

The Implications of Copyright *Droit Moral*
and Cultural Exemptions in International Trade Law

by Stephen Fraser*

In the short span of less than a decade, the world has witnessed monumental changes in the trade relations and intellectual property protection between nations. In 1988, the United States became a member of the Berne Union;¹ it was the last holdout amongst major developed countries to join the Berne Convention which created the Union in 1896 to provide uniform minimal levels of protections for literary and artistic works with the least procedural formalities.² Also in 1989, the Canada/U.S. Free Trade Agreement (CFTA) went into effect;³ it contained an "exemption" for Canada's cultural industries⁴ which United States Trade Representatives had vociferously opposed but without which Canada would not have entered into the Agreement.⁵ In 1992, Canada, Mexico and the United States signed the North American Free Trade Agreement

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¹ Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886, completed at Paris on May 4, 1886, revised at Berlin on Nov. 13, 1908, revised at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, revised at Stockholm on July 14, 1967, revised at Paris on July 24, 1971, and amended on Oct. 2, 1979, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221 [hereinafter Berne]. The United States ratified the Convention on October 31, 1988. Since treaties are generally not self-executing in the United States, the Berne Convention, along with the Berne Convention Implementation Act, did not become effective in the U.S. until March 1, 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-5688, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801 (1988)).

² **Stephen M. Stewart, International Copyright and Neighboring Rights** 98-100 (Butterworths, London, 2d ed. 1989).

³ United States-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA]; United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-499, 102 Stat. 1851 (1988).

⁴ CFTA, *supra* note 3, chap. 21, arts. 2005, 2012.

⁵ M. Peter McPherson, Comments, in **The Canada-United States Free Trade Agreement: The Global Impact** 190 (Jeffrey J. Scott Murray G. Smith eds., Institute for International Economics, Washington, DC, 1988).

(NAFTA)⁶ which included significant intellectual property provisions⁷ while maintaining Canada's so-called "cultural exemption."⁸

Less than a month after the battle to pass NAFTA in the U.S. Congress was won,⁹ the world was fixated on the completion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)¹⁰ taking place in Brussels and Geneva.¹¹ Seeming to come out of the blue, controversy arose between the United States, and more specifically its film industry, and France over the latter's refusal to include cultural industries within the new agreement.¹² France, supported by most of the European Union,¹³ and, though silent, Canada,¹⁴ wanted its European broadcasting content requirements and cinema tax, used to support its cultural industries, excluded from the new GATT agreements. The United States, as in its prior negotiations with Canada, wanted cultural industries included.¹⁵ To paraphrase former President George Bush, the line in the sand was drawn and the United States lost again.

This paper will look at why cultural and copyright industries, in particular cinema, have become so important in international law and trade. It will examine how the United States has

⁶ North American Free Trade Agreement, Nov. 17, 1993, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

⁷ NAFTA, *supra* note 6, chapt. 17.

⁸ *Id.* art. 2106 and annex 2106.

⁹ Michael Wines, The Free Trade Accord, **N.Y. Times**, Nov. 18, 1993, at A1.

¹⁰ General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

¹¹ Roger Cohen, Culture Dispute With Paris Now Snags World Accord, **N.Y. Times**, Dec. 7, 1993, at A1; Roger Cohen, Film Issue Snags Trade Talks, **N.Y. Times**, Dec. 13, 1993, at A1.

¹² *Supra* note 11; Jeffrey Goodell, Salut Suckers, **Premiere**, Apr. 1994, at 131.

¹³ Roger Cohen, Europeans Back French Curbs on U.S. Movies, **N.Y. Times**, Dec. 11, 1993, § 1, at 24.

¹⁴ Paul Gessell, Culture Industry Rallies to Back Protectionism, **Ottawa Citizen**, Dec. 10, 1993, at D6.

¹⁵ Roger Cohen, With Time Waning, Europeans Reject U.S. Movie Compromise, **N.Y. Times**, Dec. 14, 1993, at A1.

managed to become the most successful purveyor of cultural "content" on a world wide basis¹⁶ by analyzing the manner in which its copyright laws differ from those of other affected nations, namely Canada, France, and Mexico. Also studied will be the U.S.' efforts to have the copyright laws of other nations changed to protect creative works through the CFTA, NAFTA, GATT and its accession to the Berne Convention. If an underlying thesis girds this article it is that national laws and international conventions tend to reflect the particular biases of their representative states, sometimes subtly, sometimes not, and provide reasons and answers beyond the facially obvious for the problems that have plagued international trade in copyrighted materials for decades. It is one thing to say "The Americans just don't get it."¹⁷ It is another to decipher some of the overlooked reasons why the U.S. has at once succeeded and failed in the recent trade negotiations to have copyrighted content treated like any other goods subject to trade.

One important reason is the different treatment authors receive in the United States than practically anywhere else. This is reflected in U.S. copyright law and the sparse protection which it provides for the "droit moral" of its authors. Before looking at this system, an examination of what droit moral is, in the context of the Berne Convention to which the United States is now a signatory, will be undertaken.

I. "Droit Moral" and Berne

On March 1, 1989, the United States' accession to the Berne Convention became effective under the Berne Convention Implementation Act (BCIA).¹⁸ By becoming a member of the Berne Union, the U.S. committed itself to providing protection to the "droit moral," also called moral rights, of authors as spelled out in Article 6bis of the Berne Convention.¹⁹ Paragraph (1) of Article 6bis states:

(1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or derogatory action in relation to, the said work, which would be prejudicial to his honor and reputation.²⁰

¹⁶ John Rockwell, The New Colossus: American Culture as Power Export, **N.Y. Times**, Jan. 30, 1994, §2, at 1.

¹⁷ Paul Gessell, Canadian "Xenophobia" Is Paying Off -- For Now, **Vancouver Sun**, Dec. 16, 1993, at D7.

¹⁸ Berne Convention Implementation Act of 1988, Pub. L. No. 100-5688, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801 (1988)); *supra* note 1.

¹⁹ Berne, *supra* note 1, art. 6bis.

²⁰ *Id.*

As the first clause of 6bis entails, moral rights are distinguished from the economic rights an author has in his or her work of expression.²¹ The typical economic rights protected by copyright law are the right to make copies, the right to adapt, translate, or create derivative works based on the original work, the rights to broadcast and cablecast, the rights to perform and display the work, and the right to distribute the work.²² Droit moral, as the designation indicates, first arose under French law of "droit d'auteur," which translates to authors' rights.²³ Right away a distinction can be seen between copyright, rights which arose under the common law system prohibiting copying; and authors' rights, rights which arose under the French and other civil law systems to protect the property created by the author.²⁴ Where copyright was created in England under the Statute of Anne to protect publishers under the guise of protecting authors,²⁵ droit d'auteur was thought to exist independent of any statute.²⁶ The rights existed in the author; a natural right to possess the fruits of her or his labor.²⁷ In the United States and the United Kingdom, copyright has been determined to be purely a creature of statute.²⁸ By contrast, droit d'auteur, particularly in France, were protected by the courts and not truly codified until 1957.²⁹

Article 6bis of the Berne Convention establishes two moral rights to be protected by

²¹ *Id.*

²² **Stewart**, *supra* note 2, at § 4.17.

²³ Russell J. DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 **Bull. Copyright Soc'y** 1, 7-11 (1980); Dan Rosen, Artists' Moral Rights: A European Evolution, an American Revolution, 2 **Cardozo Art & Ent. L.J.** 155, 157-58 (1983).

²⁴ **Stewart**, *supra* note 2, at §§ 1.13-1.16.

²⁵ **Mark Rose, Authors and Owners; The Invention of Copyright** 35-48 (Harvard University Press, Cambridge, MA, 1993).

²⁶ **Stewart**, *supra* note 2, at § 1.14.

²⁷ *Id.*

²⁸ *Donaldson v. Becket*, 1 Eng. Rep. 837 (1774); *Wheaton v. Peters*, 8 Pet. 591, 661-662 (1834).

²⁹ Rosen, *supra* note 23, at 158; Loi no. 57-298 du 11 mars 1957 sur La propriete litteraire artistique, translated in UNESCO, Copyright Laws and Treaties of the World (1993) [hereinafter France].

members of the Berne Union.³⁰ The first is the right to claim authorship,³¹ commonly called the right of attribution.³² The second is the right of integrity.³³ The right of attribution has been recognized to consist of many different obligations. One is the right to be recognized as the author of one's work. A second is the right to prevent attribution of one's work in someone else. Third is the right to prevent "passing off," the act of being named the author of a work one did not create.³⁴ It is questionable whether the right of attribution under the Berne Convention was meant to include the second and third obligations listed.³⁵ Under U.S. copyright law it is possible for one's authorship not to be recognized in employment and other situations under the work for hire doctrine.³⁶ Article 6bis, in contrast, makes clear that moral rights remain with the

³⁰ Commentators have found that many other branches exist in droit moral. Other than the right of integrity and of attribution protected by Article 6bis of Berne, there are: the right to create, the right to publish or not to publish one's work, the right of disclosure or divulgation, the right to withdraw or modify one's work, even after one's work has already been released for sale, and the right against excessive or vexatious criticism. See Martin A. Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 *Harv. L. Rev.* 554 (1940); Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., Study No. 4, The Moral Right of the Author (1960) (Strauss); Raymond Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 *Am. J. Comp. L.* 465 (1968); DaSilva, *supra* note 23; Rosen, *supra* note 23; Carl H. Settlemyer III, Note, Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works, 81 *Geo. L.J.* 2291 (1993).

³¹ **Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986** 468 (Kluwer, London, UK 1987).

³² This right has also been called the right of paternity. Because of the sexist overtones implicit in such a designation, the term attribution will be used in this article. The designation of the right as one of attribution is relatively recent, and may itself smack of political correctness, but sometimes even the worst of intentions can achieve desirable results.

³³ **Ricketson**, *supra* note 31, at 468.

³⁴ DaSilva, *supra* note 23, at 26.

³⁵ **Ricketson**, *supra* note 31, at 467-68.

³⁶ In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b) (1988 Supp. IV 1993). See also Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166 (1989).

author, "even after the transfer" of the economic rights.³⁷ The real issue has become whether the right can be waived or sold,³⁸ but even in France, where the highest degree of protection of *droit moral* can be found, waivers are often allowed.³⁹

The right of integrity to one's work, unlike the right of attribution, is fairly well described in 6bis. It is the right to prevent changes from being made to one's work which would be "prejudicial" to "honor or reputation."⁴⁰ It is contended to be "the most essential part of *droit moral*."⁴¹ However, even this right has not escaped controversy since it does not prevent destruction of a work,⁴² nor is it clear **what** honor or reputation is being protected: is it the author's reputation as an artist or as an individual?⁴³ Can an inanimate object ever have a

³⁷ Berne, *supra* note 1, art. 6bis, par. (1); *supra* note 20 and accompanying text.

