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**MARSHALLING
COPYRIGHT
KNOWLEDGE TO
UNDERSTAND
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OF BERNE**

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Peter K. Yu
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MARSHALLING COPYRIGHT KNOWLEDGE TO
UNDERSTAND FOUR DECADES OF BERNE

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* Copyright © 2022 Peter K. Yu. Regents Professor of Law and Communication and Director, Center for Law and Intellectual Property, Texas A&M University. An earlier version of this Article was presented at “‘Marshall’ Law: An Intellectual Property Law Workshop Honoring the Career of Professor Marshall Leaffer” at Indiana University Maurer School of Law. The Author is grateful to Mark Janis and the Center for Intellectual Property Research for their kind invitation and hospitality.

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INTRODUCTION

In the year 1978, the 1976 Copyright Act had just entered into effect. Marshall Leaffer, whom this article will affectionately refer to by his first name, had just completed his duties as an attorney advisor at the U.S. Copyright Office. On his way to academia, he, like the fictional character Captain William “Buck” Rogers,¹ was to experience cosmic forces beyond all comprehension. In a freak mishap, his car veered off a rarely used mountain road and was frozen by temperatures beyond imagination. He did not return to academia until more than forty years later. What will he discover upon his return? Will he find the developments in the intervening decades interesting or surprising? What observations would he make had he not been frozen in 1978?

Answering these questions is the charge of this tribute. Because of Marshall’s love for copyright law, his many important contributions to the international intellectual property field, and his longtime membership in the *Association Littéraire et Artistique Internationale*² (ALAI), this Article pays tribute by examining the past four decades of developments surrounding the Berne Convention for the Protection of Literary and Artistic Works³ (“Berne Convention”). Parts I to III focus on three areas that are usually explored in relation to the Convention’s revision process: (1) the arrival of new members; (2) the advent of new technologies; and (3) the introduction of new rights and

¹ This imaginary scenario was chosen for three reasons. First, the protection of fictional characters is a staple in copyright law. See MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 88–90 (7th ed. 2019) (discussing such protection); Marshall Leaffer, *Character Merchandising in the U.K., a Nostalgic Look*, 11 U. MIAMI ENT. & SPORTS L. REV. 453 (1994) (analyzing the comparative legal issues involving character merchandising). Second, BUCK ROGERS IN THE 25TH CENTURY (Universal Pictures 1979), followed by a two-season television show, was released in the first year of Marshall’s teaching career. Finally, and on a more personal level, Marshall’s *Understanding Copyright Law* and his article on character merchandising were some of the first works of his that I encountered when I wrote my student note. Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355 (1998).

² Founded in 1878 by French novelist Victor Hugo as the International Literary Association, this association played crucial roles in the founding of the Berne Convention. See Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 19–22 (1986); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 337–38 (2004) [hereinafter Yu, *Currents and Crosscurrents*].

³ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971) [hereinafter Berne Convention].

limitations. Part IV concludes by examining the emergence of new external influences.

I. NEW MEMBERS

In our admittedly imaginary scenario, Marshall returned to academia in 2021 after being frozen for more than four decades. The first thing he would discover about the Berne Convention is likely the United States' accession in November 1988, which became effective on March 1, 1989.⁴ Considering that the 1976 Copyright Act was partly drafted with this goal in mind, and that Marshall was advising former Register of Copyrights Barbara Ringer on the statute's implementation before he was frozen, he would be unlikely to find such accession surprising. In fact, he would be elated to learn that the new statute that he helped implement had paved the way for the United States' accession a decade later.

By changing the duration of copyright protection from two terms of twenty-eight years to the life of the author plus fifty years,⁵ the 1976 Copyright Act has made "some progress . . . toward [the United States'] entry into the Berne Convention."⁶ The phasing out of the manufacturing clause, which required the local production of "work[s] consisting preponderantly of nondramatic literary material . . . in the English language,"⁷ also helped remove another key barrier.⁸ The Berne Convention Implementation Act of 1988 finally addressed the remaining barriers⁹ by limiting the applicability of the provisions on formalities to U.S. works¹⁰ and thereby facilitating the

⁴ WIPO-Administered Treaties: Contracting Parties > Berne Convention [Total Contracting Parties: 181], WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15 (last visited Mar. 28, 2022) [hereinafter *Contracting Parties*].

⁵ See 17 U.S.C. § 304 (stipulating the duration of copyright protection).

⁶ LEAFFER, *supra* note 1, at 12.

⁷ 17 U.S.C. § 601(a) (repealed 2010). The manufacturing clause expired on July 1, 1986. Marshall Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373, 398 (1990) [hereinafter Leaffer, *International Copyright*].

⁸ See Leaffer, *International Copyright*, *supra* note 7, at 398–402 (discussing the abrogation and limited lingering effects of the manufacturing clause).

⁹ See LEAFFER, *supra* note 1, at 570 ("The most significant change to American copyright law brought about by the Berne Convention Implementation Act of 1988 amendments is the abrogation of required notice for publicly distributed works on or after March 1, 1989.").

¹⁰ See 17 U.S.C. § 411 ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

conformity of U.S. copyright law with Article 5(2) of the Berne Convention, which stipulated that “[t]he enjoyment and the exercise of [the covered] rights shall not be subject to any formality.”¹¹

One issue that has continued to bother other Berne members after the United States’ accession concerns the limited protection of moral rights.¹² Although Congress adopted the Visual Artists Rights Act of 1990,¹³ that statute provides only limited protection to the rights of attribution and integrity in the small category of visual art, which covers paintings, drawings, prints, sculptures, and still photographic images.¹⁴ Such protection therefore does not fully meet the requirements stated in Article 6*bis* of the Berne Convention.¹⁵ Upon his return in our imaginary scenario, Marshall would be likely to find these moral rights issues highly interesting. Indeed, had he not been frozen at the time of the Berne accession, he would probably have weighed in on the debate by noting the different protections for moral rights in France and the United States.¹⁶

While the United States’ accession was one of the more notable developments concerning new Berne members, two other members deserve attention. China joined the Berne Convention on July 10, 1992,¹⁷ after

¹¹ Berne Convention, *supra* note 3, art. 5(2).

¹² See ROBERTA KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 37 (2009) (“[T]here is the stark reality that [the United States] may not be in compliance with [its] obligations under the Berne Convention.”); Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873, 875 (2014) (“Notwithstanding the United States’s obligations under the Berne Convention and its role as a vocal global champion of intellectual property rights, the country has yet to protect moral rights to the same extent as its counterparts in continental Europe.”).

¹³ 17 U.S.C. § 106A.

¹⁴ See *id.* § 101 (defining a “work of visual art”).

¹⁵ See Berne Convention, *supra* note 3, art. 6*bis*(1) (“Independently of the author’s economic rights, and even after the transfer of the 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 other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”).

¹⁶ See LEAFFER, *supra* note 1, at 568 (noting that the Visual Artists Rights Act allows the United States to “g[i]ve explicit, but hardly complete, recognition to a moral right”); Marshall A. Leaffer, *Of Moral Rights and Resale Royalties: The Kennedy Bill*, 7 CARDOZO ARTS & ENT. L.J. 234 (1989) (examining whether the act, as proposed, would enhance the protection of moral rights).

¹⁷ *Contracting Parties*, *supra* note 4.

introducing a modern copyright statute in September 1990.¹⁸ Until then, the People’s Republic of China did not have a copyright law. For decades, the country offered Soviet-like protection to authors, with emphases on *gaofei* (basic payment for writings and manuscripts) and *jingshen quanli* (the non-economic rights of attribution and integrity).¹⁹

Since its accession to the Berne Convention, China has amended its copyright law three times. The first amendment took place in October 2001,²⁰ two months before China became the 143rd member of the World Trade Organization (WTO).²¹ This amendment brought Chinese copyright law into conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights²² (“TRIPS Agreement”). The second, and more limited,

¹⁸ Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991) [hereinafter 1990 Copyright Law].

¹⁹ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 59 (1995) (“Chinese officials and scholars closely studied the Soviet example, which at least in theory provided that authors were entitled to fixed ‘basic payments’ for their work, based predominantly on the number of copies printed, which the Chinese termed *gaofei*, and had the right to prevent unauthorized alteration of their work.”); Peter K. Yu, *The Long and Winding Road to Effective Copyright Protection in China*, 49 PEPP. L. REV. 681, 689 (2022) [hereinafter Yu, *Long and Winding Road*] (noting that the copyright regulations introduced after the founding of the People’s Republic “focused primarily on the basic payments for writings and manuscripts (*gaochou* or *gaofei*), the noneconomic rights of attribution and integrity, and contracts between authors and state organs” (footnotes omitted)); Zheng Chengsi, *The Future Chinese Copyright System and Its Context*, 15 INT’L REV. INTELL. PROP. & COMPETITION L. 141, 144 (1984) (“[F]rom the very beginning of the People’s Republic of China, the author has enjoyed the right to a contribution fee in most cases, the right to publish (or not to publish) his work, the right to publish under his own name or pseudonymously, or in some other way, and the right to prevent distortion of his work in all cases.”).

²⁰ Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001) [hereinafter 2001 Copyright Law].

²¹ China became the 143rd member of the WTO on December 11, 2001. *China*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm [<https://perma.cc/ZL2L-Z3X6>]; see also Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003) (discussing the ramifications of China’s entry into the WTO).

²² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

amendment was adopted in February 2010,²³ primarily to implement the WTO panel report in *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*.²⁴ At issue in this dispute was Article 4 of the 2001 Chinese Copyright Law, which denied copyright protection to works that had been prohibited from publication or dissemination.²⁵ The WTO panel found the provision to be inconsistent with China's obligations under Article 5(1) of the Berne Convention as incorporated by Article 9.1 of the TRIPS Agreement and under Article 41.1 of the TRIPS Agreement.²⁶ The third amendment was introduced more recently in November 2020 amid the COVID-19 pandemic.²⁷ Ushering in a second complete overhaul of the Chinese copyright system, and the first since the country's WTO accession, the latest amendment entered into force in June 2021.²⁸

Although China continues to struggle with problems concerning the enforcement of copyright law²⁹ and its heavy media regulation continues to

²³ Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010).

