sup>73</sup> See also Reto M. Hilty, *Urheberrecht im digitalen Dilemma*, [2003] 2 MAXPLANCKFORSCHUNG 49, 52.

<sup>74</sup> See, e.g., Sandra Künzi, *Was haben DRMS mit Interessenausgleich zu tun?*, sic! 2004, 797.

<sup>75</sup> WILLIAM W. FISHER, PROMISES TO KEEP (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1 (2003); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004).

<sup>76</sup> See, e.g., §§ 54-54h of the German Copyright Act; Article 20 of the Swiss Copyright Act.

<sup>77</sup> See EUROPEAN COMMISSION, REPORT, DIGITAL RIGHTS MANAGEMENT (DRM) WORKSHOP 2 (April 16, 2002).

## III. COPYRIGHT LAW AND THE PROPERTY RHETORIC

The expansionist model of the legal protection of technological measures has been identified above as yet another step in the process of expanding copyright towards the ideal of an absolute property right. Indeed, the enactment of the legal protection of technological measures was accompanied by a strong property rhetoric that was even expressly incorporated into the official text of the Information Society Directive that includes the following revealing reference to property:

Any harmonisation of copyright and related rights must take as a basis a *high level of protection*, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. *Intellectual property has therefore been recognised as an integral part of property.*<sup>78</sup>

This reference to property is no coincidence, and it confirms the fact that using the term "property" to describe the exclusive rights of copyright owners is not just a matter of terminology.<sup>79</sup> Indeed, the property rhetoric has historically been associated with a distinctly expansionist notion of copyright, and those interested in establishing or increasing copyright protection have time and again invoked the concept of property to justify their normative claims. In other words, the use of the term property is anything but neutral in terms of how copyright law ought to be shaped. Any interdisciplinary study must be aware of the fact that the property analogy stands for a particular normative vision of copyright law that is based on the idea that broader copyright entitlements are better and that absolute copyright entitlements are ideal.<sup>80</sup> I have argued elsewhere<sup>81</sup> that the property rhetoric is neither necessary nor useful in copyright law, and I will limit myself here, first, to illustrating the point that the property analogy has had significant legal consequences in the past and, second, to suggesting that copyright should instead be conceptualized as a bundle of exclusive marketing rights.

A. *The Fall and Rise of the Property Theory of Copyright*

Although the use of the property analogy is a global phenomenon both in the past and in the present,<sup>82</sup> German law probably best illustrates the fact that the property rhetoric may have real legal consequences, for two reasons. *First*, while the term property was widely used in Germany in the 18th and the early 19th centuries to

<sup>78</sup> Consideration No. 9 InfoSoc (emphasis added).

<sup>79</sup> See also Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3 (2002) ("Metaphors are not just ornamental; they structure the way we think about matters and they have consequences").

<sup>80</sup> The reliance on notions of property has turned out to be particularly treacherous for the economic analysis of law, as some economists have been tempted to apply the rich body of economic literature on (real) property to copyright as "intellectual" property, thereby neglecting the fundamental differences of the economic goods in question. For a recent critique of this literature, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 82 TEX. L. REV. 1031 (2005).

<sup>81</sup> See CYRILL P. RIGAMONTI, *GEISTIGES EIGENTUM ALS BEGRIFF UND THEORIE DES URHEBERRECHTS* (2001).

<sup>82</sup> See, e.g., WILLIAM W. FISHER, *PROMISES TO KEEP* 134-35 (2004). Note that the term "intellectual property" is also on the rise in American court opinions and in American legal and economic scholarship; a good example is Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990).

describe copyright,<sup>83</sup> it had been virtually eliminated from legal scholarship by the end of the 19th century, which makes it even more remarkable that it was reintroduced into German legal discourse after World War II. *Second*, the property analogy was not just used by those interested in expanding copyright protection, but it was adopted by the German Constitutional Court in two decisions that declared two statutory copyright limitations to be unconstitutional. In the following, I will briefly discuss both the fall and the subsequent rise of the property theory in German law.