³⁸ The U.S. Copyright Act would apparently allow alienation except in the case of works of visual art. 17 U.S.C. §§ 201(d), 106A(e). Works of visual art, as defined in the Copyright Act, do not include motion pictures. *Id.* § 101. See *infra* notes 61-63 and accompanying text. The moral rights section of Canada's Copyright Act states that moral rights are not assignable, but may be waived. Copyright Act, **Can. Rev. Stat.** ch. C-42, amended by Can. Rev. Stat. ch. 10 (1st Supp. 1985), ch. 1 (3d Supp. 1985), ch. 41 (3d Supp. 1985), ch. 10 § 12.1(3) (4th Supp. 1985) [hereinafter *Can. Copyrt. Act*]. The French statute bars alienation, France, *supra* note 29, art. 6, as does Mexico's, *Ley Federal de Derochos de Autor*, D.O., Dec. 21, 1963, art. 3, translated in UNESCO, Copyright Laws and Treaties of the World (1993) [hereinafter *Mexico*]. It has been argued that Article 6bis was meant to bar alienation of *droits moral*. David Vaver, *Authors' Moral Rights - Reform Proposals in Canada: Charter or Barter of Rights for Creators?*, 25 **Osgoode Hall L.J.** 749, 771 (1987). Sam Ricketson, in a close study of the text (as opposed to the *travaux préparatoires*), argues that there is nothing to prohibit even the transfer of moral rights. **Ricketson**, *supra* note 31, at 467.

³⁹ DaSilva, *supra* note 23, at 16.

⁴⁰ Berne, *supra* note 1, art. 6bis(1).

⁴¹ DaSilva, *supra* note 23, at 31.

⁴² **Ricketson**, *supra* note 31, at 470; DaSilva, *supra* note 23, at 33. One of the few areas where the U.S. Copyright Act does provide more protection than that required by Article 6bis is in section 106A:

[T]he author of a visual work of art . . . shall have the right . . . to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3)(B).

protected honor or reputation?⁴⁴

France's authors' rights statute, like most copyright statutes, distinguishes between economic rights (*droits patrimoniaux*) and *droit moral*.⁴⁵ The first, as in most countries, are alienable and fixed for a particular term, usually life of the author plus fifty years, after which they enter the public domain for all to enjoy.⁴⁶ The moral rights, however, are "perpetual, inalienable and cannot be prescribed."⁴⁷ Mexico has a similar provision for moral rights in its authors' rights statute.⁴⁸ The Berne Convention, however, does not require a signatory to go as far as France and Mexico do in protecting *droit moral*. Paragraph (2) of 6bis states:

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of ratification of or accession to this Act, does not provide for the protection after the death of the author of all rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.⁴⁹

⁴³ Ricketson argues that it is the personal reputation that is protected, and looks to the *travaux préparatoire* to justify the argument. It is clear from his argument, however, that "consensus" was not clearly established since some parties were confused by the meaning of the final text. **Ricketson**, *supra* note 31, at 471.

⁴⁴ DaSilva's seminal article on *droit moral* seemed to be inching towards just such an argument. His concern, especially where collaborative works were involved, such as motion pictures, plays, and operas, was that a lone artist among many could place an economic stranglehold on a whole endeavor simply by claiming violation of his or her *droit moral*. DaSilva, *supra* note 23, at 32. But by placing honor and reputation in the work instead of with the author risks a theoretical inconsistency that could eviscerate the moral rights doctrine. *Droits moral* are personal to the author. Once separated therefrom, what is to distinguish them from the economic rights of copyright? See *supra* note 27 and accompanying text.

⁴⁵ France, *supra* note 29, art. 1; Can. Copyrt. Act, *supra* note 38, §§ 3 & 12.1; Mexico, *supra* note 38, art. 2; but cf. U.S. Copyright Act, 17 U.S.C. §§ 106 & 106A.

⁴⁶ France, *supra* note 29, art. 21; Can. Copyrt. Act, *supra* note 38, § 5; U.S. Copyright Act, 17 U.S.C. §§ 302-05.

⁴⁷ France, *supra* note 29, art. 6.

⁴⁸ Mexico, *supra* note 38, art. 3.

⁴⁹ Berne, *supra* note 1, art. 6bis, par. (2).

This is where some of the theoretical confusion over moral rights has arisen. Under the dualist view, led by France, *droit moral*, as distinguished from economic rights, are personal to the author, and personal rights cannot be waived or sold.⁵⁰ This explains why France views *droit moral* as perpetual.⁵¹ It also helps explain why *droit moral* cannot be found in corporations or other business organizations in France.⁵² This has been especially detrimental for producers of motion pictures in France. Since there is a constant risk that one of the creative contributors to a film will make a claim that his or her moral rights are infringed, the economic risks to film producers are heightened considerably.⁵³ There is no one "author" for a film for authors' rights

⁵⁰ **Ricketson**, *supra* note 31, at 458; DaSilva, *supra* note 23, at 9-11. Of course, as seen above, *supra* note 39 and accompanying text, even France has not been absolutist in its application of this theory. Most of the debate between the monist and dualist views originated in Germany between Joseph Kohler and Alfred Gierke. DaSilva, *supra*, at 10-11. They, in turn, were building upon ideas developed in France, under the influence of Marxist theory, which opposed characterization of *droit d'auteur* as property. *Id.* at 10. Consequently, French courts began distinguishing between *droit moral* and economic rights and the split occurred. *Id.* As DaSilva explains it, "[t]he author has, in a sense, made a gift of his creative genius to the world; in return, he has a right--a moral right--to expect that society respect his creative genius." *Id.* at 12. Because of this, France views the right as being perpetual and inalienable. *Id.*

⁵¹ DaSilva, *supra* note 23, at 12.

⁵² *Id.*

⁵³ In fact, France has tried to face the problem in Articles 14 to 17 of its *droit d'auteur*. France, *supra* note 29, arts. 14-17. Article 14 limits the amount of authors to the scriptwriter, the script adaptor, the writer of the dialogue, the composer of the music created specifically for the film, and the director. *Id.* art. 14. All other contributors, including the cinematographer and set designer, are excluded. If the screenplay is an adaptation from a preexisting work, the original author will be included in the list. *Id.* Notice that the film's producers, the persons or business or entities that finance the film, are not included as authors.

Article 15 bars an author from prohibiting the use of his or her uncompleted work. *Id.* art. 15. It does not say the author may not bar its use when his or her work is completed. Producers make their first appearance in Article 16. This article determines when the film is deemed completed. *Id.* art. 16. This occurs after consultation between the director and the producer or, "as the case may be, the co-authors and the producer." *Id.* Article 17 allows for the possibility of the producer being one of the authors, and gives the producer the power to exploit the film as to the economic rights included therein. *Id.* art 17. Thus the risk still exists for a disgruntled author to insist that his or her *droit moral* is infringed by the final product. This thus places the producer in the position of having to consult with the film's co-authors.

purposes in France.⁵⁴ The monist view, originally developed in Germany and favored by Canada,⁵⁵ and, to the extent moral rights exist within its Copyright Act, the United States,⁵⁶ takes the position that moral rights and economic rights are coextensive and cannot so easily be separated.⁵⁷ Waivers of moral rights are more easily obtained and the initial risk to producers, if any, are therefore minimized.

The first sentence of paragraph (2) of 6bis takes a neutral approach as to the monist/dualist debate,⁵⁸ allowing for both to exist in the Berne Union. The second sentence, however, refers to countries like the United States who either historically have not provided

There are, today, very few directors in Hollywood, the so-called movie capital of the world, who have final say, and in some cases, any input, in the final presentation of a film. During the years of the "studio system," when practically everyone in Hollywood films was under contract to the major film studios, instead of being independent contractors as the case is today, directors had even less power. The power has always lain with the producer or film studio. See, e.g., **Thomas Schatz, *The Genius of the System: Hollywood Filmmaking in the Studio Era*** (Pantheon Books, New York, 1988).

⁵⁴ It has been noted that *droit moral* shares a strong link with the romantic notion of authorship. Christopher Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, 48 *U. of Toronto Fac. L. Rev.* 211 (1990). What is very interesting to note in historical perspective is that the "auteur" theory of cinema originated in France, in the periodical *Cahiers du Cinema*. **Louis G. Giannetti, *Understanding Movies*** 274-75, 437-443 (Prentice Hall, Englewood Cliffs, NJ, 2d ed. 1976). This theory, which emphasizes the contributions made by the film's director, and, to a certain extent, the screenwriter, began at about the same time that France codified its *droit d'auteur*. *Id.* at 274. "Imported" to the United States by U.S. film critic Andrew Sarris, *id.* at 440, the *auteur* theory's influence is felt even today, despite the reality that, at least in the U.S., films are generally works made for hire, *supra* note 36 and accompanying text, controlled by film producers and motion picture studios. The Alfred Hitchcocks and Steven Spielbergs are rare in North America. See also *infra* note 63. French *droit d'auteur*, on the other hand, makes a strong case for the *auteurist* theory as applied to French productions. The films of Jean-Luc Goddard, Claude Chabrol, and Jean Cocteau make good arguments for the theory; application to U.S. cinema, as former New Yorker film critic Pauline Kael argued throughout much of her career, is inaccurate.

⁵⁵ Can. Copyrt. Act, *supra* note 3, § 12.2.

⁵⁶ 17 U.S.C. § 106A.

⁵⁷ DaSilva, *supra* note 23, at 11.

⁵⁸ **Ricketson**, *supra* note 31, at 473-74.

moral rights to authors in their copyright laws, or whose equivalents to those rights do not extend after the death of the author.⁵⁹ The provision was included in contemplation or hope of the United States eventually joining the Berne Union.⁶⁰ In a technical sense, since acceding to the Berne Convention, the U.S. has complied with the requirements of this second sentence to provide protection for moral rights post-death of the author with its enactment of the Visual Artists Rights Act (VARA).⁶¹ This amendment to the U.S. Copyright Act added the rights of attribution and integrity to works of visual art.⁶² Fortunately or not, motion pictures were not included within VARA's provisions after lobbying of Congress by the U.S. motion picture industry which opposed such an extension of the Copyright Act to cinema.⁶³

⁵⁹ **Ricketson**, *supra* note 31, at 462. Because many common law countries did not provide moral rights in their copyright laws when Article 6bis was first proposed at the Rome Conference in 1928, it was left open for them to protect *droit moral* outside of the copyright area. *Id.*

⁶⁰ *Id.* at 466.