²⁴ Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter *WTO Panel Report*].

²⁵ 2001 Copyright Law, *supra* note 20, art. 4.

²⁶ *WTO Panel Report*, *supra* note 24, ¶ 8.1(a); see also Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1075–81, 1096–1101 (2011) (discussing this claim); Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727, 739–43 (2011) (discussing this claim).

²⁷ Zhonghua Renmin Gongheguo Zhuzuoquan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021).

²⁸ See generally Yu, *Long and Winding Road*, *supra* note 19 (discussing the major changes in the 2020 amendment); Peter K. Yu, *Third Amendment to the Chinese Copyright Law*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022) (discussing the major changes in the 2020 amendment).

²⁹ For the Author's earlier discussions of the piracy and counterfeiting problems in China, see generally Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 1st ed. 2007); Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006).

affect the copyright industries,³⁰ what Marshall would see in the Chinese copyright system upon his return would likely differ drastically from what he saw when he was still working in the U.S. Copyright Office. At that time, China was dealing with the aftermath of the Cultural Revolution (1966–1976)³¹ and was about to reopen its economy to the outside world.³² Many of the legal reforms, including the adoption of all modern intellectual property laws, were not carried out until a decade later. The Trademark Law, the Patent Law, and the Copyright Law were adopted in 1982, 1984, and 1990, respectively.³³

The final Berne member that deserves some attention is Russia, which joined the Berne Convention on December 9, 1994.³⁴ As former Register of Copyrights Ralph Oman recounted, in a meeting he attended, the late Arpad Bogsch, the former Director General of the World Intellectual Property Organization (WIPO), lumped Russia together with China and the United States.³⁵ As Bogsch said publicly: “There they are, the three bad boys of copyright—China, the United States, and the Soviet Union—all not members

³⁰ For discussions of the regulation of media and audiovisual products in China, see generally Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY: LAW AND PRACTICE 355 (Mark A. Cohen et al. eds., 1999); Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239 (1999); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L. L.J. 1, 28–32 (2001).

³¹ The Cultural Revolution was a period in which “scientists, engineers and members of the intelligentsia were discredited, demoted or dismissed from their positions.” Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 27–28 (Nari Lee et al. eds., 2016). In these circumstances, most authors understandably declined to claim authorship or demand material rewards.

³² See Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1058–59 (2018) (discussing China’s reopening to the outside world following the Third Plenary Session of the Eleventh Central Committee in December 1978).

³³ 1990 Copyright Law, *supra* note 18; Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法) [Patent Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, effective Apr. 1, 1985); Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983).

³⁴ *Contracting Parties*, *supra* note 4.

³⁵ See Ralph Oman, *Copyright Piracy in China*, 5 J. MARSHALL REV. INTELL. PROP. L. 583, 583 (2006).

of the Berne Convention sitting next to each other in the front row!”³⁶ In the context of new Berne members, it is therefore logical to discuss Russia alongside the United States and China.

Thus far, Russia’s accession to the Berne Convention has had a rather limited impact on international copyright developments.³⁷ Nevertheless, the accession generated an important choice-of-law case in U.S. copyright law, which was noted in leading treatises and hornbooks in the field.³⁸ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* involved the unauthorized republication by a weekly Russian-language newspaper in New York of news articles that Itar-Tass Russian News Agency and several Russian newspaper publishers had originally published in Russia.³⁹ Filed in April 1995, a month after the Berne Convention took effect in Russia,⁴⁰ the case was eventually appealed to the United States Court of Appeals for the Second Circuit.⁴¹

Itar-Tass, which continues to be taught in U.S. law schools, reminded us that the Berne Convention is not self-executing in the United States.⁴² Section 4(a)(3) of the Berne Convention Implementation Act of 1988, which was codified in section 104(c) of the U.S. Copyright Act, states explicitly the following:

No right or interest in a work eligible for protection under this title may be claimed by virtue of . . . the provisions of the Berne Convention Any rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of . . . the provisions of the Berne Convention⁴³

³⁶ *Id.*

³⁷ For discussions of Russian copyright law, see generally MICHIEL ELST, COPYRIGHT, FREEDOM OF SPEECH, AND CULTURAL POLICY IN THE RUSSIAN FEDERATION (2005); MICHAEL A. NEWCITY, COPYRIGHT LAW IN THE SOVIET UNION (1978); Igor Pozhitkov, *Copyright and Neighboring Rights Protection in the Russian Federation*, 20 REV. CENT. & E. EUR. L. 53 (1994); Corien Prins & Irina V. Savel’eva, *Computer Program Copyright Law in the Russian Federation: International Experience and Russian Reality*, 19 REV. CENT. & E. EUR. L. 31 (1993).

³⁸ See LEAFFER, *supra* note 1, at 583 (discussing *Itar-Tass Russian News Agency v. Russian Kurier*).

³⁹ 153 F.3d 82 (2d Cir. 1998).

⁴⁰ The Berne Convention took effect in Russia on March 13, 1995. *Contracting Parties*, *supra* note 4.

⁴¹ *Itar-Tass*, 153 F.3d 82.

⁴² *Id.* at 90.

⁴³ 17 U.S.C. § 104(c).

The case also “illustrates the difference between national treatment and choice of law rules.”⁴⁴ Noticing that the Convention has not provided a choice-of-law rule for disputes involving foreign copyright holders, Judge Jon Newman proceeded to “fill the interstices of the Act by developing federal common law on the conflicts issue.”⁴⁵ At the comparative level, the case is also interesting because it has provided important lessons in three areas in addition to the choice of applicable law: (1) the role of private international law in resolving cross-border intellectual property disputes; (2) the interplay of intellectual property and freedom of expression; and (3) the impact of the global economy on international intellectual property norm setting.⁴⁶

Today, the Berne Convention has more than 180 members, including the United States, China, and Russia.⁴⁷ Many developing countries have also joined the Convention after the establishment of the WTO and its TRIPS Agreement.⁴⁸ Indeed, the influx of these new Berne members has provided an interesting contrast with the 1960s, when many developed countries were concerned about the future of the Berne Convention in view of the emergence of many newly independent countries as a result of decolonization. Before the Intellectual Property Conference of Stockholm in June and July 1967, at which the Berne Convention was revised and the Berne appendix took its early shape,⁴⁹ Register Ringer, Marshall’s former boss, noted the “fear that . . .

⁴⁴ LEAFFER, *supra* note 1, at 583.

⁴⁵ *Itar-Tass*, 153 F.3d at 90.

⁴⁶ See generally Peter K. Yu, *The Comparative Lessons of Itar-Tass Russian News Agency v. Russian Kurier*, in THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY IN CENTRAL AND EASTERN EUROPE 110 (Mira T. Sundara Rajan ed., 2019) (discussing these comparative lessons).

⁴⁷ *Contracting Parties*, *supra* note 4.

⁴⁸ More than seventy countries acceded to the Berne Convention after the founding of the WTO. *Id.* Virtually all of them were developing countries. Estonia, Lithuania, and South Korea were the rare exceptions from the Organisation for Economic Co-operation and Development.

⁴⁹ Berne Convention, *supra* note 3, app.; see also SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 960–63 (2d ed. 2006) (discussing the incorporation of the Berne Appendix into the TRIPS Agreement and the WIPO Copyright Treaty); Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 481–84 (2009) [hereinafter Yu, *Development Agendas*] (discussing the Berne Appendix).

Berne would become a moribund old gentlemen's club."⁵⁰ Today, however, there is no denying that the Berne Convention has become the predominant international treaty in the copyright field. Few copyright law scholars still discuss developments relating to the Universal Copyright Convention,⁵¹ a middle-of-the-road treaty that the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted in September 1952 to ease the United States and other Latin American countries into the international copyright family.⁵² Even fewer mention those regional conventions to which the United States remains a party, such as the Buenos Aires Convention.⁵³

II. NEW TECHNOLOGIES

Since its inception in the late nineteenth century, the Berne Convention has evolved to keep pace with new technology. The 1908 Berlin Act was introduced to update the Convention in light of photographic and cinematographic technologies.⁵⁴ Article 3 states expressly that the Convention "shall apply to photographic works and to works produced by a

⁵⁰ Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1066 (1968); see also Eugene M. Braderman, *International Copyright—A World View*, 17 BULL. COPYRIGHT SOC'Y U.S.A. 147, 153 (1970) (noting the "fear that there would be a mass exodus of developing countries from Berne and into the [Universal Copyright Convention]").

⁵¹ Universal Copyright Convention, Sept. 6, 1952, 25 U.S.T. 1341 (revised at Paris July 24, 1971); see also LEAFFER, *supra* note 1, at 563–65 (discussing the Convention); Ringer, *supra* note 50, at 1060–69 (discussing the Convention); Jørgen Blomqvist, *Universal Copyright Convention—RIP*, IPKAT (Dec. 22, 2021), <https://ipkitten.blogspot.com/2021/12/guest-post-universal-copyright.html> [<https://perma.cc/AVH6-UW5Q>] (suggesting the demise of the Universal Copyright Convention following the recent accession to the Berne Convention by Cambodia, the only member of the former that has not joined the latter until then).

⁵² See Yu, *Currents and Crosscurrents*, *supra* note 2, at 342 (discussing the establishment of the Convention); see also Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 53 (1989) (contending that the Convention "had been designed as a sort of junior Berne Convention, with the specific objective of bringing the United States and other recalcitrant nations into the fold"); Ringer, *supra* note 50, at 1061 (describing the Convention as "a new 'common denominator' convention that was intended to establish a minimum level of international copyright relations throughout the world, without weakening or supplanting the Berne Convention").

⁵³ Copyright Convention Between the United States and Other American Republics, Aug. 11, 1910, 38 Stat. 1785 (1910); see also LEAFFER, *supra* note 1, at 577 (discussing the Buenos Aires Convention).