### 1. *The Elimination of Property from Copyright Law in the 19th Century*

The reason why both the term "property" and "intellectual property" were considered inappropriate for copyright towards the end of the 19th century is that property was reserved for ownership rights in *tangible* things<sup>84</sup> and that the substantive rules governing real property were deemed inadequate for rights in *intangible* objects such as works of art, even by those who continued to use the term intellectual property.<sup>85</sup> For the vast majority of lawyers, it was clear that only laymen could use the term "property" to include copyright entitlements or any other rights whose object was not a "res corporalis."<sup>86</sup> A good example of the strong opposition to the term "property" (and of the substantive importance of using a particular legal category) is the behavior of the German delegation during the 1885 negotiations of the most important international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works.<sup>87</sup> The originally proposed title of the Convention focused on the protection of the rights of authors ("protection des droits d'auteurs"). However, the French delegation suggested that the title be changed to include the protection of literary and artistic property ("protection de la propriété littéraire et artistique"), because the term "droits d'auteur" (author's rights) was not as widely accepted in France as the term "Urheberrecht" (author's right) in Germany, and since the Convention was drafted in

<sup>83</sup> See, e.g., Diethelm Klippel, *Die Idee des geistigen Eigentums in Naturrecht und Rechtsphilosophie des 19. Jahrhunderts*, in HISTORISCHE STUDIEN ZUM URHEBERRECHT IN EUROPA 121 (Elmar Wadle ed., 1993); WILHELM AUGUST KRAMER, *DIE RECHTE DER SCHRIFTSTELLER UND VERLEGER* 48 (1827); CHRISTIAN F.M. EISENLOHR, *DAS LITERARISCH-ARTISTISCHE EIGENTHUM UND VERLAGSRECHT* 44 (1855). For other jurisdictions, see also GEORGE TICKNOR CURTIS, *A TREATISE ON THE LAW OF COPYRIGHT* 1 (1847); Jane C. Ginsburg, *A Tale of Two Copyrights – Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990).

<sup>84</sup> See, e.g., 2 GEORG BESELER, *SYSTEM DES GEMEINEN DEUTSCHEN PRIVATRECHTS* 953 (4th ed. 1885); GUSTAV VON MANDRY, *DAS URHEBERRECHT AN LITERARISCHEN ERZEUGNISSEN UND WERKEN DER KUNST* 34 (1867). This understanding of property was codified in § 90 of the German Civil Code ("Bürgerliches Gesetzbuch", BGB) and Article 713 of the Swiss Civil Code ("Zivilgesetzbuch", ZGB).

<sup>85</sup> See, e.g., Rudolf von Jhering, *Rechtsschutz gegen injuriöse Rechtsverletzungen*, 23 JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 155, 307-308 (1885).

<sup>86</sup> See, e.g., Carl Friedrich von Gerber, *Ueber die Natur der Rechte des Schriftstellers und Verlegers*, 3 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 359, 360 (1859); JOHANN CASPAR BLUNTSCHLI, *DEUTSCHES PRIVATRECHT* 112 (3d ed. 1864); ANDRÉ MORILLOT, *DE LA PROTECTION ACCORDÉE AUX ŒUVRES D'ART* 96-97 (1878); EDUARDO PIOLA-CASELLI, *DEL DIRITTO DI AUTORE* 83 (1907).

<sup>87</sup> See Actes de la 2me Conférence internationale pour la protection des œuvres littéraires et artistiques réunie à Berne du 7 au 18 septembre 1885, at 20, 40 (hereinafter "ACTES 1885"); see also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, at 154-156 (1987); JEAN CAVALLI, *LA GENESE DE LA CONVENTION DE BERNE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES DU 9 SEPTEMBRE 1886*, at 170-71 (1986).