⁶¹ Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1991) (codified in scattered sections of 17 U.S.C., particularly §§ 101, 106A, 113(d)); see Edward J. Damich, The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection for Visual Art, 39 **Cath. U. L. Rev.** 945 (1990); Russ VerSteeg, Federal Moral Rights for Visual Artists: Contract Theory and Analysis, 67 **Wash. L. Rev.** 827 (1992); Joseph Zuber, Do Artists Have Moral Rights?, 21 **J. of Arts Mgmt & L.** 284 (1992).

⁶² 17 U.S.C. §§ 106A, 113(d) (1988 & Supp. IV)

⁶³ A "work of visual art" is --

(1) a painting, drawing, print, or sculpture, existing in a single, [or] in a limited edition . . .

(2) a still photographic image produced for exhibition purposes only . . .

A work of visual art **does not include** --

(A)(i) any poster, . . . **motion picture** or other audio visual work, . . . data base, electronic information service, electronic publication, or similar publication. . .

(B) any **work made for hire**

17 U.S.C. § 101 (1988 & Supp. IV) (emphasis added).

Despite pleas from filmmakers of the likes of Woody Allen, and star actor Jimmy Stewart (who was speaking on behalf of film director Frank Capra), Congress chose to ignore the issue of

Because the Berne Convention provides for the above moral rights protections, the United States had avoided joining the Berne Union because its own laws had been thought to be inconsistent with *droit moral*, and also because its copyright laws had long required many of the formalities which the Union specifically forbids.⁶⁴ By joining the Berne Union, the U.S. hoped to regain a position of leadership in international copyright protection in light of the fact that it was no longer the dominant presence in the area.⁶⁵ With the rise of other developed industrial nations, and because it had left UNESCO⁶⁶ in 1984⁶⁷ and could no longer exert much sway under the Universal Copyright Convention (UCC),⁶⁸ administered by UNESCO,⁶⁹ the U.S. government

the colorization of such classic black and white movies as Capra's "It's a Wonderful Life," and John Huston's "The Maltese Falcon." Artists, Newly Militant, Fight for Their Rights, **N.Y. Times**, Mar. 3, 1988, at C29. Cablecaster Ted Turner, who had purchased much of MGM studio's library of films, and was one of the initial proponents of colorizing B&W films, was voiceful in his opposition to moral rights, *id.*, as was the Motion Picture Association of America. VerSteeg, *supra* note 61, at 830. See Suzanne I. Schiller, Black and White and Brilliant: Protecting Black-and-White Films from Color Recording, 9 **Hastings Comm. & Ent. L.J.** 523 (1987); Woody Allen et al., Colorization: The Arguments Against, 17 **J. of Arts Mgmt. & L.** 79 (1987); Craig A. Wagner, Comment, Motion Picture Colorization, Authenticity, and the Elusive Moral Right, 64 **N.Y.U. L. Rev.** 628 (1989).

⁶⁴ David Nimmer, The Impact of Berne on United States Copyright Law, 8 **Cardozo Arts & Ent. L.J.** 27, 30-37, 39 (1989).

⁶⁵ *Id.* at 29 ("[A] primary motivation of the United States in joining the Berne Convention was to make an international statement about our moral posture in adhering to the world's foremost multilateral copyright treaty"). Mr. Nimmer is extremely critical of the U.S.' "minimalist" approach in adhering to the Berne Convention. *Id.* at 28-29. His article implicitly raises the question what international political capital can be gained by stating one position to the world, while practicing the opposite in one's backyard.

⁶⁶ United Nations Educational, Scientific and Cultural Organization.

⁶⁷ **U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information** 223 (1986).

⁶⁸ *Id.* Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, revised July 24, 1971, Paris Text, 25 U.S.T. 1341, T.I.A.S. No. 7868 [hereinafter UCC]. The United States is still a member of the Universal Copyright Convention (UCC). Originally, the UCC was created to bridge the gap between the Berne Union and countries in the Americas and common law countries, including the U.S., who provided very different types of authors' rights. **Stewart**, *supra* note 2, at § 6.01. Consequently, there are few moral rights provisions included in the UCC. *Id.* § 6.28.

decided that it could better influence other nations regarding intellectual property protection through the Berne Union than without.⁷⁰ The significance of this move will become even more apparent when the recent round of trade agreements are examined infra.

Some commentators have seen the United States' joining of the Berne Union as a political move and that it may never have intended to abide by the moral rights requirements of Article 6bis.⁷¹ Indication of this can be seen not only in the legislative history of the BCIA⁷² but also in

⁶⁹ Stewart, supra note 2, at § 6.01.

⁷⁰ Nimmer, supra note 64, at 29; supra note 65.

⁷¹ See Nimmer, supra note 64, at 29-30; supra note 65; VerSteeg, supra note 61, at 30, 32-33.

⁷² The House concluded that the U.S. was already in compliance with the moral rights requirements of Article 6bis of the Berne Convention. **H. R. Rep. No. 100-609**, 100th Cong., 2d Sess. 34 & n.67; in agreement is Strauss, supra note 30, at 141. The reasons given by the House are well summarized by the following:

[T]here is a composite of laws in this country that provides the kind of protection envisioned by Article 6bis. Federal laws include 17 U.S.C. § 106, relating to derivative works; 17 U.S.C. § 115(a)(2), relating to distortions of musical works used under the compulsory license respecting sound recordings; 17 U.S.C. § 203, relating to termination of transfers and licenses and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws include those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the rights of integrity and paternity in certain works of art. Finally, some courts have recognized the equivalent of such rights.

H. R. Rep., supra, at 33-34.

Examination of this contentious issue would deserve an article in and of itself and is beyond the scope of this one. However, it must be noted that although much of the above statement is correct, it does ignore the difficulties authors face in defending their moral rights through the various and diffuse doctrines listed. Vaver, supra note 38, at 770-72. Many of the state law provisions mentioned are common law causes of action that do not survive the death of the author. Though paragraph (2) of Article 6bis recognizes that common law countries like the U.S. are practically expected to provide moral rights protection outside of the copyright area, Berne, supra note 1, art. 6bis, par. (2), it has been argued that equating what often amounts to common law economic rights to the personal rights inherent in *droit moral* is inconsistent and harmful to the doctrine. Vaver, supra, at 767-70, 772-74. Finally, as Russ VerSteeg points out, paragraph (3) of Article 6bis requires a national law of moral rights instead of the state

the final agreements reached in NAFTA and the Trade Related Aspects of Intellectual Property Rights (TRIPs) of the Uruguay Round of negotiations of the GATT where moral rights were specifically excluded.⁷³ To understand the United States' aversion to *droit moral*, a closer look at the theory underlying U.S. copyright protection, especially in light of free speech and trade concerns, is required.

II. The U.S. Copyright System in Perspective

United States Copyright Law, enacted under the authority granted Congress by the U.S. Constitution,⁷⁴ protects "original works of authorship fixed in any tangible medium of expression."⁷⁵ In conformance with Article 5 of the Berne Convention,⁷⁶ since March 1, 1989, when the BCIA became effective, registration with the Copyright Office is no longer a prerequisite for protection under U.S. Copyright Law.⁷⁷ Thus the maxim has arisen that as soon as a work is written down or recorded, it is copyrighted.⁷⁸

United States Copyright grants its owner certain exclusive rights that are listed in section 106 of the Copyright Act.⁷⁹ As the Supreme Court in Sony Corporation of America v. Universal

patchwork now existent. VerSteeg, supra note 61, at 833. Paragraph (3) of Article 6bis states: "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the **country** where protection is claimed." Berne, supra note 1, art. 6bis, par. (3) (emphasis added). It is the U.S. that acceded to the Berne Union, not its individual states.

⁷³ Infra Part IV.

⁷⁴ The text of Article I, section 8, clause 8 of the United States Constitution reads as follows: "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." **U.S. Const.** art. I, § 8, cl. 8.

⁷⁵ 17 U.S.C. § 102(a).

⁷⁶ Berne, supra note 1, art. 5 (2) ("The enjoyment and exercise of these rights shall not be subject to any formality. . .").

⁷⁷ 17 U.S.C. § 408(a).

⁷⁸ 17 U.S.C. § 201(a).

⁷⁹ Subject to sections 107 through 120, the owner of copyright under this title has the exclusive right to do and to authorize any of the following:

- (1) **to reproduce** the copyrighted work in copies or phonorecords

City Studios, Inc.⁸⁰ noted: "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit."⁸¹ In other words, copyright is not property like real and personal property are commonly viewed in the U.S.⁸² In the House Report to the 1909 Copyright Act, the predecessor of the current Act, which Sony quotes,⁸³ the Judiciary Committee of the House of Representatives stated:

(2) **to prepare derivative works** based upon the copyrighted work;

(3) **to distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform** the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display** the copyrighted work publicly.

17 U.S.C. § 106 (emphasis added).

The reader will note that none of the exclusive rights granted by the U.S. Copyright Act, other than those found in section 106A and 113(d), supra note 61-63 and accompanying text, explicitly include moral rights. Except possibly for the right to distribute copies, id. § 106(3), which implicitly recognizes a limited right of divulgation, and 106(2), which requires permission to create a derivative work, section 106 is a list of the authors' economic rights. Supra note 30.

⁸⁰ 464 U.S. 417 (1984).

⁸¹ Id. at 429.

⁸² Eminent copyright Professor (later Judge) Kaplan had this to say to say on the subject:

To say that copyright is 'property,' although a fundamentally unhistorical statement, would not be boldly misdescriptive if one were prepared to acknowledge that there is property **and** property, with few if any legal consequences extending uniformly to all species and that in practice the lively questions are likely to be whether certain consequences ought to attach to a given piece of so-called property in given circumstances.

Benjamin Kaplan, An Unhurried View of Copyright 78 (Columbia University Press, New York, 1967).

⁸³ Sony, 464 U.S. at 429-30 n.10.

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any **natural right** that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for the limited periods the exclusive rights to their writings. . . .⁸⁴

This is in marked contrast to the authors' rights regimes found in most civil law countries, especially France and Mexico, examined in the prior section on droit moral, which do base authors' rights protection on a natural right in the author or on a right in the author's personality.⁸⁵

Feist Publications, Inc. v. Rural Telephone Service Co.⁸⁶ is the U.S. Supreme Court's latest thorough analysis of what the Copyright Act protects, and it makes clear the social purpose copyright serves.