⁵⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1 L.N.T.S. 217 (revised at Berlin Nov. 13, 1908) [hereinafter Berlin Act].

process analogous to photography.”⁵⁵ Article 14 extended protection to “the exclusive right of authorizing the reproduction and public representation of their works by cinematography.”⁵⁶

Two decades later, the 1928 Rome Act included new provisions covering the broadcasting of copyrighted works.⁵⁷ Article 11*bis*(1) declares: “Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion.”⁵⁸ Yet another twenty years later, the 1948 Brussels Act extended the coverage to situations involving “television broadcasts, retransmissions, public communication of transmissions by such means as loudspeakers, and the fixation of works after transmission.”⁵⁹ Article 11*bis*(1)(i) specifically mentioned the “wireless diffusion of signs, sounds or images.”⁶⁰ The past four decades generally followed these expansive directions, even though the Berne Convention has not been revised since the 1971 Paris Act, the act that the TRIPS Agreement has now incorporated by reference.⁶¹

Upon his return in our imaginary scenario, Marshall would be likely to immediately notice that the United States and other Berne members had gone through one of the biggest transformations in copyright history: the digital revolution.⁶² In the past three decades, legal commentators

⁵⁵ *Id.* art. 3. The Final Protocol to the original Berne Convention did state that “those countries of the Union where the character of artistic works [wa]s not refused to photographs engage[d] to admit them to the benefits of the Convention.” Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, final protocol, <https://global.oup.com/booksites/content/9780198259466/15550015> [<https://perma.cc/3EZU-N5FV>] [hereinafter Original Text].

⁵⁶ Berlin Act, *supra* note 54, art. 14.

⁵⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 123 L.N.T.S. 233 (revised at Rome June 2, 1928) [hereinafter Rome Act].

⁵⁸ *Id.* art. 11*bis*(1).

⁵⁹ RICKETSON & GINSBURG, *supra* note 49, at 117 (footnote omitted).

⁶⁰ Berne Convention for the Protection of Literary and Artistic Works art. 11*bis*(1)(i), Sept. 9, 1886, 331 U.N.T.S. 217, 231 (revised at Brussels June 26, 1948) [hereinafter Brussels Act].

⁶¹ See TRIPS Agreement, *supra* note 22, art. 9.1 (stating that WTO members “shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto”).

⁶² See Marshall Leaffer, *Protecting Authors’ Rights in a Digital Age*, 27 U. TOL. L. REV. 1 (1995) [hereinafter Leaffer, *Protecting Authors’ Rights*] (discussing the voluntary aspects of digital technology). See generally COMM. ON INTELL. PROP. RTS. & THE EMERGING INFO. INFRASTRUCTURE, NAT’L RSCH. COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) (discussing the threat digital technology has posed to the copyright system).

documented the revolution's tremendous impacts on the copyright system.⁶³ For example, the internet and digital technologies have simultaneously broken six different types of access barriers that have hitherto protected copyright holders from the unauthorized exploitation of their works: geographical, temporal, economic, linguistic, legal, and technological.⁶⁴ The widespread use of these technologies in private homes has also elided the traditional distinction between what is public and what is private—and, by extension, what is commercial and what is non-commercial.⁶⁵ While the No Electronic Theft Act extended criminal liability for copyright infringement to individuals who have not made any monetary profit through their infringing activities,⁶⁶ file-sharing cases such as *A&M Records, Inc. v. Napster, Inc.* stated that internet users could reap economic advantages from file-sharing services by “get[ting] for free something they would ordinarily have to buy.”⁶⁷ To enhance protection for authors in the digital environment, the copyright system has also put in place new laws governing both technological protection measures and rights management information.⁶⁸

In addition, it remains difficult to determine whether the internet-related technologies represent one form of technology or multiple forms.

⁶³ Marshall is no exception. See, e.g., Marshall Leaffer, *Internet 2.0: Une perspective Américaine*, in *CONTREFAÇON SUR INTERNET: LES ENJEUX DU DROIT D'AUTEUR SUR LE WEB 2.0* (Institut de Recherche en Propriété Intellectuelle ed., 2009) (providing an American perspective in a collection of articles on internet counterfeiting in the context of Web 2.0); Marshall Leaffer, *Domain Names, Globalization, and Internet Governance*, 6 *IND. J. GLOBAL LEGAL STUD.* 139 (1998) (identifying the problems concerning the domain name system and calling for the development of a coordinated multilateral solution based on national interests); Leaffer, *Protecting Authors' Rights*, *supra* note 62 (delivering the Doermann Distinguished Lecture on the difficulties the digital revolution has created for the protection of the authors' creative outputs).

⁶⁴ See Peter K. Yu, *A Seamless Global Digital Marketplace of Media and Entertainment Content*, in *RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT* 265, 266–76 (Megan Richardson & Sam Ricketson eds., 2017) (discussing the internet's impact on these access barriers).

⁶⁵ See Peter K. Yu, *Increased Copyright Flexibilities for User-Generated Creativity*, in *REFORMING INTELLECTUAL PROPERTY* 304, 308 (Gustavo Ghidini & Valeria Falce eds., 2022) (discussing the gradual shift in U.S. copyright law from making a distinction between commercial and non-commercial infringement to evaluating whether the unauthorized use has provided a commercial advantage).

⁶⁶ No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

⁶⁷ 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

⁶⁸ See 17 U.S.C. § 1201 (offering protection against the circumvention of copyright protection systems); *id.* § 1202 (safeguarding the integrity of copyright management information).

Since the mid-1990s, copyright law continues to address challenges brought about by electronic communications, the internet, cloud computing, digital streaming, and many other forms of digital technology. While many of these issues are quite similar, they also bring new issues to the copyright debate. For instance, even though cloud computing raises many of the same issues explored in the cyberlaw literature in the 1990s, it sparks new questions concerning the “replicat[ion of content] within the cloud for reasons of performance, availability, backup, and redundancy.”⁶⁹ Because cloud platforms tend to involve remote servers located abroad, distribution of copyrighted works on these platforms will raise additional territoriality-related questions concerning the applicable laws and their extraterritorial application.⁷⁰

Another type of new technology that will deeply affect the future development of the copyright system is artificial intelligence—a very hot topic in today’s copyright debate.⁷¹ While WIPO has initiated a series of conversations to explore the impact of artificial intelligence on intellectual property policy,⁷² national governments have actively explored whether they need to introduce updates⁷³ to accommodate what commentators have referred to as the “Second Machine Age” or the “Fourth Industrial Revolution.”⁷⁴ At the time of writing, the laws governing the copyrightability

⁶⁹ Ian Walden, *Law Enforcement Access to Data in Clouds*, in *CLOUD COMPUTING LAW* 285, 287 (Christopher Millard ed., 1st ed. 2013).

⁷⁰ See Peter K. Yu, *Towards the Seamless Global Distribution of Cloud Content*, in *PRIVACY AND LEGAL ISSUES IN CLOUD COMPUTING* 180, 186 (Anne S.Y. Cheung & Rolf H. Weber eds., 2015) (“If the cloud platform involves remote servers located outside the country, such distribution will raise two additional sets of territoriality questions: (1) What is the applicable law? (2) Will such law be applied extraterritorially?”).

⁷¹ See Peter K. Yu, *Can Algorithms Promote Fair Use?*, 14 *FIU L. REV.* 329, 330 n.2 (2020) (collecting the literature that discusses whether creative works generated by intelligent machines are eligible for copyright protection).

⁷² *The WIPO Conversation on Intellectual Property and Artificial Intelligence*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-ip/en/artificial_intelligence/conversation.html [<https://perma.cc/H7GZ-EEP3>] (last visited Mar. 23, 2022).

⁷³ See, e.g., U.S. PAT. & TRADEMARK OFF., *PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY* (2020) (collecting comments on the impact of artificial intelligence on different areas of intellectual property policies, including copyrights, patents, trademarks, database protections, and trade secret law).

⁷⁴ See, e.g., ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* (2014); Yann Ménière & Ilja Rudyk, *The Fourth Industrial Revolution from the European Patent Office Perspective*,

of works generated solely by computers or machines remain diverse. For example, the *Compendium of U.S. Copyright Office Practices* states that the U.S. Copyright Office “will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”⁷⁵ By contrast, copyright laws in Ireland, New Zealand, and the United Kingdom cover the special category of computer-generated works.⁷⁶ Section 9(3) of the Copyright, Designs and Patents Act declares: “In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”⁷⁷

Since the emergence of the debate at the intersection of intellectual property and artificial intelligence, commentators have questioned whether the legal system needs quick adjustments considering that works that involve artificial intelligence today are created with the assistance of, but not autonomously by, artificial intelligence.⁷⁸ As James Grimmelman noted

in INTELLECTUAL PROPERTY AND DIGITAL TRADE IN THE AGE OF ARTIFICIAL INTELLIGENCE AND BIG DATA 29, 33 (Xavier Seuba et al. eds., 2018) [hereinafter IP AND DIGITAL TRADE].
⁷⁵ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2021).

⁷⁶ See, e.g., Copyright Act 1994, s 5(2)(a) (N.Z.) (stipulating that “in the case of a literary, dramatic, musical, or artistic work that is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken”); Copyright and Related Rights Act 2000 (Act. No. 28/2000) § 21(f) (Ir.), <https://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/html> [<https://perma.cc/DQK3-CBBS>] (stipulating that “in the case of a work which is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken”); Copyright, Designs and Patents Act 1988, c. 48, § 9(3) (U.K.) (“In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.”).

⁷⁷ Copyright, Designs and Patents Act 1988, c. 48, § 9(3) (U.K.).

⁷⁸ As WIPO defined in an issue paper:

“AI-generated” and “generated autonomously by AI” are terms that are used interchangeably and refer to the generation of an output by AI without human intervention. In this scenario, AI can change its behavior during operation to respond to unanticipated information or events. This is to be distinguished from “AI-assisted” outputs that are generated with material human intervention and/or direction.