French, the French version should prevail.<sup>88</sup> The German delegation objected to this proposal, insisting on the original title and stating that Germany could not accept the French proposal, "given the consequences that legal science would draw from the term property."<sup>89</sup> The Germans ultimately lost a vote on this issue by 5 to 7.<sup>90</sup> They then declared that this decision would most probably prevent Germany from joining the Berne Convention, because Germany could not accept a term that was incorrect in view of its domestic legal system.<sup>91</sup> The Swiss delegation subsequently proposed a compromise consisting of replacing the original expression "protection des droits d'auteur" (protection of author's rights) with the alternative "protection des œuvres littéraires et artistiques" (protection of literary and artistic works).<sup>92</sup> This compromise was ultimately adopted. This is a powerful example of the strength of the objection to the term "property" in German legal science, considering that Germany preferred to walk away from an important international treaty rather than accept a title which seemed inaccurate. In any event, the idea of copyright as property had effectively been eliminated from the legal discourse, and it has since been considered self-evident that copyright is not property in the technical legal sense.

This becomes readily apparent if one examines the application of property notions such as "theft" or "stealing" to describe the act of copyright infringement, as is frequently done in U.S. copyright legislation, either in the text of the bill itself or as part of the explanation for the necessity of legislation. The most recent example is the Artists' Rights and Theft Prevention Act of 2005<sup>93</sup>, which creates new criminal penalties for those who record motion pictures in movie theaters and establishes new civil and criminal causes of action for the willful distribution of pre-release works. In view of this content, the Act's title is misleading in three ways. First, it is not concerned with the rights of artists, but with new criminal penalties introduced in the interest of motion picture studios. Second, it provides no means for actual prevention, but simply allows for punishment of certain acts deemed harmful to the motion picture studios as copyright owners after the acts have been committed. Third, and most importantly in the context of this paper, it is not about theft, because those who engage in illegally recording or distributing copyrighted works, while committing copyright infringement, do not "steal" anything. What is it that is stolen or taken away from the copyright owner if a work is illegally copied? It cannot be the work itself, because the work is intangible and continues to exist when it is reproduced. It also cannot be a particular embodiment of a work, because those who duplicate the work do not touch any embodiments, but simply create a second one, if the duplicate is fixed at all. What is

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<sup>88</sup> ACTES 1885, at 20 (statement by the French delegates Lavollée and Renault). Note that the term "literary and artistic property" had been used in France since the enactment of the very first French copyright statutes in 1791 and 1793; see EDUARDO PIOLA-CASELLI, *DEL DIRITTO DI AUTORE* 69-70 (1907); Jane C. Ginsburg, *A Tale of Two Copyrights – Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990). It is still used today; see 1 AGNES LUCAS-SCHLOETTER, *DROIT MORAL ET DROITS DE LA PERSONNALITE* 17 (2002).

<sup>89</sup> ACTES 1885, at 20 ("M. Reichardt déclare que l'Allemagne ne pourrait pas admettre la proposition française, vue les conséquences que la jurisprudence tirerait du term *propriété*"). The Italian delegation concurred with the Germans, stating that it would be "more exact and appropriate" to retain the original title, but declaring at the same time that Italy would not formally oppose the French proposal.

<sup>90</sup> See ACTES 1885, at 40. Not surprisingly, the French proposal was supported, *inter alia*, by the United Kingdom and Spain, both countries in which the term "literary property" was commonly used to refer to copyright; see ACTES 1885, at 40 n.1.

<sup>91</sup> See ACTES 1885, at 40.

<sup>92</sup> *Id.*

<sup>93</sup> Pub. L. 109-9, 119 Stat. 218 (2005).

taken away from the copyright owner is his or her exclusivity with respect to the marketing of the work in question,<sup>94</sup> but it seems difficult to reconcile the loss of exclusivity in the marketplace with notions of theft and stealing, particularly in a society that values competition and that has been continuously increasing the reach of antitrust laws. The point is simply to show that the use of property notions is inappropriate for copyright from a strictly legal perspective and has been for quite a while.