The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by the work. Harper & Row, supra, 471 U.S. at 556-557. This principle, known as the idea expression or fact/expression dichotomy, applies to all works of authorship. . . . **This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.**⁸⁷

Feist dealt with the issue of whether the white pages of a phone book was copyrightable subject matter.⁸⁸ Nowhere in its opinion was the Court concerned with the fact that the defendants, who had admittedly copied from plaintiff's phone listing, had not named plaintiffs as the source for the listing. The right of attribution or any other moral rights were simply not in question. The plaintiff's white pages were found to be merely facts arranged in an unoriginal manner which were not protected by the Copyright Act.⁸⁹

⁸⁴ **H.R. Rep. No. 2222**, 60th Cong., 2d Sess. 7 (1909) (emphasis added).

⁸⁵ See *supra* note 27 and accompanying text.

⁸⁶ 111 S. Ct. 1282 (1991).

⁸⁷ *Id.* at 1290 (emphasis added).

⁸⁸ *Id.* at 1287.

⁸⁹ *Id.* at 1290.

It is interesting to point out the similar backgrounds the free speech protections found in the First Amendment of the United States Constitution⁹⁰ and the law of copyright share historically in the English licensing system. When the First Amendment was first construed by the Supreme Court, it was viewed primarily as targeted at prior restraints on publication.⁹¹ As the Court said in *Lovell v. Griffen*:⁹² "[t]he struggle for the freedom of the press was primarily directed against the power of the licensor."⁹³ In England, this power had predominantly been given to the Stationers' Company.⁹⁴ "The primary interest of the state in granting this monopoly was not, however, the securing of stationers' property rights but the establishment of a more effective system for governmental surveillance of the press."⁹⁵ Thus it should not be surprising to find that even today, prior restraints imposed on the press in the United States incur the highest prohibition under First Amendment theory.⁹⁶

The emergence of copyright in England occurred shortly after governmental licensing of the press died due to licensing's unpopularity.⁹⁷ What is ironic about the rise of copyright and the first copyright statute, the Statute of Anne of 1710,⁹⁸ is that the Stationers' Company, by campaigning for the protection of the literary property of authors, through the "copy-right," it was truly campaigning for the reassertion of its monopoly as sole provider of literary content. It was campaign by deceit.⁹⁹ When the Statute of Anne was passed, the Stationers' Company was

⁹⁰ "Congress shall make no law . . . abridging the freedom of speech, or of the press" **U.S. Const.** amend. I.

⁹¹ See *Patterson v. Colorado*, 205 U.S. 454 (1907) (Holmes, J.).

⁹² 303 U.S. 444 (1938).

⁹³ *Id.* at 451.

⁹⁴ **Rose**, *supra* note 25, at 12.

⁹⁵ *Id.*

⁹⁶ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (The Pentagon Papers Case); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

⁹⁷ **Rose**, *supra* note 25, at 31-32, 36.

⁹⁸ An Act for the Encouragement of Learning, 8 Anne, ch. 19 (1710).

⁹⁹ **Rose**, *supra* note 25, at 31-48.

effectively circumvented by a Parliament specifically concerned with avoiding censorship.¹⁰⁰ This segues into the other theories underlying the protection of the freedom of speech under the First Amendment. Justice Brandeis was of the view that the protection of free speech can be an end in itself.¹⁰¹

Most, if not all of the bases said to underlie the First Amendment were best raised by Justice Brandeis in his famous concurrence in Whitney v. California.¹⁰² To quote at length one of the most powerful statements ever made by a United States Supreme Court Justice, Brandeis stated:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freed to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in

¹⁰⁰ Id. at 47. Though it might be taking the analogy far, similar arguments for protecting the livelihood of U.S. authors were made by the United States during all of its recent trade negotiations. The argument is similar to that of the Stationers' Company in the sense that the true foci of the U.S.' concerns were in fact the industries that have arisen to take advantage of copyright protection, such as film, publishing, music, and broadcasting. See, e.g., Letter from Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America, to the House Ways and Means Committee, Subcommittee on Trade 3 (Sept. 17, 1992) quoted in Stephen R. Konigsberg, Think Globally, Act Locally: North American Free Trade, Canadian Cultural Industry Exemption, and The Liberalization of the Broadcast Ownership Laws, 12 **Cardozo Arts & Ent. L.J.** 281, 306-07 (1994). This is not to suggest that United States industry or the government is using its international trade powers to censor opposing views.

¹⁰¹ Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

¹⁰² Id.

its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹⁰³

The above paragraph is Brandeis' extrapolation of what Justice Oliver Wendell Holmes first termed the "marketplace of ideas."¹⁰⁴ The First Amendment acts as a base for good government, as a check to bad government, as a road to truth, as a safety valve against repression, as a means of self-fulfillment and expression, and as an end in and of itself.¹⁰⁵

Why then does not the First Amendment prevail over the Copyright Act which creates a grant withdrawing certain speech from the marketplace of ideas? The answer lies in the words "marketplace of ideas," with, for the Supreme Court, an emphasis on the marketplace. In Harper & Row, Publishers, Inc. v. Nation Enterprises,¹⁰⁶ the U.S. Supreme Court found that the distinction made by the Copyright Act between ideas and expression¹⁰⁷ provided a "definitional balance" by leaving to the public domain important tools for free speech. Facts (and ideas) are free.¹⁰⁸ The crux of the majority's argument in Harper & Row was that "[i]f every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."¹⁰⁹ According to the Court:

The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to use one's expression, copyright supplies the economic incentive to create and disseminate ideas."¹¹⁰

As the majority in Harper & Row states, "**freedom of thought and expression**

¹⁰³ Id. at 375-76.

¹⁰⁴ Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting opinion).

¹⁰⁵ **John E. Nowak & Ronald D. Rotunda, Constitutional Law** 940-41 (4th ed. 1991).

¹⁰⁶ 471 U.S. 539 (1985).

¹⁰⁷ 17 U.S.C. § 102(a) ("In no case does copyright protection for an original work of authorship extend to any idea . . ."); Feist, 111 S. Ct. at 1290; supra note 87 and accompanying text.

¹⁰⁸ Harper & Row, 471 U.S. at 556.

¹⁰⁹ Harper & Row, 471 U.S. at 559 (quoting Sobel, Copyright and the First Amendment: A Gathering Storm?, 19 **Copyright L. Symp. (ASCAP)** 43, 78 (1971)).

¹¹⁰ Harper & Row, 471 U.S. at 558.

'includes both the right to speak freely and the right to refrain from speaking at all.'¹¹¹

Thus, if one is going to speak, but is only willing to do so for a price, copyright will aid in the dissemination of that speech and prevent unauthorized copying (infringement) by others. If, under exercise of the First Amendment right to remain silent, speech can not be voluntarily obtained without remuneration, copyright provides the economic incentive to release that expression to the public.¹¹² The speech clause of the First Amendment does not say the government cannot encourage speech, only that it cannot discourage it.¹¹³ Through copyright, the public benefits because the marketplace of ideas is a First Amendment end in itself.¹¹⁴ Authors are benefited by a system of trade regulation for the dissemination of their work for profit.¹¹⁵ Only in this way can copyright be seen as "the engine of free expression" under the First Amendment and still be consistent with First Amendment principles.

Most of the civil law countries that adhere to authors' rights protection have managed to avoid any possible conflicts between their free speech provisions and the protection of the expression of their authors because the issue never arises.¹¹⁶ Under the French view of authors'

¹¹¹ *Id.* at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (Burger, C.J.)).

¹¹² There have been some suggestions that copyright law is not as effective in encouraging new authorship as it could or should be. See Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenge of Consistency, Consent, and Encouragement Theory*, 41 *Stan. L. Rev.* 1343 (1989).

¹¹³ "Congress shall make no law . . . **abridging** the freedom of speech . . ." **U.S. Const.**, amend. I.

¹¹⁴ *Supra* notes 101 and 105 and accompanying text. *But cf.* Barbara Ringer, *Two Hundred Years of American Copyright Law, in Bicentenary Symposium of the American Bar Association* 118 (1976) ("It is harder to determine that the inter-relationship between a strong copyright protection and individual freedom of expression is one of cause and effect, but I believe that, on the basis of the historical evidence, a causal relationship can be shown.")

¹¹⁵ i.e. the U.S. Copyright Act.

¹¹⁶ The Canadian Charter of Rights and Freedoms, Constitutional Act of 1982, is much less absolutist a document than the Amendments to the U.S. Constitution tend to be, especially where speech is concerned. Part 1 of the Canadian Charter states:

1. The Charter guarantees the rights and freedoms set out in it **subject only to such limits prescribed by law as can be demonstrably justified in a free and democratic society.**

2. Everyone has the following fundamental freedoms

rights, protection of expression is not original to the state but from the natural right in the author to the property of his or her creation.¹¹⁷ The state merely helps in the protection of the property that results out of that personal authorship. The U.S. system, and that of other common law jurisdictions, are generally purely creatures of statute.¹¹⁸ The purpose of copyright is to benefit society and the marketplace of ideas by providing an economic incentive for authors to create.¹¹⁹

It is almost ironic that between the system most influenced by Marxist theory¹²⁰ and the one most influenced by Lockean principles of property,¹²¹ it is the U.S. copyright system that shows itself the most socialist, and the French system the most property based. This is due very much to the fact that the civil law system introduced by the French is the one most concerned with the protection of the author while the common law copyright system was more concerned with encouraging industry. Even the French Declaration of the Rights of Man and of

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications.

Canadian Charter of Rights and Freedoms (emphasis added).

In 1992, the Supreme Court of Canada put meaning to the above emphasized words when, though recognizing that content of speech is protected by the Charter, it held sexually explicit materials could be degrading to woman, and thus proscribable under the override clause. *Regina v. Butler*, [1992] 1. S.C.R. 452. This is not to say that obscene materials are not barred in the United States, see *Miller v. California*, 413 U.S. 15 (1973), only that the Canadian Charter has an explicit escape hatch which the First Amendment does not.

Article 7 of Mexico's Constitution sounds much the same message:

Freedom of writing and publishing writings on any subject is inviolable. No law or authority may establish censorship, require bonds from authors or printers, or restrict the freedom of printing, **which shall be limited only by the respect due to the right of privacy, morals and public peace**

¹¹⁷ *Supra* note 27 and accompanying text.

¹¹⁸ *Supra* note 28 and accompanying text.

¹¹⁹ *Supra* note 87 and accompanying text.

¹²⁰ *Supra* note 50.