World Intell. Prop. Org., *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, ¶ 12, WIPO Doc. WIPO/IP/AI/2/GE/20/1 Rev. (May 21, 2020); see also Peter K. Yu, *Artificial Intelligence, the Law–Machine Interface, and Fair Use Automation*, 72 ALA. L. REV. 187, 232 n.218 (2020) [hereinafter Yu, *Artificial Intelligence*] (collecting sources that discuss the concept of “intelligence augmentation”).

emphatically, “no one has ever exhibited even one work that could plausibly claim to have a computer for an ‘author’ in the sense that the Copyright Act uses the term.”⁷⁹ While Professor Grimmelman’s observation correctly captured the current state of technology, one policy question that deserves greater policy and scholarly attention concerns whether copyright law needs amendments if the human creative contributions are significantly reduced. After all, in the future, we are likely to see many situations involving a mix of human and machine contributions, rather than contributions from humans or machines alone.⁸⁰

For instance, if the human creative contributions have been reduced from eighty or ninety percent to, say, ten or twenty percent, should copyright law be amended to account for the more limited human creative input? Answering this question will require us to abandon a binary debate concerning whether copyright should be granted to authors—or, in constitutional terms, whether machines can be “authors” within the meaning of the U.S. Copyright Clause.⁸¹ Instead, we should explore what creative contributions are worthy of copyright protection.

Some good questions to ask are what the U.S. Patent and Trademark Office included in the copyright section of its consultation document:

Assuming involvement by a natural person is or should be required, what kind of involvement would or should be sufficient so that the work qualifies for copyright protection? For example, should it be sufficient if a person (i) designed the AI [artificial intelligence] algorithm or process that created the work; (ii) contributed to the design

⁷⁹ James Grimmelman, *There’s No Such Thing as a Computer-Authored Work—And It’s a Good Thing, Too*, 39 COLUM. J.L. & ARTS 403, 403 (2016).

⁸⁰ See Rebecca Crootof, “*Cyborg Justice*” and the Risk of Technological–Legal Lock-in, 119 COLUM. L. REV. F. 233 (2019) (discussing the benefits and side effects of hybrid human–AI judicial systems, or “cyborg justice”); Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1 (2019) (explaining why complementary legal automation will play a bigger role in the legal profession than substitutive legal automation); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001 (2019) (describing the development of hybrid machine–human systems as the “predictable future of legal adjudication” and exploring the prospects and limitations of such development); Yu, *Artificial Intelligence*, *supra* note 78 (emphasizing the importance of the law-machine interface in the artificial intelligence context).

⁸¹ See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o 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.” (emphasis added)).

of the algorithm or process; (iii) chose data used by the algorithm for training or otherwise; (iv) caused the AI algorithm or process to be used to yield the work; or (v) engaged in some specific combination of the foregoing activities? Are there other contributions a person could make in a potentially copyrightable AI-generated work in order to be considered an “author”?⁸²

It will also be useful to explore the degree of human control over works generated substantially by artificial intelligence.⁸³ In a long line of copyright cases that date back to the nineteenth century, courts have made clear that “[a]n author . . . is ‘he to whom anything owes its origin.’”⁸⁴ Had Marshall in our imaginary scenario returned to academia in time to join this debate, he would be eager to help us understand these complex authorship issues.⁸⁵

Interestingly, the arrival of artificial intelligence is actually not that surprising to those following the historical literature on the interplay of law and artificial intelligence. Even though Marshall was frozen from 1978 to 2021, upon his return he would be likely to find some similarity and continuity between what was published in the 1970s and what legal scholars write today. Indeed, a number of articles concerning how artificial intelligence will change the legal system were published shortly before he was frozen.⁸⁶

In sum, the popularization of the internet in the mid-1990s and the advent of a plethora of digital technologies have greatly transformed

⁸² U.S. PAT. & TRADEMARK OFF., *supra* note 73, at 22.

⁸³ *Cf. Lindsay v. The Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1999 WL 816163, at *5 (S.D.N.Y. Oct. 13, 1999) (“All else being equal, where a plaintiff alleges that he exercised such a *high degree of control* over a film operation . . . such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an ‘author’ within the meaning of the Copyright Act.” (emphasis added)).

⁸⁴ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

⁸⁵ *See* LEAFFER, *supra* note 1, at 109 (“[C]opyright should be denied for computer-generated works involving insignificant or no user discretion. As in any other legal determination, difficult line-drawing processes will arise . . . to determine whether the user of a program has supplied enough original authorship to merit copyright.”).

⁸⁶ *See, e.g.*, Bruce G. Buchanan & Thomas E. Headrick, *Some Speculation About Artificial Intelligence and Legal Reasoning*, 23 STAN. L. REV. 40 (1970); Anthony D’Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977); L. Thorne McCarty, *Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning*, 90 HARV. L. REV. 837 (1977). The literature cited here was collected in Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1137 n.3 (2019).

copyright law. It has led countries to adopt new rules at the international level—such as those found in the WIPO Copyright Treaty (WCT),⁸⁷ which the next Part will discuss in greater detail. At the domestic level, the digital revolution has also resulted in the introduction of new laws that aim to improve copyright protection in the digital environment. Of these laws, there is no better example than the Digital Millennium Copyright Act.⁸⁸ The addition of this lengthy statute has caused many treatise and hornbook authors in the copyright field to substantially revise their works.⁸⁹

III. NEW RIGHTS AND LIMITATIONS

From the mention of the translation right in the original 1886 text of the Berne Convention⁹⁰ to the explicit protection of the right of public performance in the 1948 Brussels Act⁹¹ to the formal recognition of the reproduction right in the 1967 Stockholm Act,⁹² the Convention has seen the arrival or expansion of a wide array of economic rights. Since the 1928 Rome Act, the Convention has also protected two forms of moral rights: “the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to [the author’s] honour or reputation.”⁹³

In addition, the revision process has altered the duration of copyright protection. While Article 7 of the 1908 Berlin Act included an optional requirement that such protection lasts for the life of the author plus fifty years,⁹⁴ the 1948 Brussels Act made this requirement mandatory.⁹⁵ Today,

⁸⁷ WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 [hereinafter WCT].

⁸⁸ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

⁸⁹ A case in point is Marshall’s *Understanding Copyright Law*, which increased by close to 150 pages from the second to third edition. Compare MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW (2d ed. 1995) (400 pages), with MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW (3d ed. 1999) (544 pages).

⁹⁰ Original Text, *supra* note 55, arts. 5, 9.

⁹¹ Brussels Act, *supra* note 60, art. 11.

⁹² Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886, 828 U.N.T.S. 221, 239 (revised at Stockholm July 14, 1967).

⁹³ Rome Act, *supra* note 57, art. 6*bis*. Such protection, the conditions for which were initially governed by domestic legislation, eventually became mandatory.

⁹⁴ Berlin Act, *supra* note 54, art. 7(1).

⁹⁵ Brussels Act, *supra* note 60, art. 7(1).

the Berne standard for the duration of copyright protection remains the life of the author plus fifty years, even though the European Union, the United States, and other jurisdictions have extended the protection for another twenty years.⁹⁶

The previous Part has discussed the advent of digital technologies. This Part turns to the new rights that have to be created to respond to those technologies. Traditionally, the Berne Convention has been revised every twenty years or so. Since its establishment in 1886, the Convention was revised in 1908, 1928, 1948, 1967, and 1971. Interestingly, the Convention has not been revised again since 1971. Instead, a new treaty known as the WCT was established as a “special agreement” pursuant to Article 20 of the Berne Convention.⁹⁷

In December 1996, WIPO member states convened a diplomatic conference that led to the adoption of this treaty and the WIPO Performances and Phonograms Treaty (WPPT).⁹⁸ Because members were unable to reach consensus over the standards governing the digital transmission of copyrighted works—with European countries favoring adjustments to the right of communication to the public while the United States preferring alternative approaches⁹⁹—the WCT fostered a compromise by accepting what commentators have generally referred to as the “umbrella solution.”¹⁰⁰ This solution “allowed the treaty’s contracting parties to provide for the agreed-upon protections without specifying which rights they would use to

⁹⁶ See, e.g., 17 U.S.C. § 302(a) (providing a copyright term of the life of the author plus seventy years); Council Directive 93/98/EEC, of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, art. 1(1), 1993 O.J. (L 290) 9, 11 (providing a copyright term of the life of the author plus seventy years).

⁹⁷ See Berne Convention, *supra* note 3, art. 20 (“The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.”).

⁹⁸ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203; see also Yu, *Currents and Crosscurrents*, *supra* note 2, at 369–74 (discussing this diplomatic conference).

⁹⁹ See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT’L L. 369, 393–94 (1997) (discussing these differences).

¹⁰⁰ See MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 205–06, 496–97 (2002) (discussing the “umbrella solution”).

provide substance for these protections.”¹⁰¹ Article 6(1), which covers the right of distribution, provides: “Authors of literary and artistic works shall enjoy the *exclusive right of authorizing the making available to the public* of the original and copies of their works through sale or other transfer of ownership.”¹⁰² Article 8, which protects the right of communication to the public, further states: “Authors of literary and artistic works shall enjoy the *exclusive right of authorizing the making available to the public* of the original and copies of their works through sale or other transfer of ownership.”¹⁰³

At the domestic level, this umbrella solution has sparked challenging questions concerning whether the right of distribution has been expanded to cover the right of making available, which does not exist, at least explicitly, in section 106 of the U.S. Copyright Act.¹⁰⁴ In *Capitol Records, Inc. v. Thomas*, for instance, the district court carefully explained why the distribution right under section 106(3) does not encompass the act of making available or an offer to do those acts specified in the provision.¹⁰⁵ By contrast, other courts seem to be more willing to undertake a dynamic interpretation and provide updates to copyright law. As the U.S. Copyright Office noted in its study on the making available right:

The courts of the United States have been less consistent in their analyses and decisions. On the one hand, the Supreme Court’s recent decision in *American Broadcasting Cos. v. Aereo, Inc.* confirms that the public performance right encompasses the transmission of copyrighted works to the public through individualized streams. On the other hand, in the context of offers of access to copyrighted content, some district courts have questioned the existence of the right under U.S. law, ultimately failing to recognize a cause of action where copyright owners cannot prove that downloads or receipt occurred. Others have wholly rejected the right out of hand, failing to discuss or even acknowledge the international obligations of the United States. At the appellate level, courts have yet to conclusively resolve these issues in cases involving works in digital format. There are, however, two

¹⁰¹ Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 726 (2010).