## 2. *The Reintroduction of the Property Theory in German Copyright Law*

### a) *The Modern Property Theory of Copyright*

The modern property theory of copyright that emerged after World War II had little to do with the property theory that had been eliminated before. It was no longer a doctrinal theory according to which the rules of (real) property should be applied to copyright as "intellectual" property. The scholars who contributed to the modern property theory were fully aware of and generally agreed with the doctrinal critique that had led to the demise of the property theory during the 19th century.<sup>95</sup> If they continued to use the term "property" to describe copyright entitlements, it was not because they confused real and intellectual property as a matter of doctrine, but because they were committed to advancing a particular normative vision of copyright law whose primary purpose is to maximize the protection of copyright owners by eliminating statutory limitations on a potentially absolute property right. Initially, this theory was solidly grounded in natural law<sup>96</sup> and was used to advocate for increased protection for authors during the discussions about the revision of German copyright law that ultimately led to the adoption of the German Copyright Act of 1965. The basic argument of the new property theorists was that copyright legislation had to look to the law of real property when defining the rights of authors of copyrightable works.<sup>97</sup> In other words, the German legislature was asked to treat authors, as a group, the same way it treated property owners,<sup>98</sup> which implied the normative claim that authors had to be granted rights that were as absolute in their scope as real property rights. Of course, the idea that real property rights are absolute in scope is itself a misperception, and the myth of absolute property rights has since been rightfully dispelled.<sup>99</sup> Nevertheless, the claim that copyright should be an absolute property right and that the statutory expansion necessary to achieve this goal was inherently just, as an expression of natural property law, was a central theme during the revision of German copyright law and was, at least in part, an important factor in the significant increase of copyright protection brought about by the German Copyright Act of 1965.<sup>100</sup> The new property theory of copyright

<sup>94</sup> See also ANDRÉ MORILLOT, DE LA PROTECTION ACCORDÉE AUX ŒUVRES D'ART 115-116 (1878).

<sup>95</sup> See HEINRICH HUBMANN, DAS RECHT DES SCHÖPFERISCHEN GEISTES 75-76 (1954).

<sup>96</sup> For a more recent human rights version of the property theory, see Reinhold Kreile, *Einnahme und Verteilung der gesetzlichen Geräte- und Leerkassettenvergütung für private Vervielfältigung in Deutschland*, 41 GRUR INT. 24, 25 (1992).

<sup>97</sup> See Reinhold Kreile, *Die Sozialbindung des geistigen Eigentums*, in FESTSCHRIFT PETER LERCHE 255 (Peter Badura & Rupert Scholz eds., 1993).

<sup>98</sup> HEINRICH HUBMANN, DAS RECHT DES SCHÖPFERISCHEN GEISTES 61 (1954); see also Georg Roeber, *Urheberrecht oder Geistiges Eigentum*, 21 UFITA 150, 184 (1956).

<sup>99</sup> See, e.g., Charles Donahue, Jr., *The Future of the Concept of Property Predicted From Its Past*, in PROPERTY 28 (J. Roland Pennock & John W. Chapman eds., 1980); Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 28 (J. Roland Pennock & John W. Chapman eds., 1980).

<sup>100</sup> Even Heinrich Hubmann, perhaps the primary representative of the new property theory in Germany, called the German Copyright Act of 1965 an "extraordinarily author-friendly statute"; see

was later stripped of its natural law connotations and turned into a theory of positive constitutional law<sup>101</sup> that found its basis in Article 14 of the German Constitution.<sup>102</sup> The new property theory was relied upon by the German Constitutional Court in two cases which challenged the constitutionality of two limitations contained in the German Copyright Act of 1965, which are perhaps the best example of the power of metaphors.