¹²¹ *Cf.* Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individuality in the Natural Law of Intellectual Property, 102 *Yale L.J.* 1533 (1993).

the Citizens of 1789 shows this emphasis for the individual¹²² while even free speech theory in the United States is based on economic theory.¹²³

III. CFTA and NAFTA

With the election of the Conservative party in 1984, led by Brian Mulroney, Canada's economic policy of self-sufficiency in trade, as advocated by the Liberal Party under the leadership of Pierre Elliott Trudeau,¹²⁴ continued its slow demise to oblivion.¹²⁵ As part of an overall strategy towards more open trade, in 1986, Canada began talks with the United States that eventually led to the Canada/U.S. Free Trade Agreement (CFTA).¹²⁶ Two elements of the deal, found in the "Other Provisions" section, are important for present purposes. The first is that, though the U.S. and Canada did not come to agreement on intellectual property issues, they did agree that: "The Parties shall cooperate in the Uruguay Round of multilateral trade negotiations and in other international forums to improve protection of intellectual property."¹²⁷ The second, and probably one of the most contentious issues during negotiations,¹²⁸ was the

¹²² "The unrestrained communication of thoughts or opinion being one of the most precious rights of man, every citizen may speak, write and publish freely, **provided he be responsible for the abuse of the liberty, in the cases determined by law.**"

Declaration of the Rights of Man and of the Citizens (emphasis added).

¹²³ See, e.g., *supra* notes 103-04 and accompanying text.

¹²⁴ Trudeau was Prime Minister of Canada from 1969 to 1979, and then again from 1980 to 1984. Early on in his tenure, Trudeau was a very charismatic leader. He is fondly remembered for a remark he once made in the early 1970s to a group of U.S. visitors in Canada: "Living next to you is in some ways like sleeping with an elephant. No matter how friendly and even-tempered the beast, one is affected by every twitch and grunt." Pierre Elliott Trudeau, *quoted in* Michael T. Kaufman, *What it Means to Be Canadian*, **N.Y. Times**, Sept. 11, 1988, § 2, at 33.

¹²⁵ Konigsberg, *supra* note 100, at 298. That policy, begun after a White Paper, issued by the Department of External Affairs in 1972, suggested that "Canada . . . pursue a comprehensive long-term strategy to develop and strengthen the Canadian economy and other aspects of its national life and in the process reduce the . . . Canadian vulnerability [to the United States]" was first advocated by then Secretary of State for External Affairs Mitchell Sharp. Secretary of State of External Affairs Mitchell Sharp, *Canadian-U.S. Relations: Options for the Future*, **Int'l Persp.**, Autumn 1972, at 1.

¹²⁶ *Id.*; *supra* note 3.

¹²⁷ CFTA, *supra* note 3, chap. 21, Art. 2004.

¹²⁸ Konigsberg, *supra* note 100, at 286.

question of applicability of the CFTA to cultural industries. Though Canada had made it clear that a condition for an agreement would be exclusion of cultural industries,¹²⁹ as Article 2005 of Chapter 21 of the deal shows, total exclusion was not obtained.¹³⁰

1. Cultural industries are exempt from the provisions of this Agreement
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph one.¹³¹

However, with this Article, the Canadian government was able to state to Canadians that culture¹³² was not part of the deal with the U.S. The United States could go to Congress¹³³ and

¹²⁹ *Id.*

¹³⁰ CFTA, *supra* note 3, chap. 21, art. 2005.

¹³¹ *Id.*

¹³² A cultural industry was defined as:

[A]n enterprise engaged in the following activities:

- a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,
- b) the production, distribution, sale or exhibition of film or video recordings,
- c) the publication, distribution, sale or exhibition of audio or video music recordings,
- d) the publication, distribution, or sale of music in print or machine readable form, or
- e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcasting network services.

CFTA, *supra* note 3, chap. 21, art. 2012.

It is remarkable that visual arts such as painting and photography were not included in the list, nor were works of folklore, such as Inuktitut (Eskimo) or First Nations art.

¹³³ Unlike the situation with NAFTA, little public attention in the United States was given to the CFTA.

say that they had maintained the right to retaliate against Canada in case Canada ever imposed protective measures on its cultural industries.¹³⁴ Unlike the situation in GATT, as will be later examined, the parties did not merely agree to disagree. Instead, Canada and the United States explicitly agreed that cultural industries were a special part of the deal; one, however, that would not have the benefit of CFTA's dispute settlement provisions, but which left each side open to "equivalent" retaliation.¹³⁵ Politically, this may have looked sound; economically, it was widely viewed as inconsistent with free trade principles.¹³⁶ For many in the Canadian film industry it was seen as a capitulation.¹³⁷ How could cultural industries be deemed excluded from the CFTA

¹³⁴ See McPherson, *supra* note 5, at 190; of course, the issue of existing protections were also overlooked.

¹³⁵ CFTA, *supra* note 3, chap. 21, art. 2005; *supra* note 131.

¹³⁶ See, e.g., Stacie I. Strong, *Banning the Cultural Exclusion: Free Trade and Copyrighted Goods*, 4 *Duke J. Comp. & Int'l L.* 93 (1993). Unfortunately, with commentators such as Strong studying the impact of the issue of cultural exemptions in trade in broad economic terms, just like studying issues in purely legal terms, it tends to lead to tunnel vision and ignorance of important factors. Strong's difficulty is history and culture. She sees the United States and Canada as having "similar" "cultural histories." *Id.* at 105. Konigsberg, *supra* note 100, by comparison, has a knowledge of Canada that would make most Canadians blush, and recognizes the validity of the Canadian wish to be not-"American." *Id.* at 285-300. Yet, he believes the answer to easing trade frictions lies in reducing the stringent citizenship requirements to owning broadcast facilities in the U.S., *id.* at 315-316, a solution that is as narrow in conception as Strong's economic outlook.

Konigsberg's underlying argument, "that every nation enjoys a sovereign right with which no other nation may interfere, to regulate as it pleases its own internal domestic affairs including economic and cultural policies," *id.* at 285 n.22, is certainly appealing on the surface. But it is also idealistic since it ignores the reality that multilateral trade agreements, by definition, involve "ceding" exercise of some of that sovereignty in the hopes of achieving better domestic economic performance through unimpeded trade in a wider sphere. *Cf.* *S.S. Wimbledon Case*, P.C.I.J., Series A, No. 1, at 25 (1923). The question becomes whether cultural self-determination is ever an appropriate bargaining chip in trade negotiations.

¹³⁷ See, e.g., **Michael Posner, Canadian Dreams** (Canadian Independent Film Caucus, Canada, 1993). The reaction of one of Canada's most revered writers is better known:

Canada as separate but dominated country has done about as well under the United States as women, worldwide, have done under men; about the only position they've ever adopted toward us, country to country, has been the missionary position, and we were not on top. I guess that's why the national wisdom vis a vis Them has so often taken the form of lying still, keeping your mouth shut and pretending you like it. But as part of

when the CFTA made retaliation an acceptable trade response to the nation's prerogative of fostering its own self-definition?

There are few, if any, nations that do not protect or subsidize at least some aspect of their cultural industries,¹³⁸ and the United States is no exception. The Federal government subsidizes the arts with the National Endowment for the Arts, as do State and local governments with similar programs.¹³⁹ The broadcasting industry is regulated by the Federal Communications Act of 1934 that requires owners of radio and television broadcast stations be citizens of the United States.¹⁴⁰ Canada does not allow more than 10 to 20% foreign ownership of its broadcast facilities.¹⁴¹ Historically, however, the United States governments have provided less protection to their cultural industries than most other nations.¹⁴² It has been fortunate in having a strong industrial base and many wealthy patrons to subsidize the arts thus not requiring as much

Them, at least we'd get to vote, eh? We'd sure as heck fit in, we already know more about them than we do about one another, or so you'd think.

Margaret Atwood, **Toronto Globe & Mail**, Nov. 5, 1987, at A7, quoted in Manjunath Pendakur, *Canadian Dreams & American Control: The Political Economy of the Canadian Film Industry* 251 (Garamond Press, Toronto, 1990).

¹³⁸ Because the Americans' commercial success is achieved at the expense of everyone else's (there is no commercially viable film industry, in an unprotected market, outside the United States), levy has become the norm, rather than the exception, for the world's film industries. To it we owe Bergman, Truffaut, Bunuel, and most of our non-American experience.

The countries applying this sanction have no less access to the American market than Canada. Our fear is based on a myth that somehow, if we are a good branch plant and forfeit total control of our own market, the Americans will allow us into theirs where we will have a shot at the pot of gold at the end of the rainbow. The fact of the matter is that there is no entry to the American market -- on a large scale -- and there is little hope of realizing profits from films which do gain entry.

Sandra Gathercole, *The Best Film Policy This Country Never Had*, in **Take Two: A Tribute to Film in Canada** 42-43 (Seth Feldman ed., Irwin Publishing, Toronto 1984).

¹³⁹ New York has the New York State Council for the Arts, and the Department of Cultural Affairs of the City of New York just to state two prominent agencies.

¹⁴⁰ 47 U.S.C. § 310 (1988); Konigsberg, *supra* note 100, at 304-05.

¹⁴¹ Konigsberg, *supra* note 100, at 315.

¹⁴² Rosen, *supra* note 23, at 179-80.

governmental intervention.¹⁴³ Countries like Canada, France and Mexico have had much more direct governmental involvement in their cultural industries.¹⁴⁴

Canada's film history is one marked by cycles of boom and bust.¹⁴⁵ During the 1970s, the Federal government, in order to spur the flagging film industry, provided tax shelters for those willing to invest in Canadian film production.¹⁴⁶ The result was a sharp increase in the number of feature films being made, but the quality of many of the films was atrocious.¹⁴⁷ In the early 1980s, the amount which an investor in a film project could deduct or shelter was considerably reduced and Canadian film production slowed to all but a trickle.¹⁴⁸ Instead, the Canadian

¹⁴³ *Id.* Unfortunately, Rosen's attitude towards the (lack of) historical development of a strong artist class in the United States displays an amount of cultural priggishness not commonly encountered in the pages of law reviews. His belief in art for art's sake is to be commended, and it is a view no less a person than Justice Brandeis would have agreed with. *Supra* notes 101-05 and accompanying text. Nevertheless, to argue that the U.S has not contributed very much to art is simply to ignore the fact that the commercialism so decried by Rosen, at least in the arts, began in Europe long before it did in the United States where it was merely emulated. See, e.g., **John Berger, Ways of Seeing** 83-113 (on the depiction of things in European paintings during the 18th and 19th centuries) 7-33 (on the commercialization of art) (BBC and Penguin, London, 1972). It could be argued that the U.S.' lack of pretensions was a much needed breath of fresh air for art. Witness Jasper Johns and Roy Lichtenstein.

¹⁴⁴ Konigsberg, *supra* note 100, at 300-10 (discussing the European Community); Gathercole, *supra* note 138, at 45.

¹⁴⁵ **Posner**, *supra* note 137.

¹⁴⁶ **Pendakur**, *supra* note 138, at 169-93; Scott Haggett, Canadian Movie Makers Come of Age, **Fin. Post**, Sept. 9, 1993, at 15.