¹⁰² WCT, *supra* note 87, art. 6 (emphasis added).

¹⁰³ *Id.* art. 8 (emphasis added).

¹⁰⁴ The distribution right in the U.S. Copyright Act involves specific statutory language: “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.” 17 U.S.C. § 106(3).

¹⁰⁵ 579 F. Supp. 2d 1210, 1216–23 (D. Minn. 2008).

appellate decisions holding that, in the context of a library offering physical copies of a work to the public, distribution does not necessarily require an actual transfer of copies.¹⁰⁶

Another development that deserves attention concerns how much protection copyright law will provide to the reproduction of creative works in the digital environment, including the generation of temporary copies in computer memory.¹⁰⁷ That question seems settled in the United States, due in part to the findings of the National Commission on the New Technological Uses of Copyrighted Works, which declared that “the placement of a work into a computer is the preparation of a copy.”¹⁰⁸ At the international level, however, Berne members remained deeply divided over how to handle digital copies at the time of the 1996 WIPO Diplomatic Conference.¹⁰⁹ During the negotiations, members ended up leaving the issue out of the WCT text. Instead, they accepted the following agreed statement concerning Article 1(4) toward the end of the negotiations:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.¹¹⁰

¹⁰⁶ U.S. COPYRIGHT OFF., THE MAKING AVAILABLE RIGHT IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHTS 3 (2016).

¹⁰⁷ See, e.g., *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (“[S]ince we find that the copy created in the RAM [Random Access Memory] can be ‘perceived, reproduced, or otherwise communicated,’ we hold that the loading of software into the RAM creates a copy under the Copyright Act.”).

¹⁰⁸ NAT’L COMM’N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 13 (1978).

¹⁰⁹ See Samuelson, *supra* note 99, at 372 (“Clinton administration officials sought approval in Geneva for international norms that would have . . . granted copyright owners an exclusive right to control virtually all temporary reproductions of protected works in the random access memory of computers . . .”).

¹¹⁰ *Agreed Statements Concerning the WIPO Copyright Treaty Adopted by the Diplomatic Conference on December 20, 1996*, WIPO Doc. TRT/WCT/002, <https://wipolex.wipo.int/en/text/295456> [<https://perma.cc/776R-KA32>] (providing the statement concerning Article 1(4) of the WCT).

Many commentators found this statement controversial, considering that it was adopted in the eleventh hour when some delegations had already left the diplomatic conference.¹¹¹

Apart from the new rights relating to copyright protection in the digital environment, there has also been growing attention on the development of copyright limitations and exceptions—an issue that is relevant to both the online and offline worlds.¹¹² Upon his return in our imaginary scenario, Marshall would be unlikely to find such discussion surprising. After all, during the revision of the Berne Convention in both Stockholm and Paris, limitations and exceptions were a major issue for developing country members. The 1971 Paris Act eventually added an optional appendix to the Berne Convention, which was derived from the Protocol Regarding Developing Countries adopted in Stockholm in 1967 but that had failed to be ratified.¹¹³ Today, the Berne appendix “remains the only bulk access mechanism tool in international copyright law.”¹¹⁴ To some

¹¹¹ As I noted in an earlier book chapter:

[T]his agreed statement was drafted towards the very end of the negotiations and in suspicious circumstances: while the first sentence was adopted by consensus, the second was not. According to Seth Greenstein, who observed the WIPO diplomatic meeting on behalf of the Electronic Industries Association, the final vote count was 48 in favour, 13 against, 28 abstentions and a whopping 63 absences.

Peter K. Yu, *The Copy in Copyright*, in *INTELLECTUAL PROPERTY AND ACCESS TO IM/MATERIAL GOODS* 65, 75 (Jessica C. Lai & Antoinette Maget Dominicé eds., 2016) (footnotes omitted); see also Samuelson, *supra* note 99, at 390–92 (discussing the eleventh-hour negotiations).

¹¹² The Berne Convention included copyright limitations and exceptions from the very beginning. Article 8 of the original 1886 text states explicitly that the Convention does not affect “the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies.” Original Text, *supra* note 55, art. 8.

¹¹³ See Yu, *Development Agendas*, *supra* note 49, at 580–81 (discussing the stalemate over the ratification of the protocol).

¹¹⁴ Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* 16 (UNCTAD–ICTSD Project on IPRs & Sustainable Dev., Issue Paper No. 15, 2006), https://unctad.org/system/files/official-document/iteipc200610_en.pdf [<https://perma.cc/L6VL-N44F>].

extent, the ongoing discussion of limitations and exceptions bring back part of the old debate on intellectual property and development.¹¹⁵

In recent years, many jurisdictions have introduced a new copyright exception for text and data mining,¹¹⁶ similar to the flexibility provided by the transformative use doctrine in the United States.¹¹⁷ For example, section 29A(1) of the UK Copyright, Designs and Patents Act 1988 permits “[t]he making of a copy of a work by a person who has lawful access to the work” in order to “carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose.”¹¹⁸ Articles 3 and 4 of the EU Directive on Copyright and Related Rights in the Digital Single Market also create new exceptions for text and data mining, which is defined as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.”¹¹⁹ In addition,

¹¹⁵ See Peter K. Yu, *Déjà Vu in the International Intellectual Property Regime*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 113, 114–17 (Matthew David & Debora Halbert eds., 2015) (discussing the establishment of development agendas as a recurring development in the international intellectual property regime and linking the development agendas in the 2000s to the earlier development agendas in the 1960s and 1970s).

¹¹⁶ For discussions of the importance of exceptions for text and data mining to the copyright systems, see generally Christophe Geiger et al., *Crafting a Text and Data Mining Exception for Machine Learning and Big Data in the Digital Single Market*, in IP AND DIGITAL TRADE, *supra* note 74, at 95; Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining Is Lawful*, 53 U.C. DAVIS L. REV. 893 (2019); Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. COPYRIGHT SOC’Y U.S.A. 291 (2019).

¹¹⁷ See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216–17 (2d Cir. 2015) (“Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose, in the sense intended by *Campbell*.”); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2013) (“[T]he creation of a full-text searchable database is a quintessentially transformative use.”). See generally Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797 (2010) (discussing fair use in the technological context).

¹¹⁸ Copyright, Designs and Patents Act 1988, c. 48, § 29A(1) (U.K.).

¹¹⁹ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, arts. 2(2), 3–4, 2019 O.J. (L 130) 92, 112.

commentators have paid considerable attention to the exceptions for parody, satire, caricature, and pastiche¹²⁰—and, more recently, to the right to quote.¹²¹

When limitations and exceptions are being discussed in the TRIPS context, such discussion often brings up the three-step test in Article 13.¹²² Derived from Article 9(2) of the Berne Convention,¹²³ that TRIPS provision requires WTO members to “confine limitations or exceptions to exclusive rights to [1] certain special cases which [2] do not conflict with a normal exploitation of the work and [3] do not unreasonably prejudice the legitimate interests of the right holder.”¹²⁴ Although the Berne provision was adopted to enlarge the policy space for member states to develop new copyright limitations and exceptions,¹²⁵ the TRIPS Agreement’s incorporation of the three-step test has raised the question about whether WTO members intended to emphasize the test’s constraining function while undercutting its enabling

¹²⁰ See generally SABINE JACQUES, *THE PARODY EXCEPTION IN COPYRIGHT LAW* (2019); AMY LAL, *THE RIGHT TO PARODY: COMPARATIVE ANALYSIS OF COPYRIGHT AND FREE SPEECH* (2021).

¹²¹ See generally TANYA APLIN & LIONEL BENTLY, *GLOBAL MANDATORY FAIR USE: THE NATURE AND SCOPE OF THE RIGHT TO QUOTE COPYRIGHT WORKS* (2020).

¹²² TRIPS Agreement, *supra* note 22, art. 13.

¹²³ Berne Convention, *supra* note 3, art. 9(2) (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).

¹²⁴ TRIPS Agreement, *supra* note 22, art. 13.

¹²⁵ See Martin Senftleben, *From Flexible Balancing Tool to Quasi-Constitutional Straitjacket—How the EU Cultivates the Constraining Function of the Three-Step Test*, in *GLOBAL INTELLECTUAL PROPERTY PROTECTION AND NEW CONSTITUTIONALISM: HEDGING EXCLUSIVE RIGHTS* 83 (Jonathan Griffiths & Tuomas Mylly eds., 2021) (expressing concerns about interpretations of the three-step test that focus on its constraining function at the expense of its enabling function); Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, in 1 *KRIKA: ESSAYS ON INTELLECTUAL PROPERTY* 278, 289 (Peter Drahos et al. eds., 2015) [hereinafter Yu, *Confuzzling Rhetoric*] (“Instead of creating a large number of specific exceptions to accommodate the different approaches taken by the then Berne members, the drafters came up with a flexible test to ensure that members could introduce minor exceptions without waiting for the Berne Convention to be revised, as long as these exceptions pass the test.”); Christophe Geiger et al., *The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law*, 29 *AM. U. INT’L L. REV.* 581, 616 (2014) (“From the perspective of national legislation, it would seem more logical to interpret the three-step test as not designed exclusively for restricting new use privileges, but also as enabling them. . . . Many use privileges that have become widespread at the national level are directly based on the international three-step test.”).

function.¹²⁶ This question has become even more important considering that the WCT has incorporated the same test.¹²⁷

Thus far, the WTO Dispute Settlement Body has had only one opportunity to determine whether a copyright limitation or exception passes the three-step test. In January 1999, Ireland and other members of the European Union filed a WTO complaint challenging section 110(5) of the U.S. Copyright Act, which includes an exception for using homestyle equipment to play copyrighted music without compensating copyright holders and a business exception that enables restaurants and small establishments to do the same.¹²⁸ Although the WTO panel eventually found the business exception inconsistent with the TRIPS Agreement,¹²⁹ Congress declined to bring the law in conformity with the Agreement. Today, section 110(5)(b), which codified that exception, remains intact despite the WTO panel's negative finding.¹³⁰

In the past two decades, commentators have also questioned whether the fair use provision in U.S. copyright law complies with the TRIPS Agreement.¹³¹ Although other WTO members have not used the WTO

¹²⁶ See Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 861–62 (2001) [hereinafter Leaffer, *Uncertain Future*] (“Article 9(2) merely permits nations to provide for limitations on copyright in certain circumstances. It leaves open the possibility that other limitations may be allowable on the basis of other treaty provisions. By contrast, article 13 expressly restricts allowable limitations and exceptions to those that comply with its standards.”).