b) *The Property Theory in the German Constitutional Court*

The first case<sup>103</sup> involved a limitation on the author's copyright in the sense that it exempted from copyright infringement liability the reproduction and distribution of copyrightable works as part of a collective work that was exclusively designed for church or school use.<sup>104</sup> The plaintiffs' principal argument was that this provision violated Article 14 of the German Constitution, because copyright was an absolute property right that was constitutionally protected and that could not be statutorily limited. As a result, any statutory limitation would be unconstitutional, including the one challenged in the case at hand. The Court first seemed to reject this claim when it explained that while copyright qualified as property under Article 14, there was no substantive constitutional concept of property that could be used to determine the specific boundaries of a property right, and that it was up to the legislature to define the content and limits of these rights.<sup>105</sup> However, the Court then reasoned that the legislature was not entirely free in its legislative determinations, stated that the constitutionality of the challenged provision would turn on whether it was justified by the public good,<sup>106</sup> and held that the provision was unconstitutional, because the authors did not receive any compensation and because there was no "increased public interest" in excluding such compensation. In reaching this decision, the Court explicitly relied on comparisons between authors and other groups and deemed it "essential" that authors were the only ones – unlike editors, publishers, and printers – who were forced by statute to provide the result of their work to the public for educational purposes without compensation.<sup>107</sup> In order to strike down the statutory limitation in question, the Court had to rely on a notion of property outside the copyright statute that was broader than statutory copyright, and it found that notion in the property theory of copyright.<sup>108</sup> The hypothetical scope of this absolute property right could then be used as a baseline, and every statutory deviation from that baseline had to be justifiable by reference to an "increased public interest" in order to be constitutional. It was precisely this type of

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Heinrich Hubmann, *Die Idee vom geistigen Eigentum, die Rechtsprechung des Bundesverfassungsgerichts und die Urheberrechtsnovelle von 1985*, 32 ZUM 4, 7 (1988).

<sup>101</sup> Note that Heinrich Hubmann had himself converted his natural law theory of copyright as property into a constitutional theory in his contribution to a commentary on the German Constitution; see Heinrich Hubmann, *Geistiges Eigentum*, in DIE GRUNDRECHTE, vol. IV/1, at 20 (Karl August Bettermann et al. eds., 1960).

<sup>102</sup> Grundgesetz (GG) für die Bundesrepublik Deutschland vom 23. Mai 1949, BGBl. I, 1. Article 14(1) reads: "Property and the right of inheritance are guaranteed. Their content and limits shall be determined by statute".

<sup>103</sup> German Constitutional Court, Decision of July 7, 1971, BVerfGE 31, 229.

<sup>104</sup> See § 46 of the German Copyright Act of 1965 (original version). Note that this limitation was not newly introduced in 1965, but had essentially been carried over from previous copyright statutes.

<sup>105</sup> BVerfGE 31, 229 (240).

<sup>106</sup> BVerfGE 31, 229 (242).

<sup>107</sup> BVerfGE 31, 229 (246).

<sup>108</sup> See also Heinrich Hubmann, *Die Entscheidungen des Bundesverfassungsgerichts zum Schutz des geistigen Eigentums*, 22 GRUR INT. 270, 271 (1973).

analysis that the Court again employed when deciding a second case<sup>109</sup> involving a copyright limitation that exempted religious organizations from liability when publicly performing a work for noncommercial purposes.<sup>110</sup> The Court again compared the scope of statutory copyright law with the potential scope of copyright as property under the Constitution<sup>111</sup> and then held that the statutory limitation in question was unconstitutional to the extent that copyright owners were not compensated for the noncommercial public performances by religious institutions. To be clear, the Court also went the other way in a number of other cases,<sup>112</sup> but even in those cases, it applied roughly the same methodology of conjuring up a hypothetical scope of copyright as property that was broader than the sum of all statutory rights and limitations and of determining whether the limitation in question was justified by an "increased public interest." Inherent in this methodology is the tendency to expand copyright towards an absolute property right and to justify this expansion by invoking the legitimacy of the protection of property. This is what the current use of the term "property" to describe copyright entitlements is all about.