¹⁴⁷ One Canadian film critic, leaving after seeing part of a Canadian film at the Cannes festival in 1980, remarked he felt like throwing up. Haggett, *supra* note 146, at 15. Another critic had this to say about the era:

From the Twenties on, Canadians bought at American movies an image of themselves that has nothing to do with their own reality. But given the opportunity to bring their disparate experiences to the screen, to engender their own dreams and to immortalize their own mythologies, they opted in most instances for slavish imitation of American dreams, for a crude approximation of American mythology and its attendant iconography.

Jay Scott, Burnout in the Great White North, in **Take Two: A Tribute to Film in Canada** 34 (Seth Feldman ed., Irwin Publishing, Toronto, 1984).

¹⁴⁸ Haggett, *supra* note 146, at 15.

government essentially decided to abandon the feature film market and emphasize aid to television production. Since Canadian films only commanded 3% of Canadian screens, and the distribution and exhibition networks were dominated by the United States, it was decided that it would be more efficient and effective to expend monies in support of Canadian television content, which still commanded about twenty percent of broadcast time.¹⁴⁹ Canadian content requirements for broadcasting were strengthened,¹⁵⁰ and throughout the 1980s, with the aid of Telefilm Canada,¹⁵¹ Canada developed an industrial base of television, and, indirectly, film production.¹⁵² Because of the availability of highly skilled production crews and the strength of the U.S. dollar in Canada, United States film producers increasingly began going North to film their stories, a reality still existent today.¹⁵³

Almost simultaneous with the negotiations of the Canada/U.S. Free Trade Agreement, Communications Minister Flora McDonald tabled a bill in the Canadian House of Commons in 1987 that would have boosted the Canadian film industry considerably.¹⁵⁴ Since the United States film distributors considered Canada as part of its own film market, and contracted away the distribution rights for U.S. films as such,¹⁵⁵ the bill, dubbed the Federal Distribution Bill, would have ended this practice and forced many film producers to deal with Canadian film distributors to license their films in Canada.¹⁵⁶ The government's hope was that the bill would create a distribution infrastructure whose profits would remain in Canada and finance more Canadian film production and exhibition.¹⁵⁷ The reaction from the U.S. film industry was swift.

¹⁴⁹ The State and/or/of Canadian Cinema: A Debate Around "The Cinema We Need", **Cinema Canada**, July-Aug. 1985, at 26.

¹⁵⁰ Konigsberg, *supra* note 100, at 292. Canadian television content levels were increased to 60% of all day programming, and 50% for evening, or prime time programming. *Id.*

¹⁵¹ Telefilm Canada is a federal film and television funding agency that provides financial assistance to Canadian television and filmmakers and Canadian co-productions. Nelson Wyatt, Telefilm Sets New Record For Help, **Calgary Herald**, Sept. 4, 1992; Canada Newswire, Telefilm Canada Budget to Be Slashed by 10% for 1993-94 and 1994-95 (Dec. 7, 1992).

¹⁵² **Pendakur**, *supra* note 138, at 214-15.

¹⁵³ Clyde H. Farnsworth, The Versatile City That Film Makers Like to Film, **N.Y. Times**, Apr. 10, 1993, at D15.

¹⁵⁴ **Pendakur**, *supra* note 138, at 269.

¹⁵⁵ Ian Austen, Hollywood Goes to War, **Maclean's**, June 22, 1987, at 53.

¹⁵⁶ **Pendakur**, *supra* note 138, at 264-66.

¹⁵⁷ *Id.* at 264-65.

Jack Valenti, President of the Motion Picture Association of America (MPAA), went to Ottawa to speak with Ms. McDonald and was reportedly "lectured" by her and told there would be no change of course.¹⁵⁸ When his suggestion that Canada place a tax on its box office to support its film industry was rebuffed, Valenti turned to Washington.¹⁵⁹ Soon even President Ronald Reagan became involved, voicing concerns to Prime Minister Mulroney during a summit conference in Ottawa in 1987.¹⁶⁰ The U.S. Congress passed a resolution condemning the Canadian bill with unveiled threats that the CFTA would be derailed if the Bill became law.¹⁶¹

In 1988, the Federal Distribution Bill died quietly when the House of Commons adjourned for the Federal elections.¹⁶² The major campaign issue was whether Canada should enter into the CFTA with the United States.¹⁶³ The Conservatives, who had initiated the talks, won a handy majority. Though there was talk in the Communications Ministry until 1991 of reintroducing the Distribution Bill, nothing ever happened. It is highly doubtful such a Bill could have been passed in Canada without there being pressure placed on the U.S. government by the strong film lobby headed by Valenti to retaliate under the CFTA cultural "exemption" provision.¹⁶⁴ For all intents and purposes, Canadians were doomed to having practically no access to the exhibition market to show their own films in Canada.¹⁶⁵ Only a handful of Canadian filmmakers could hope to be seen on anything other than Canadian television screens. These include such notables as David Cronenberg, Atom Egoyan, Brian McDonald, and Quebec filmmakers Denys Arcand and Jean-Claude Lauzon. Admittedly they are an impressive group. The fact that, other than the first two, they work so sporadically leaves pause to wonder.

During negotiations for the North American Free Trade Agreement (NAFTA), the U.S.

¹⁵⁸ Austen, *supra* note 155, at 54.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ **Pendakur**, *supra* note 138, at 271.

¹⁶² *Id.* at 275.

¹⁶³ For an excellent study on the 1988 Canadian Federal elections *see* **David Taras, The Newsmakers** (Nelson, Scarborough, Ont. 1990).

¹⁶⁴ CFTA, *supra* note 3, chap. 21, art. 2005; *supra* note 130-37 and accompanying notes.

¹⁶⁵ The amount of screen space devoted to Canadian films in Canada has been estimated to be less than three percent. U.S. movies make up the bulk of the Canadian film market. **Pendakur**, *supra* note 138, at 266; Brian D. Johnson, Casting Hollywood North, **Maclean's**, Feb. 17, 1986, at 34.

again pressured Canada to drop the cultural industries exemption but failed to do so.¹⁶⁶ Again, the political atmosphere in Canada would have made passage of such a deal practically impossible.¹⁶⁷ But it became clear as the negotiations for the deal proceeded that the U.S. had another target in mind when complaining about the cultural exemption: Europe.¹⁶⁸ They were worried that the Europeans might try to use Canada's cultural exclusion as a shield at the GATT talks, as the French eventually did.¹⁶⁹

One remarkable aspect of the NAFTA, practically ignored by the press, is the strong intellectual property protection it forces Canada, Mexico and the United States to abide by.¹⁷⁰ Mexico has long had a history of piracy within its borders.¹⁷¹ Even before the NAFTA was completed, Mexico passed legislation that increased its levels of intellectual property

¹⁶⁶ Canada: A Free Trader Draws the Line At Culture, **Fin. Post.**, July 29, 1991.

¹⁶⁷ Canadians were generally more opposed to NAFTA than they had been of the CFTA, blaming the latter for the current severe depression in Canada. Brian Mulroney's popularity was at a depth generally unheard of in western democratic politics. Yet the Conservatives still had a strong majority in the House and the deal was passed before Mulroney stepped down as Prime Minister in June. Elections were held in October 1993, and the Liberals, under Jean Chretien, won a sweeping majority, partly on a promise to renegotiate NAFTA. What little was changed is not worth mention here.

The situation for new Democratic President Bill Clinton in the United States was not much easier. Faced with a deal negotiated by his Republican predecessor, Clinton was looking at a divided Democratic majority in the House opposed to the Agreement, fearing mostly what Presidential candidate Ross Perot had described during the election campaign as the "sucking sound" of U.S. jobs disappearing to Mexico where wages were lower. Nevertheless, after the President strenuously lobbied individual House members, the House of Representatives passed the bill by a comfortable margin on November 17. The Senate soon gave its assent, and President Clinton signed the Agreement on December 18, 1993, allowing NAFTA to come into effect on January 1, 1994. See John Daly, Down to the Wire, **Maclean's**, Nov. 22, 1993, at 34; John Daly, The Fight for Open Markets, **Maclean's**, Nov. 29, 1993, at 32-35; Deirdre McMurdy, The Great Global Trade-Off, **Maclean's**, Dec. 27, 1993, at 49-49.

¹⁶⁸ Supra note 166; Matthew Fraser, A Question of Culture: The Canadian Solution Resolves A GATT Standoff, **Maclean's**, Dec. 27, 1993, at 50-51.

¹⁶⁹ *Id.*

¹⁷⁰ NAFTA, *supra* note 6, chap. 17.

¹⁷¹ John B. McKnight & Carlos Muggenburg, Mexico's New Intellectual Property Regime, 27 **Int'l Law.** 27, 29 (1993).

protection.¹⁷² As in Canada during the mid-1980s,¹⁷³ Mexico had come to realize that isolation was not the answer to its economic difficulties and decided to turn to the increasingly interrelated global trade to boost its economy.¹⁷⁴ Its intellectual property legislation was seen as a positive sign of its intentions in negotiating the NAFTA trade pact.¹⁷⁵ What the intellectual property provisions of Chapter 17 of the NAFTA do is build upon the draft agreement reached during the Trade Related Aspects of Intellectual Property Rights (TRIPs) negotiations of the Uruguay Round of the GATT.¹⁷⁶ Consequently, they will be examined side by side.

IV. Intellectual Property Under NAFTA and GATT

During the late 1970s and early 80s, the U.S. government was being urged by various domestic copyright industries to increase pressure on various countries to enforce or enact stronger intellectual property laws to protect U.S. goods from piracy.¹⁷⁷ In response, the U.S. government took a dual approach to the problem.¹⁷⁸ The first was to address the issue on a bilateral basis. The Trade Act of 1984¹⁷⁹ was enacted to give more authority to the United States Trade Representative Office (USTR) in the area of intellectual property trade disputes.¹⁸⁰ Section 301 of the Act made a nation's inadequate intellectual property protection a ground for unilateral retaliatory trade action by the United States.¹⁸¹ The second was to have intellectual

¹⁷² *Id.*

¹⁷³ *Supra* note 124-26 and accompanying text.

¹⁷⁴ McKnight & Muggenberg, *supra* note 171, at 28.

¹⁷⁵ *Id.*

¹⁷⁶ Charles S. Levy & Stuart M. Weiser, The NAFTA: A Watershed for Protection of Intellectual Property, 27 *Int'l Law*. 671, 672 (1993).

¹⁷⁷ **Terence P. Stewart, *The GATT Uruguay Round: A Negotiating History*** 2255 (Kluwer, Cambridge, MA, 1993).

¹⁷⁸ *Id.* at 2255, 2259

¹⁷⁹ Trade and Tariff Act of 1984, Pub. L. No. 9-573, 98 Stat. 2948 (1984).