¹²⁷ See WCT, *supra* note 87, art. 10(1) (incorporating the three-step test).

¹²⁸ 17 U.S.C. § 110(5).

¹²⁹ See Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶ 7.1(b), WTO doc. WT/DS160/R (adopted June 15, 2000) (finding that section 110(5)(b) of the U.S. Copyright Act “does not meet the requirements of Article 13 of the TRIPS Agreement and is thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement”).

¹³⁰ See Peter K. Yu, *Are Developing Countries Playing a Better TRIPS Game?*, 16 UCLA J. INT'L L. & FOREIGN AFFS. 311, 337–38 (2011) (“Notwithstanding the adverse panel report, the United States has refused to update its statute to ensure compliance with the TRIPS Agreement. The United States also has refused to make annual payments to the European Union, even though the arbitration award was determined to be €1,219,900 per year. The only payment it has made thus far was \$3.3 million, which was provided more than a year after the arbitration proceeding.” (footnote omitted)).

¹³¹ See Leaffer, *Uncertain Future*, *supra* note 126, at 861–63 (noting the serious reservations concerning the conformity of the U.S. fair use provision with the three-step test); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75,

dispute settlement process to challenge the U.S. fair use provision, and are unlikely to do so in the future,¹³² the debate concerning its consistency remains unsettled. In many jurisdictions, which range from Australia to Hong Kong to South Africa, complications raised by the three-step test continue to pose challenges to copyright reforms that seek to introduce an open-ended fair use provision.¹³³

Finally, it is worth mentioning the ongoing effort to create rights at WIPO to protect traditional cultural expressions. Although some readers may quickly point out that these rights are being negotiated at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore,¹³⁴ not in a forum relating to the Berne Convention, one should not forget that the efforts to strengthen the protections for traditional cultural expressions—or what used to be called “folklore”—actually began with the Tunis Model Law on Copyright for Developing Countries (“Tunis Model Law”).¹³⁵ This model law could be

114–23 (2000) (noting the incompatibility between fair use and the three-step test). *But see* Justin Hughes, *Fair Use and Its Politics—at Home and Abroad*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 234, 236–56 (Ruth L. Okediji ed., 2017) (arguing that fair use will pass the three-step test because it is a mechanism for establishing specific copyright exceptions).

¹³² See Austln. L. Reform Comm’n, *Copyright and the Digital Economy* (Report No. 122, Nov. 2013) 120–22 (noting the lack of challenges to fair use in international fora); Peter K. Yu, *The Quest for a User-Friendly Copyright Regime in Hong Kong*, 32 *AM. U. INT’L L. REV.* 283, 309–10 (2016) (explaining why other WTO members are unlikely to challenge the U.S. fair use provision, including the transformative use doctrine, before the WTO Dispute Settlement Body).

¹³³ See, e.g., Austln. L. Reform Comm’n, *supra* note 132, at 116–22 (explaining why reform introducing fair use in Australia will pass the three-step test); Yu, *Confuzzling Rhetoric*, *supra* note 125, at 287–93 (discussing the three-step test in relation to copyright reform in Hong Kong); Letter from Sean Flynn, Dir., Program on Info. Just. & Intell. Prop., Am. Univ. Wash. Coll. of L., to the Portfolio Comm. on Trade & Indus., Parliament of the Republic of S. Afr. (July 9, 2021), <https://infojustice.org/wp-content/uploads/2021/07/User-Rights-Network-CAB-Submission-July-9-2021.pdf> [<https://perma.cc/NVC9-WGJ3>] (explaining why reform introducing fair use in South Africa will pass the three-step test).

¹³⁴ *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/tk/en/igc> [<https://perma.cc/3FJ2-XFRQ>] (last visited Dec. 4, 2021). See generally *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* (Daniel F. Robinson et al. eds., 2017) (collecting articles that offer detailed analyses of the Intergovernmental Committee’s effort).

¹³⁵ *Tunis Model Law on Copyright for Developing Countries*, WIPO Doc. 812(E) (1976), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_812.pdf [<https://perma.cc/DBY7->

traced back even further to the African Study Conference on Copyright in Brazzaville in August 1963.¹³⁶ Jointly organized by WIPO's predecessor¹³⁷ and UNESCO, that conference sought "to assist the new African states to formulate appropriate principles for the drafting of their own copyright laws."¹³⁸

As somebody who has presented on the topic of traditional knowledge and traditional cultural expressions and who also has a life companion in an anthropologist, Marshall, upon his return in our imaginary scenario, would certainly find these developments highly interesting. That these developments bring back memories of the Tunis Model Law, which was adopted only two short years before he was frozen, would also make these developments less surprising to him.

IV. NEW EXTERNAL INFLUENCES

Thus far, this Article has focused on developments internal to the Berne Convention. However, some of the biggest challenges to the international intellectual property regime in the past four decades came from outside, raising questions about the exogenous limits to intellectual property

XDV7]; see also Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 813–17 (1999) (discussing the Tunis Model Law).

¹³⁶ See Monika Dommann, *Lost in Tradition? Reconsidering History of Folklore and Its Legal Protection Since 1800*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 3, 11 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008) (tracing the protection of folklore to the Brazzaville Conference); see also Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 BULL. COPYRIGHT SOC'Y U.S.A. 91, 103–08 (1970) (discussing this conference).

¹³⁷ WIPO's predecessor is the United International Bureau for the Protection of Intellectual Property, known commonly by its French acronym "BIRPI" (for *Bureaux internationaux reunis pour la protection de la propriete intellectuelle*).

¹³⁸ RICKETSON & GINSBURG, *supra* note 49, at 888.

rights.¹³⁹ Because there are many different external influences,¹⁴⁰ which range from international trade to human rights and from public health to biological diversity,¹⁴¹ this Part focuses on the first two issue areas. These areas are highlighted not only because they are relevant to the discussion of the Berne Convention, but also because they would be likely to receive Marshall's attention.¹⁴²

Even though Marshall was frozen in 1978 in our imaginary scenario, upon his return he would not be surprised to find international trade playing an increasingly important role in the international copyright regime. After all, the Berne Convention was created in part to respond to the expanded bilateral trade between the European powers,¹⁴³ and the ineffectiveness in using

¹³⁹ See Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1008 (2009) [hereinafter Yu, *Objectives and Principles*] (noting the “exogenous limits that can be found in related regimes, such as those concerning public health, human rights, biological diversity, food and agriculture, and information and communications”); Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 794–96 (2010) (discussing the need to establish internal and external maximum limits on intellectual property rights).

¹⁴⁰ Cf. Leaffer, *Uncertain Future*, *supra* note 126, at 863 (surmising that “the fate of the fair use doctrine in the United States may be determined even more by outside influences than internal politics”).

¹⁴¹ See Yu, *Development Agendas*, *supra* note 49, at 511–15, 522–38 (discussing the development agendas in international trade, human rights, public health, biological diversity, and other international fora).

¹⁴² See, e.g., Marshall Leaffer, *Fair Use, Transformative Use and Free Speech*, in INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS 417 (Paul Torremans ed., 4th ed., 2020) (discussing the support that the transformative use doctrine has provided to First Amendment values by facilitating the production of new creative works); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273 (1991) [hereinafter Leaffer, *New Multilateralism*] (providing a pioneering discussion of the TRIPS negotiations and advocating caution in addressing the divergent intellectual property positions taken by developed and developing countries).

¹⁴³ See Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do with It?*, 47 J. COPYRIGHT SOC'Y U.S.A. 209, 228 (2000) (“In the nineteenth century, industries grew to serve new markets. Artisanal workshops were replaced by ever-more rationalized and highly capitalized enterprises that operated on increasingly global scales. . . . In response to industrialization, copyright was augmented both with new economic and moral rights, while it was transplanted worldwide.” (emphasis in original)); Yu, *Currents and Crosscurrents*, *supra* note 2, at 333–34 (“As cross-border markets developed and expanded, countries became concerned about the limited national protection and the virtually nonexistent international protection for foreign authors and inventors.”).

bilateral conventions to protect foreign authors.¹⁴⁴ During the Tokyo Round of Trade Negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), the United States, with strong support from Levi Strauss, pushed for the development of an anti-counterfeiting code.¹⁴⁵ That proposal was a precursor to the greater demands for a separate intellectual property instrument during the Uruguay Round of Multilateral Trade Negotiations (“Uruguay Round”) in Punta del Este, Uruguay.¹⁴⁶ Although the proposal for an anti-counterfeiting code did not emerge until 1979, after Marshall was frozen, the Tokyo Round was launched in September 1973, when he worked at the U.S. Patent and Trademark Office.¹⁴⁷

What he might find surprising upon his return, however, is the sharp turn of international negotiations and the aggressive push for the TRIPS Agreement in the Uruguay Round.¹⁴⁸ Only a few years before, the international community was addressing the oil crisis brought about by the 1973 Arab-Israeli War and the subsequent embargo imposed by the Arab

¹⁴⁴ For discussions of the use of bilateral treaties to protect foreign authors before the establishment of the Berne Convention, see generally STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 43–55 (1938); RICKETSON & GINSBURG, *supra* note 49, at 27–40; Yu, *Currents and Crosscurrents*, *supra* note 2, at 334–35.

¹⁴⁵ See DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* 9 (2002) (discussing the push for an anti-counterfeiting code during the Tokyo Round); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 40–41 (2003) [hereinafter Sell, *PRIVATE POWER*] (discussing the push for an anti-counterfeiting code during the Tokyo Round). A revised proposal was later submitted in preparation for the next round of GATT talks. *Agreement on Measures to Discourage the Importation of Counterfeit Goods*, GATT Doc. L/5382 (Oct. 18, 1982), https://www.wto.org/gatt_docs/English/SULPDF/91000099.pdf [<https://perma.cc/R7R8-ZK4K>].