### B. *Copyright Entitlements as Exclusive Marketing Rights*

Instead of relying on notions of property, copyright entitlements are more accurately conceptualized as exclusive marketing rights. This term is known to those interested in intellectual property law from international patent law, since it has been used to describe the set of rights that countries without effective patent protection for pharmaceutical patents need to provide during the transitional phase from no protection to patent protection under Article 70(9) of the TRIPS Agreement. While the term is new and not yet established in mainstream intellectual property scholarship outside its narrow use in TRIPS, it captures the essence of intellectual property rights without carrying with it a series of descriptive or normative connotations that come with the modern property theory of copyright. It is also historically accurate in that the initial goal of copyright law across the globe was to restrict competition between different market participants, traditionally between the first and any subsequent publishers of a particular book. The publisher has been called "the merchant for the author,"<sup>113</sup> and copyright is still essentially a law for merchants, regardless of the authorship rhetoric that is used in copyright statutes, court opinions, and scholarship. If the expansion of copyright through the legal protection of technological measures described above were understood as an expansion of exclusive marketing rights, it would also be easier to grasp the potential effects of this development, because the focus would automatically be put on the role of market intermediaries as opposed to writers, directors, composers, and performing artists. It is essential for any interdisciplinary work at the intersection of art and copyright to recognize that copyright law in practice is not as much about

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<sup>109</sup> German Constitutional Court, Decision of October 25, 1978, BVerfGE 49, 382.

<sup>110</sup> See § 52(1)(2) of the German Copyright Act of 1965 (original version).

<sup>111</sup> BVerfGE 49, 382 (392).

<sup>112</sup> See German Constitutional Court, Decision of July 7, 1971, BVerfGE 31, 248; Decision of July 7, 1971, BVerfGE 31, 270; Decision of November 4, 1987, BVerfGE 77, 263; Decision of October 11, 1988, BVerfGE 79, 29. The Court also declined to use the property theory in favor of holders of neighboring rights, which suggests that copyright has a privileged status among the various property rights covered by Article 14 of the German Constitution; see Decision of July 8, 1971, BVerfGE 31, 275; Decision of October 3, 1989, BVerfGE 81, 12; Decision of January 23, 1990, BVerfGE 81, 208.

<sup>113</sup> RICHARD ROGERS BOWKER, COPYRIGHT – ITS HISTORY AND ITS LAW 434 (1912).

rights of actual creators as it is about rights of market intermediaries, regardless of the language commonly used in copyright statutes.

#### IV. CONCLUSION

The preceding analysis has shown that the characteristic element of the global wave of "millennium legislation" is the establishment of a novel type of protection against the circumvention of technological measures taken by copyright owners to protect their works. Despite the fact that the central international rules contained in the WCT and the WPPT tied the scope of the legal protection of technological measures to the scope of the underlying substantive copyright law, both the United States and the European Union turned this model upside down and used it to expand the exclusive rights of copyright owners, thereby contributing to the further "propertization" of copyright law. While it is too early to assess the effects of these developments on artistic creativity, it is important to understand that neither copyright nor the legal protection of technological measures is driven by or enacted for artists, but rather for the commercial intermediaries that market the artists' works to consumers.<sup>114</sup> What legal scholarship has to offer to the interdisciplinary discourse on art and copyright is the insight that the rhetoric employed in copyright law and copyright statutes may differ considerably from copyright law as it plays out in practice and that scholars in other fields should resist the temptation of conceptualizing copyright as property, unless they share the particular normative vision associated with the modern property theory of copyright.

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<sup>114</sup> It is also no coincidence that the moral rights of performing artists recognized in Article 5 WPPT were not implemented in the United States and were not inserted into the European Union's Information Society Directive.