¹⁸⁰ 19 U.S.C. § 2462(c)(5) (1988).

¹⁸¹ A "special" 301 was passed by Congress in 1988 to place even more urgency on intellectual property issues, providing for the United States Trade Representative (USTR) to identify countries that did not enforce or did not have any protection for intellectual property rights (China is an example, it did not have a copyright law until 1990) and to begin bilateral negotiations within a strict time period before retaliatory action would occur. 19 U.S.C. § 2242

property protection included within the Uruguay Round of the GATT.¹⁸² The later was not easy to accomplish. The process began at the GATT Ministerial Meeting of 1982 when U.S. Trade Representative William Brock suggested that negotiations should begin for a Code that would prohibit counterfeiting of goods.¹⁸³ Developing countries such as Brazil and India vehemently opposed the U.S. proposal, arguing that the GATT's jurisdiction did not include intangible as opposed to tangible goods and that intellectual property was within the purview of the World Intellectual Property Organization (WIPO).¹⁸⁴

A study program "on the trade aspects of commercial counterfeiting"¹⁸⁵ was announced in the 1982 Ministerial Declaration, and an Expert Group was established to study the effect of counterfeit goods on international trade two years later at the 40th Session of the Contracting Parties of GATT.¹⁸⁶ Despite opposition by the developing countries, by the time proposals were accepted for the 1986 Ministerial Declaration on the Uruguay Round, the United States, with support from Japan, managed to have all intellectual property, not just counterfeiting of trademarked goods, accepted as one of the dozen or so subjects for negotiations in the new round of trade talks.¹⁸⁷

Inclusion of TRIPs in the Uruguay round would eventually prove to be a quite a coup for the United States. Since leaving UNESCO in 1984, and not then being a member of the Berne Union, the U.S. had essentially become lone person out among industrialized nations in the area of international copyright relations.¹⁸⁸ One of the major complaints, of the U.S. and other nations, in this area had been about the lack of effective enforcement and dispute resolution procedures under the Berne and U.C.C. conventions.¹⁸⁹ With the TRIPs negotiations, the U.S.

(1988); **Stewart**, *supra* note 177, at 2257; Levy & Weiser, *supra* note 176, at 671 n.1; Douglas Jehl, Clinton Makes No Progress With Beijing, **N.Y. Times**, May 3, 1994, at A8.

¹⁸² **Stewart**, *supra* note 177, at 2260-61.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2261. WIPO is a United Nations organization created in 1967 to take over the administration of various intellectual property treaties, including the Berne Convention. **Ricketson**, *supra* note 31, at 123.

¹⁸⁵ **Stewart**, *supra* note 177, at 2261.

¹⁸⁶ *Id.* at 2261-62.

¹⁸⁷ *Id.* at 2262-63.

¹⁸⁸ *Supra* notes 70-75 and accompanying text.

¹⁸⁹ **Stewart**, *supra* note 177, at 2253. Countries had every reason to complain. As Stephen

hoped that these contentious issues could be dealt with through the GATT.¹⁹⁰ In this endeavor, the United States succeeded. With the completion of the Uruguay Round, GATT, to be renamed the World Trade Organization (WTO), had an agreement on TRIPs which provided for dispute resolution under ordinary WTO rules.¹⁹¹ Suddenly international copyright protection was no longer solely the domain of UNESCO and WIPO; they were effectively replaced by the WTO and its forum to settle disputes.

The most important provision on copyright protection in the TRIPs agreement is that all "Members shall comply with Articles 1-21 and the Appendix of the Berne Convention

Stewart has pointed out, all multilateral treaties on authors' rights today abide by the principle of national treatment. **Stewart**, *supra* note 2, at § 3.15. What this means is that the level of protection a work can be expected to maintain will usually depend on the country where the protected work is located. *Id.* Thus, if Germany provides a term of protection of 70 years post-author death, and Canada provides 50, different copies of the same work can get varying terms of protection depending on where they are located. This explains why some cases brought under moral rights principles in the United States have been lost, but have been won in a different country. DaSilva, *supra* note 23, at 1-3. The advantages of national treatment is that it provides a certain measure of certainty and assures local courts that they will not be judging cases based on law which they may not be unfamiliar with. Cary H. Sherman & David E. Korn, *Overview of Major Principles in International Intellectual Property Law*, in **International Aspects of Intellectual Property Law** 9 (New York State Bar Association, 1991). The disadvantage of national treatment, especially where disputes between countries are not quickly settled or otherwise taken care of, is that individual countries with low levels of protection will be able to take advantage of works from countries with higher levels of protection to the disadvantage of the other country's copyright owner(s). *Id.* Again, the moral rights cases prove the point.

Though the Berne Convention abides by the principle of national treatment, Berne, *supra* note 1, art. 5, it also provides for certain minima which Union members must abide by. Article 6bis is one such minima. When countries do not abide by the minima, and the administrative agent (WIPO) of the Convention does not, or can not act effectively to obtain compliance, protection risks breaking down. This was the situation complained of and taken care of by the TRIPs agreement. By providing for dispute resolution procedures within the GATT, namely Articles XXII and XXIII, there now exists an effective forum to resolve the hypothetical disputes raised above and throughout this article. GATT, *supra* note 10, arts. XXII & XXIII; TRIPs draft, April 15, 1994 (LEXIS, Intlaw library). These procedures are beyond the scope of this article.

¹⁹⁰ **Stewart**, *supra* note 177, at 2260.

¹⁹¹ TRIPs draft, *supra* note 189, art. 64.

(1971)."¹⁹² By the time the Members of the WTO have complied with this provision, it is likely that many more nations will become members of the Berne Union,¹⁹³ thus marking a significant advance in the development of the international law of copyright.¹⁹⁴ However, the agreement does not require joining the Union, only compliance with the Berne Convention's substantive Articles.¹⁹⁵ Although alone amongst **all** the countries involved in its opposition, the United States managed to have moral rights excluded from the TRIPs agreement.¹⁹⁶ The agreement reads: . . . Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of . . . [the Berne] Convention or of the rights derived therefrom."¹⁹⁷ With this limit, the United States can continue to avoid the Article 6bis requirements of protection of moral rights in the U.S. with impunity since the enforcement measures of the WTO will not apply.

Even before the Uruguay Round was completed, the TRIPs agreement was showing its influence in other areas, especially the NAFTA. Most of the negotiations on TRIPs had been completed in December 1991.¹⁹⁸ The agreement was delayed by events to be examined later and by difficulties in other areas of the Uruguay Round, notably that of agriculture and France's insistence on maintaining much of the protections and subsidies provided to its politically powerful farmers.¹⁹⁹ NAFTA took what was called the Dunkel Draft of the TRIPs agreement²⁰⁰

¹⁹² TRIPs draft, *supra* note 189, art. 9.

¹⁹³ The Berne Union currently consists of over 80 nations. *See* 17 U.S.C.A. § 104 (Supp. 1994).

¹⁹⁴ In the sense that the minimum levels of protection provided by Berne and TRIPs show general and concordant practice of states, an effective grievance procedure will help establish **opinio uris sive necessitatis**, and thus an international law of copyright. *See* North Sea Continental Cases, (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3. So far, no commentator has been willing to posit that any international law exists in the area of intellectual property precisely due to the fact of national treatment and lack of consistent practice between states.

¹⁹⁵ TRIPs draft, *supra* note 189, art. 9.

¹⁹⁶ *Id.*; Stewart, *supra* note 177, at 2282.

¹⁹⁷ TRIPs draft, *supra* note 189, art. 9.

¹⁹⁸ Stewart, *supra* note 177, at 2282.

¹⁹⁹ *Id.* at 2286.

²⁰⁰ Levy & Weiser, *supra* note 176, at 672.

and used it as a floor to provide for even more intellectual property protections between Canada, Mexico and the United States.

Where the TRIPs agreement is limited by the list of protectable works found in Article 2 of the Berne Convention, Article 1705 of the NAFTA provides that copyright protection is to be extended to "any other works that embody original expression," thus allowing for the protection of emerging technological media of information such as multi-media works and virtual reality.²⁰¹ This will become very important in the near future as the United States and Canada are leaders in these areas: works which will one day, it is hoped and believed, be carried over the "information superhighway" linked directly to homes.²⁰² Like TRIPs, the NAFTA also provides that the parties are to abide by the Berne Convention, as a minimum,²⁰³ but in NAFTA they must also accede to Berne.²⁰⁴ Canada, so far, has only acceded to the 1928 Rome round of the Berne Convention.²⁰⁵ Both the U.S. and Mexico have acceded to the 1971 Paris round, and the 1979 amendments, the latest binding action by the Union.²⁰⁶ NAFTA requires Canada to accede to the latest round, thus requiring some changes to its copyright law. Though the countries are required to provide these protections as a minimum, again the U.S. has managed to avoid protecting the moral rights found in 6bis of Berne. In an annex to the NAFTA's chapter on intellectual property, it is stated that: "[T]his Agreement confers no rights and imposes no obligations on the United States with respect to Article 6bis of the Berne convention, or the rights derived from that Article."²⁰⁷

Since the moral rights provisions of the Berne Convention do not apply to the United States amongst the members of NAFTA (they do apply to Canada and Mexico), one provision not included in TRIPs, and sure to be of aid to the U.S. motion picture industry, is Article

²⁰¹ NAFTA, *supra* note 6, art. 1705. Both TRIPs and the NAFTA extend copyright protection to computer programs under Berne, an important development since Mexico until that time had believed computers to be outside the purview of the Berne Convention. Levy & Weiser, *supra* note 176, at 673.

²⁰² Edmund L. Andrews, Big Risk and Cost Seen in Creating Data Superhighway, **N.Y. Times**, Jan. 3, 1994, at C17

²⁰³ NAFTA, *supra* note 6, arts. 1701(2), 1702; TRIPs draft, *supra* note 189, art. 9.

²⁰⁴ NAFTA, *supra* note 6, art. 1701(2).

²⁰⁵ See **Stewart**, *supra* note 2, at § 5.69; Berne, *supra* note 1.

²⁰⁶ *Id.*

²⁰⁷ NAFTA, *supra* note 6, annex 1701.3(2).