¹⁴⁶ See Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, Sept. 20, 1986, 25 I.L.M. 1623, 1626 (setting out the negotiating objectives of the TRIPS Agreement); see also Yu, *Objectives and Principles*, *supra* note 139, at 983–84 (discussing these objectives and the Punta del Este Declaration).

¹⁴⁷ *Ministerial Meeting Tokyo, 12–14 September 1973 Declaration*, GATT Doc. GATT/1134 (Sept. 14, 1973), <https://docs.wto.org/gattdocs/q/GG/GATT/1134.PDF> [<https://perma.cc/J36V-TAKR>].

¹⁴⁸ For the discussions of the origins of the TRIPS negotiations, see generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 3–27 (3d ed. 2008); *THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS* (Jayashree Watal & Antony Taubman eds., 2015); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11–47 (2001); Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTEL. PROP. L. REV. 369, 371–79 (2006).

members of the Organization of the Petroleum Exporting Countries (OPEC).¹⁴⁹ That crisis helped precipitate the development of the New International Economic Order,¹⁵⁰ which “sought to bring about fundamental changes in the international economic system by redistributing power, wealth, and resources from the developed North to the less developed South.”¹⁵¹ As Chantal Thomas recounted:

The origins of [the momentum to establish this new economic order] lay in three changes to the international order in the postwar era: first, the “massive expansion of international organization for cooperative purposes”; second, the “growing importance of states representing non-Western civilizations” in the wake of decolonization and independence movements; and third, “the growing gap between the economically developed and the economically less developed countries.”¹⁵²

From the late 1970s to the mid-1980s, developing countries were also busy developing the International Code of Conduct on the Transfer of Technology under the auspices of the United Nations Conference on Trade and Development (UNCTAD).¹⁵³ This code sought “to eliminate those clauses in

¹⁴⁹ See Essam E. Galal, *The Developing Countries' Quest for a Code*, in INTERNATIONAL TECHNOLOGY TRANSFER: THE ORIGINS AND AFTERMATH OF THE UNITED NATIONS NEGOTIATIONS ON A DRAFT CODE OF CONDUCT 199, 200 (Surendra J. Patel et al. eds., 2001) [hereinafter INTERNATIONAL TECHNOLOGY TRANSFER] (noting, in relation to the drafting of the International Code of Conduct on the Transfer of Technology, “the political tensions during this period of the cold war, the Arab-Israeli War in 1973 being one example, as well as the economic tension as a result of the oil embargo, the oil crisis and the obligatory recycling of its funds to the supposed victims of the crisis”); Yu, *Development Agendas*, *supra* note 49, at 561–62 (noting that those negotiations “were . . . colored by the 1973 Arab-Israeli War and the oil crisis” (footnote omitted)).

¹⁵⁰ G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974). For discussions of the New International Economic Order and related issues, see generally MOHAMMED BEDAJOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); ROBERT L. ROTHSTEIN, GLOBAL BARGAINING: UNCTAD AND THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER (1979); THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE (Jagdish N. Bhagwati ed., 1977).

¹⁵¹ Yu, *Development Agendas*, *supra* note 49, at 499.

¹⁵² Chantal Thomas, *Transfer of Technology in the Contemporary International Order*, 22 FORDHAM INT'L L.J. 2096, 2105 (1999).

¹⁵³ For discussions of the negotiation of this Code, see generally MICHAEL BLAKENEY, LEGAL ASPECTS OF THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES 131–61 (1989); INTERNATIONAL TECHNOLOGY TRANSFER, *supra* note 149; SUSAN K. SELL, POWER

transfer of technology contracts which are harmful to the economic development of developing countries,” as well as other restrictive foreign investment practices.¹⁵⁴

This pro-development effort did not last long, however.¹⁵⁵ By the late 1980s, developed countries had successfully pushed through intellectual property negotiations at the Uruguay Round, which led to the eventual adoption of the TRIPS Agreement in April 1994 and the introduction of new international minimum standards in different areas of intellectual property law across all WTO members.¹⁵⁶ Incorporated by reference into the TRIPS Agreement are Articles 1 to 21 of the Berne Convention and its appendix.¹⁵⁷

Because of this arrangement, the Berne norms no longer evolve solely within the intellectual property forum. Instead, changes brought about by the WTO—in particular, its mandatory dispute settlement process—are just as important. As Laurence Helfer observed, “[w]hat began as a regime with a single intergovernmental organization—WIPO—then became a bimodal regime with two predominant organizations—the WTO and WIPO.”¹⁵⁸

AND IDEAS: NORTH–SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 79–106 (1998); Peter K. Yu, *International Technology Contracts, Restrictive Covenants and the UNCTAD Code*, in EMPLOYEES, TRADE SECRETS AND RESTRICTIVE COVENANTS 41 (Christopher Heath & Anselm Kamperman Sanders eds., 2017); Yu, *Development Agendas*, *supra* note 49, at 493–505.

¹⁵⁴ Ton J.M. Zuijdwijk, *The UNCTAD Code of Conduct on the Transfer of Technology*, 24 MCGILL L.J. 562, 563 (1978).

¹⁵⁵ The negotiations stopped in 1985. *See* SELL, PRIVATE POWER, *supra* note 145, at 89 (“Beginning in October 1978, negotiators met in six sessions, the last of which was held in Geneva in May 1985.”); *see also* Galal, *supra* note 149, at 204–08 (discussing the breakdown of the 1983 Code Conference).

¹⁵⁶ The TRIPS Agreement explicitly covers eight forms of intellectual property rights: (1) copyright and related rights; (2) trademarks; (3) geographical indications; (4) industrial designs; (5) patents; (6) plant variety protection; (7) layout designs of integrated circuits; and (8) the protection of undisclosed information (including trade secrets). TRIPS Agreement, *supra* note 22, arts. 9–39.

¹⁵⁷ *Id.* art. 9.1.

¹⁵⁸ Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RESV. J. INT’L L. 123, 136 (2004). As Professor Helfer explained:

[T]he shift from WIPO to GATT to TRIPs was not intended to eclipse WIPO. Rather, it established a new venue for trade-related intellectual property lawmaking, in effect creating a bimodal intellectual property regime within which the two organizations shared authority according to

Indeed, many commentators viewed the adoption of the WCT, the WPPT, and other activities as urgent efforts that WIPO introduced after the WTO's establishment to rejuvenate this U.N. specialized agency and to reclaim intellectual property norm-setting activities.¹⁵⁹

Because of the considerable gap between the intellectual property policies in developed and developing countries, greater sensitivity to policy differences is in order. As a noted intellectual property scholar declared in a prescient article published amid the TRIPS negotiations:

Including the developing countries in the GATT system will require a less legalistic method than many are advocating at this time. As the GATT negotiations have shown, the member nations may be unable to agree on clear, precisely stated, enforceable substantive rules. The reason for this inability is obvious. One need only consider the nature of the world trading system, which is comprised of highly disparate units, varying widely in political orientation, social organization, and stages of development. A certain amount of differentiation in this environment will have to be accepted. . . . A system that does not take into account the differing cultural, economic, and moral aspirations of

their respective areas of expertise. Whereas the WTO emphasized implementation, enforcement, and dispute settlement, WIPO focused on generating new forms of intellectual property protection, administering existing intellectual property agreements, and providing technical assistance to developing countries.

Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 25 (2004).

¹⁵⁹ See CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA 66 (2006) (noting "a sustained campaign by the WIPO itself to return the organization to the center of global intellectual property policy making"); Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT L. REV. 993, 1005 (2002) ("[T]he sudden emergence of the WTO as part of the international intellectual property lawmaking process seemed to energize WIPO, resulting in the conclusion of several new treaties in copyright, patent and trademark law, as well as the reorganization . . . designed to make WIPO fit for the twenty-first century." (footnotes omitted)); Sisule F. Musungu & Graham Dutfield, *Multilateral Agreements and a TRIPS-Plus World: The World Intellectual Property Organisation (WIPO)* 11 (Quaker United Nations Off., TRIPS Issues Paper No. 3, 2003) ("In a move aimed at preserving its relevance in the new scenario, WIPO quickly adopted a resolution in 1994 mandating the International Bureau to provide technical assistance to WIPO members on TRIPS-related issues. This was followed by a second resolution in 1995 to enter into a cooperation Agreement with the WTO for WIPO to provide technical assistance to developing country members of the WTO irrespective of their membership in WIPO.").

the developing countries will be doomed to failure and will not be enforced effectively by those countries on which it is imposed.¹⁶⁰

These words of wisdom remain highly relevant today. In the past four decades, most of the disagreements between developed and developing countries in the intellectual property area concerned their different policy choices.¹⁶¹ Because these two groups of countries continue to disagree—at times, vehemently—the United States Trade Representative has deployed strong-arm tactics to induce copyright reforms abroad, including the use of the widely criticized Section 301 reports¹⁶² and the WTO dispute settlement process.¹⁶³ Not having much success in improving intellectual property enforcement in developing countries, the United States and its like-minded trading partners have resorted to the negotiation of bilateral, regional, and plurilateral trade agreements, including both the Anti-Counterfeiting Trade Agreement¹⁶⁴ and the Trans-Pacific Partnership Agreement¹⁶⁵ (which has

¹⁶⁰ Leaffer, *New Multilateralism*, *supra* note 142, at 306.

¹⁶¹ See *Disputes by Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm [<https://perma.cc/P5F7-3ZZZ>] (last visited Apr. 2, 2022) (listing disputes involving all the WTO agreements, including the TRIPS Agreement). See generally Peter K. Yu, *The Comparative Economics of International Intellectual Property Agreements*, in *COMPARATIVE LAW AND ECONOMICS* 282 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) (using comparative law and economics to question the TRIPS Agreement's purported benefits to developing countries).

¹⁶² Section 301 permits the U.S. President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests. See 19 U.S.C. §§ 2411–2420. For discussions of the Section 301 process, see generally PETER DRAHOS WITH JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 85–107 (2002); Joe Karaganis & Sean Flynn, *Networked Governance and the USTR*, in *MEDIA PIRACY IN EMERGING ECONOMIES* 75 (Joe Karaganis ed., 2011); Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 *UCLA PAC. BASIN L.J.* 87 (1994).