1705.²⁰⁸ Paragraph (3) of that article provides for the free alienation of an author's economic rights, including in contracts of employment, to be exercisable by the end owner as it pleases.²⁰⁹ Thus a U.S. film producer filming in Canada or Mexico would not have to fear either limits placed by a contributor's moral rights nor any possible limits Canada or Mexico could impose on contracts for work-for-hire.²¹⁰ As in the United States, the film producer would own all rights in the film free and clear.²¹¹ Finally, NAFTA extends its protections to not just copyrights, but also to what are called neighboring rights.²¹² These rights include the right to lend, rent, or lease copyrighted works for profit.²¹³ The TRIPs agreement did not go this far, partly due to the fact that Japan already had an advanced rental system in place, which, at least as to rentals of sound recordings, was grandfathered.²¹⁴ The fear in protecting neighboring rights is that it leaves individual countries open to impose levies on audio and visual works.²¹⁵ These levies can then in turn be used to support local arts activities or distributed to local performers without consideration of the nationality of the works being levied.²¹⁶ A country as dominant as the United States is in popular culture is the hardest hit by such losses in "revenue." It is precisely such levies imposed by the French at their motion picture box offices, as well as European broadcast content requirements, that almost scuttled the Uruguay round of negotiations of the GATT.

V. The Experience with France in Perspective

The confrontation between the U.S. and France over free trade in cultural industries could have been foreseen after the negotiations with Canada and Mexico. In fact, the problems with France actually predate the CFTA and NAFTA. In 1984, a European Community (EC) commission released a Green Paper on Television Without Frontiers, a study on the importance

²⁰⁸ NAFTA, *supra* note 6, art. 1705.

²⁰⁹ *Id.*

²¹⁰ *Supra* note 36 and accompanying text.

²¹¹ *Id.*; *supra* notes 53 & 54 and accompanying text.

²¹² **Stewart**, *supra* note 2, at § 7.01.

²¹³ *Id.*

²¹⁴ TRIPs draft, *supra* note 189, art. 11.

²¹⁵ **Stewart**, *supra* note 2, at § 3.23.

²¹⁶ *Id.*

of broadcasting for EC integration.²¹⁷ The Green Paper was clear that encouraging broadcasting between member states, without barriers, was desirable, and that an effort to protect European culture from outside domination required EC action.²¹⁸ "Frequent warnings are heard about the danger of cultural domination of one country by another in the cinema, although this is not a problem between Member States."²¹⁹ If any doubt as to who was dominating who existed, the suggestion that creation of a single EC television market was needed as an "essential step if the dominance of the big American media corporations is to be counterbalanced,"²²⁰ made clear who the target was. In 1989, an E.C. Directive was issued putting these suggestions into effect. It stated: "Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time. . . ."²²¹ The U.S. House of Representatives quickly passed a resolution denouncing the E.C. Directive,²²² much like it had when Canada attempted to enact legislation to gain a foothold within its own film distribution market.²²³

Some of the content of the Resolution hints at where future actions could take place against the EC, now the European Union, as to its protective actions in regards to its cultural industries. One area will likely be within GATT,²²⁴ now the World Trade Organization, or through unilateral use of section 301 of the Trade Act.²²⁵ The U.S. squabble with France over

²¹⁷ Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, especially Satellite and Cable, COM(84)300 (1984) [hereinafter Green Paper].

²¹⁸ Green Paper, *supra* note 217, at 1, 33.

²¹⁹ *Id.* at 33.

²²⁰ *Id.*

²²¹ Council Directive, of 3 October 1989, on the Coordination of Certain Provisions Laid Down By Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298), reprinted in 28 I.L.M. 1492 (1989), art. 4(1) [hereinafter TV Directive].

²²² Konigsberg, *supra* note 100, at 309 n.175.

²²³ *Supra* note 161 and accompanying text.

²²⁴ Konigsberg, *supra* note 100, at 309 n.175 (The resolution states in part: "Whereas such local content requirement violates the General Agreement on Tariffs and Trade (GATT), specifically Article I relating to most-favored-nation treatment and Article III relating to national treatment . . .").

²²⁵ *Supra* notes 179-81 and accompanying text. See, e.g., **Edward S. Yambrusic, Trade-Based Approaches to the Protection of Intellectual Property** (Oceana Publications, New

motion pictures which threatened failure of the whole Uruguay Round demands closer examination to see what can be done to avoid reoccurrence of similar situations in the future.

Other than the broadcast content requirements and their quotas, what particularly seemed to irk the U.S. film industry and its lobby led by MPAA president Jack Valenti was the fact that France imposed an 11% tax on movie tickets sold in the country.²²⁶ The receipts from this tax are placed into a fund run by a government agency which distributes the proceeds to French and European filmmakers to help produce their films.²²⁷ Hollywood, and Hollywood it was because all of the major motion picture studios in the U.S. are based in its California vicinity, resented not being able to collect what it saw as its share of these proceeds.²²⁸ After all, 60% of French movie screens show motion pictures made in, or by, the U.S.²²⁹ The French turned that one right side up again and pointed out that it was precisely because the U.S. so dominated its movie screens that the tax was needed to prevent the obliteration of what was left of its film industry.²³⁰ Even French President Francois Mitterand became involved when he stated: "A society which abandons the means of depicting itself would soon be an enslaved society."²³¹

What is truly ironic about the whole issue is that as recently as 1987, Valenti himself was suggesting that Canada use such a levy system in order to build up its own film industry.²³² Valenti has become so identified with U.S. motion picture interests that he actually wound up hurting the U.S. delegation in France.²³³ His ad hominem attacks were seen as an assault against what the French believed to be their culture.²³⁴ As one anonymous journalist put it, in France, Valenti is "the face of cultural imperialism."²³⁵ The Canadian film industry has known this for

York, 1992).

²²⁶ Goodell, *supra* note 12, at 134.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 135.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Supra* notes 158 & 159 and accompanying text.

²³³ Goodell, *supra* note 12, at 136.

²³⁴ *Id.*

²³⁵ *Id.*

years.²³⁶ One reporter, examining the situation soon after the U.S. was forced to abandon its pressure on France, to save the Uruguay Round of negotiations, explained the event as follows:

In the end, the GATT debacle was a classic example of cross-cultural static in the new world order. To the French, who tend to trust government more than business, it's perfectly natural that the government should be involved in film and TV; to Americans, who trust business over government, that is akin to socialism. In France the movie business is like a big family; in Hollywood it is like Bosnia, full of bloodshed and tribal warlords. So it's no surprise that when the Americans talked about a trade war, the French took it personally. What they didn't understand was that in Hollywood, everyone talks like that all the time.²³⁷

Unfortunately, as this quote implies, the French were expected to understand this brand of "Americanism" and just deal with it. In the end, the French turned the tables and played the "American" game and won. Had the arguments not turned into polemics and personal attacks, quite possibly the whole issue could have been avoided, and a suitable compromise reached. As the situation stands now, the EU feels justified in studying further measures to protect its cultural industries,²³⁸ probably beyond what is necessary, while the U.S. contemplates possible retaliatory measures,²³⁹ all because both sides agreed to disagree.²⁴⁰

Conclusion

My thesis is that the United States' negotiating strategies in dealing with Canada's cultural exemption in the CFTA and NAFTA, and its reaction to France's refusal to include cultural industries in the final round of the GATT negotiations, can be explained by numerous factors, an important one being the differences in protection of authors' rights in the United States, and the rest of the world.²⁴¹ The United States has refused to extend more than cursory protection to the moral rights of its authors because it contradicts the purposes of the U.S. copyright system to

²³⁶ *Supra* notes 158-60 and accompanying text.

²³⁷ Goodell, *supra* note 12, at 139.

²³⁸ *Id.*

²³⁹ Andre Viollaz, U.S. Still Putting Heat on EU over Films, **Agence France Presse**, Apr. 5, 1994.

²⁴⁰ Keith Bradsher, The World Trade Agreement: An Overview, **N.Y. Times**, Dec. 15, 1993, at A1.

²⁴¹ *Supra* notes 196 & 197 and accompanying text.

benefit the public foremost.²⁴² These purposes have been achieved by providing an economic incentive to authors to create original works. Through a system of trade regulation of the economic rights granted by copyright, the U.S. Copyright Act has made the United States one of the greatest purveyors of popular culture in the world.

In the end, all of this has occurred by treating copyrighted works not as creations imbued with the rights and spirits of their authors, but simply as any other goods to be bought or sold at a profit.²⁴³ Since the U.S. has never been threatened by outside cultural domination, (and where it has, it has usually succeeded in destroying it)²⁴⁴ U.S. trade representatives "just don't get it"²⁴⁵ when other countries have taken action to protect their cultural heritage in hope of protecting and furthering its development, and in consequence thereof, defining themselves to themselves and to others in the Global Village. Since such stratagem are seen as protectionist measures against trade in its copyrighted "goods," the U.S. cannot understand that such bars to entry are not always meant as retaliation for having a stronger product, or to protect a weaker "industry" per se, but as a nation's wish to control its own cultural destiny which it has a sovereign right to exercise.²⁴⁶ The U.S. would bar this exercise of a sovereign's prerogative for the sake of better trade, competition, and, yes, for the sake of free speech. If the increasingly interdependent international marketplace of ideas tends to favor what U.S. producers have to say, free speech, according to Justice Brandeis, is an end in and of itself.²⁴⁷ To prevent its flow is, well, anti-"american." Though this might help explain the U.S. mindset, it does not excuse the fact that the U.S. comes across in precisely the fashion it has historically rebelled against -- imperial rulers who would impose their commands without care for the consequences.

²⁴² *Supra* Part II.

²⁴³ Goodell, *supra* note 12, at 134.

²⁴⁴ Rosen, *supra* note 23, at 181.

²⁴⁵ *Supra* note 17 and accompanying text.

²⁴⁶ Culture is viewed as a necessary agent in the process of social and political self-definition, and national identity remains a salient issue in the various debates over Canadian culture. Culture can increase our determination and potential to act upon and understand the environment we live in because it delineates our position in relation to that environment. It shows in who and where we are. In Canada, where most of the cultural products consumed are imported from other political and cultural contexts, the situation is regarded as urgent and particularly pronounced.

Geoff Pevere, The rites (and wrongs) of the elder of The Cinema We Got: The Critics We Need, *Cinema Canada*, July-Aug. 1985, at 36.

²⁴⁷ *Supra* note 101-05 and accompanying text.

Given the success of the U.S. experiment in copyright and free speech, one should not expect any changes soon in United States trade and intellectual property policy. The question becomes whether the U.S. should be emulated, or resisted. That is up to the individual countries to decide, either on their own, or collectively, maybe through the new World Trade Organization. But countries like Canada and those in the European Union are not entirely to be blamed when they bristle at U.S. attempts to dominate their domestic cultural markets. Once a country loses its ability to define itself to its own people, it exchanges more than just a tool in its economic policy for the sake of free trade. It loses an important element of its sovereignty. As a consequence, the United States gets branded as a cultural imperialist. Thus international copyright and trade relations in the area of cultural industries should be approached cautiously, as a cultural experience almost, and not as a game of win, loose or draw.