¹⁶³ See TRIPS Agreement, *supra* note 22, art. 64 (mandating the use of the WTO dispute settlement process to resolve disputes arising under the TRIPS Agreement).

¹⁶⁴ Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 *I.L.M.* 243; see also Peter K. Yu, *ACTA and Its Complex Politics*, 3 *WIPO J.* 1 (2011) (discussing the complex politics behind the negotiations for the Anti-Counterfeiting Trade Agreement); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 *SMU L. REV.* 975 (2011) (criticizing those negotiations).

¹⁶⁵ Trans-Pacific Partnership Agreement, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [<https://perma.cc/5J9E-DG37>]; see also Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 *FORDHAM INT'L L.J.* 1129 (2014) (criticizing the Trans-Pacific Partnership negotiations).

been incorporated into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership¹⁶⁶ following the United States' withdrawal¹⁶⁷).

Another area that has emerged in the past two decades is the arrival of the human rights discourse in the intellectual property field. Although the Universal Declaration of Human Rights¹⁶⁸ and the International Covenant on Economic, Social and Cultural Rights¹⁶⁹ were adopted in 1948 and 1966, respectively, the interplay of intellectual property and human rights “did not receive much attention until WIPO and the [Office of the United Nations High Commissioner for Human Rights] organized a panel on November 9, 1998 to commemorate the fiftieth anniversary of the [Universal Declaration of Human Rights].”¹⁷⁰ This event generated a series of papers that remain widely cited today.¹⁷¹

Although U.S. judges rarely discuss the tensions or conflicts between domestic copyright law and international human rights treaties, those tensions and conflicts are not new to these judges. As early as the decision of *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the United States Supreme Court has engaged in the tension between copyright law and the First Amendment.¹⁷² That case concerned the unauthorized publication of excerpts from President Gerald Ford's memoirs, *A Time to Heal*.¹⁷³ In later cases, the Court advanced the transformative use doctrine to protect the free speech interests in creating parodies in *Campbell v. Acuff-Rose Music, Inc.*,¹⁷⁴

¹⁶⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, <https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> [<https://perma.cc/L2GK-WQW4>]; see also Peter K. Yu, *Thinking About the Trans-Pacific Partnership (and a Mega-Regional Agreement on Life Support)*, 20 SMU SCI. & TECH. L. REV. 97, 104–06 (2017) (discussing this replacement pact).

¹⁶⁷ Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 23, 2017).

¹⁶⁸ G.A. Res. 217 A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁶⁹ International Covenant on Economic, Social and Cultural Rights art. 15(1), Dec. 16, 1966, 993 U.N.T.S. 3, 9.

¹⁷⁰ Peter K. Yu, *Intellectual Property and Human Rights 2.0*, 53 U. RICH. L. REV. 1375, 1383 (2019).

¹⁷¹ See generally WORLD INTEL. PROP. ORG., INTELLECTUAL PROPERTY AND HUMAN RIGHTS 1377 (1999) (providing the proceedings of the “Intellectual Property and Human Rights” panel).

¹⁷² 471 U.S. 539, 555–60 (1985).

¹⁷³ *Id.* at 542.

¹⁷⁴ 510 U.S. 569, 578–85 (1994).

addressed the potential intrusion of the extended copyright term on free speech interests in *Eldred v. Ashcroft*,¹⁷⁵ and explained why the restoration of copyright protection under the Uruguay Round Agreements Act of 1994 did not inhibit First Amendment interests in *Golan v. Holder*.¹⁷⁶ All of these Supreme Court cases have raised important questions about how best to balance copyright protection against human rights interests.

Although courts and commentators have repeatedly noted that copyright should be seen as an “engine of free expression,”¹⁷⁷ quoting Justice O’Connor’s memorable words,¹⁷⁸ and that the tensions and conflicts between copyright law and the First Amendment interests may not need separate balancing,¹⁷⁹ many of these views reflect an over-reading of *Harper & Row*. What Justice O’Connor said in the opinion was that “it should not be forgotten that the Framers [of the U.S. Constitution] intended copyright itself to be the engine of free expression,”¹⁸⁰ not that the *current* copyright system is the engine of free expression.¹⁸¹ As copyright protection rapidly expanded in the past few decades and as interest group politics had actively shaped the development of such protection, it is possible that copyright law has veered off the path the Framers *intended* in the eighteenth century. One should also not forget Justice Brennan’s oft-overlooked dissent in the same decision. That dissent reminds us that “[t]he copyright laws serve as the ‘engine of free expression’ only when the statutory monopoly does not choke off multifarious indirect uses and consequent broad dissemination of information and ideas.”¹⁸² In the later *Eldred* decision, the Court also stated that greater

¹⁷⁵ 537 U.S. 186, 218–21 (2003).

¹⁷⁶ 565 U.S. 302, 327–32 (2012).

¹⁷⁷ See, e.g., *Golan*, 565 U.S. at 305; *Eldred*, 537 U.S. at 219.

¹⁷⁸ *Harper & Row*, 471 U.S. at 558.

¹⁷⁹ See *Eldred*, 537 U.S. at 219 (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (“The first amendment is not a license to trammel on legally recognized rights in intellectual property.”).

¹⁸⁰ *Harper & Row*, 471 U.S. at 558.

¹⁸¹ See Peter K. Yu, *Digital Copyright Enforcement Measures and Their Human Rights Threats*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 455, 475 (Christophe Geiger ed., 2015) (noting Justice O’Connor’s focus on the Framers’ intent and lamenting that “what the Framers *intended* in the 18th century is actually quite different from what we have today” (emphasis in original)).

¹⁸² *Harper & Row*, 471 U.S. at 589 (Brennan, J., dissenting).

First Amendment scrutiny may be necessary when “Congress has . . . altered the traditional contours of copyright protection.”¹⁸³

While the discussion of intellectual property and human rights tends to focus on the tensions and conflicts between these two forms of rights,¹⁸⁴ we should not ignore the human rights bases of intellectual property rights.¹⁸⁵ In fact, a human rights-based approach could make the copyright system more author-centric, as opposed to one centering around either the publisher or the copyrighted work itself.¹⁸⁶ As Farida Shaheed, the first U.N. Special Rapporteur in the Field of Cultural Rights, reminded us in her report on copyright policy and the right to science and culture:

[T]he human right to protection of authorship is non-transferable, grounded on the concept of human dignity, and may be claimed only by the human creator, “whether man or woman, individual or group of individuals”. Even when an author sells their copyright interest to a corporate publisher or distributor, the right to protection of authorship

¹⁸³ *Eldred*, 537 U.S. at 221.

¹⁸⁴ See Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 48 (2003) (“The [conflict] approach views human rights and intellectual property as being in fundamental conflict. This framing sees strong intellectual property protection as undermining—and therefore as incompatible with—a broad spectrum of human rights obligations, especially in the area of economic, social, and cultural rights.”).

¹⁸⁵ See Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1078 (2007) [hereinafter Yu, *Reconceptualizing Intellectual Property Interests*] (noting the need “to separate the human rights aspects of intellectual property protection from others that have no human rights basis”).

¹⁸⁶ See Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 997 (2007) (“A human rights framework for authors’ rights is . . . more protective in that rights within the core zone of autonomy are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws.”); Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045, 1059 (2012) (“[T]he increasing focus on the authors’ human rights has made the intellectual property system more author-centric.”); Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 185, at 1131 (“In the copyright context, . . . [the recognition of the human rights attributes of intellectual property rights] will encourage the development of an author-centered regime, rather than one that is publisher-centered.”).

remains with the human author(s) whose creative vision gave expression to the work.¹⁸⁷

If followed, such an author-centric approach would move the U.S. copyright regime closer to the model found in continental Europe, which protects authors' rights (*droit d'auteur*) rather than copyright. Upon his return in our imaginary scenario, Marshall would be likely to become intrigued, if not delighted, by "the process of reformulation along civil law lines."¹⁸⁸

CONCLUSION

This tribute focuses on what would have happened had Marshall been frozen on his way to academia in 1978 and whether he would find certain developments surrounding the Berne Convention interesting or surprising upon his return in 2021. This imaginary scenario, of course, did not happen. For more than forty years, Marshall has been deeply engaging with many of the copyright questions explored in this Article.¹⁸⁹ Those who follow his scholarship also know that he is the noted scholar who wrote the prescient piece amid the TRIPS negotiations. Even after a quarter of a century of the WTO, policymakers should take seriously his cautious advice.

Without Marshall's insights into both domestic and international copyright law, we would not have understood the Berne Convention as well as we have today. Many of us who travel with him on the copyright law journey—or join him in international conferences—have also benefited from his generous insights, helpful advice, and good companionship. Considering that Marshall has educated many students from around the world—including those from mainland China and Taiwan—let me close this tribute by bringing up the wise words of my favorite philosopher. In Book 2 of the *Analects*, Confucius declared: "At thirty, I had planted my feet firm upon the ground. At forty, I no longer suffered from perplexities. [*Sanshi erli / sishi er*

¹⁸⁷ Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Copyright Policy and the Right to Science and Culture*, ¶ 28, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) (footnote omitted).

¹⁸⁸ Leaffer, *Uncertain Future*, *supra* note 126, at 865.

¹⁸⁹ Marshall has written in all major areas of intellectual property law. In addition to copyright and international intellectual property law, his work in the areas of trademarks and right of publicity is widely recognized.

buhuo]¹⁹⁰ Having an academic life for more than forty years, Marshall no longer suffers from any perplexities in copyright law. That is why we are so eager to learn from this revered *laoshi*.

Marshall, congratulations on having a long, rich, and fruitful career. Thank you for your dedication and tireless work in helping us understand copyright law—domestic and international alike. I look forward to continuing our intellectual engagement after the publication of this special issue, and I cannot wait to see you again in your hometown, Fort Worth.

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¹⁹⁰ THE ANALECTS OF CONFUCIUS bk. II, ¶ 4 (Arthur Waley trans., Vintage Books 1st ed. 1989).