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AUS DER NEUEN WELT

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Today as we gather here, the computer revolution that so engages our thoughts is still only a touch more than fifty years old.[1] We are therefore still charting the rough contours of cyberspace at present, acting somewhat analogously to the great Dutch mariners of centuries past. Because many of the best navigators from the Age of Exploration came from Holland, it is only appropriate to sing their praises at the Tropen Instituut.

Even though I come from the New World of America—"Aus der Neuen Welt," as Antonin Dvořák put it—I know enough history about the Old World to proclaim that some of the best mapmakers from that age were also Dutch. The foremost example, Gerardus Mercator, is so well known for his famous projection that his name remains almost a household word today.[2]

To consider what should happen as we continue to map cyberspace today, it is useful to advert to prior examples. In particular, what happened

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On October 28, 1997, *Internet.l@w+tax/Europe.97* took place at the Tropen Instituut in Amsterdam. (That palatial setting, formerly The Colonial Institute, was renamed in honor of the "Tropics" after Holland lost its overseas possessions.) This article derives from *Digital Copyrights: Content and Management*, a talk that David Nimmer delivered there; he is grateful to Lisa Brownlee for the kind invitation to Amsterdam, and to her, Julie Cohen, Neil Netanel, Jerry Reichman, and Cindy Vroom for helpful suggestions to the manuscript.

Part 1 of this triptych appeared as David Nimmer, *A Tale of Two Treaties*, 22 COLUM.-VLA J.L. & ARTS 1 (1997), and Part 2 appeared as David Nimmer, *Time and Space*, 38 IDEA 501 (1998).

[1] The birth of the ENIAC on Valentine's Day in 1946 is normally recognized as the initiation of the computer era. *See A Computer Chronology: From Bugs to the Net*, SEATTLE TIMES, Nov. 24, 1996, at N12. Others identify the revolution as having taken place on December 23, 1947. *See* John Naughton, *Computers: Once So Big, Now So Personal*, OBSERVER REV., Dec. 12, 1997, at 1.

[2] For an exquisite description of the history of cartography, and seemingly every other pertinent field of human endeavor, see DANIEL J. BOORSTIN, THE DISCOVERERS 146-56 (1983) (evolution from *portolano* to modern map). As the former Librarian of Congress (titular overseer of the Copyright Office) explains, Mercator was born in Flanders. *See id.* at 273. After producing the obligatory map of Palestine, Mercator's first definitive effort was therefore his "*Exactissima Flandriae Descriptio.*" *See id.* Although Mercator was actually Flemish rather than Dutch, Professor Jaap Spoor kindly assured me, at the conclusion of my Amsterdam remarks, that the borders separating the two countries in 1568 were much more porous (even evanescent) than today's boundaries.

fifty years after the advent of an analogous revolutionary event, namely, the invention of the printing press?

Having invoked maps and the Age of Exploration, the name of Martin Waldseemüller rises to the fore.[3] In 1507, Waldseemüller compiled the best available data about where things existed in geographic space. He was able, on that basis, to compose a map of the entire world. Not only that, but he took advantage of the art of printing—then but fifty years old—to produce multiple copies of the map. Though few remember the name Waldseemüller today, the effect of his printed map actually continues to reverberate more strikingly in our world than does even the legacy of Mercator.

In particular, Waldseemüller concluded, based on the best materials extant, that credit for discovery of a certain southern continent lay with one Amerigo Vespucci. On that basis, he developed a label for the large block of land across the Atlantic Ocean from the bulge of West Africa: *Americae pars meridionalis*. The label stuck. Today we know that continent by its same name in vernacular translation—South America.

Later on, however, Waldseemüller changed his mind. He belatedly realized that the discoveries in those lower latitudes did not differ in kind from the earlier pioneering of Christopher Columbus. He therefore concluded that a different label should pertain to the previously named body of land.

But it was too late.[4] For as of that date, Waldseemüller had already distributed fully one thousand copies of his printed map. Their recall was no longer humanly possible.[5]

As I said, the map that I have been contemplating from 1507 affects our language even today. For Mercator himself adopted Waldseemüller's label and applied it not only to the continent in which Brazil and Argentina find themselves, but also to my own home: *Americae pars septentrionalis*. Thus, I could say a moment ago that I come from "America," rather than invoking a variant of "Columbia."

A sobering thought arises: Will the decisions that we make today likewise reverberate five hundred years hence? When assigning nomenclature, the example of Waldseemüller counsels circumspection.

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Applying that lesson to the World Wide Web, let us consider one of the web of copyright issues that it poses. This particular issue goes under

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[3] *See id.* at 252-54.

[4] "The printing press could disseminate, but it could not retrieve. To his annoyance, Waldseemüller himself learned the fantastic, irreversible reach of this new technology .... The printing press, still only a half-century old, revealed its unprecedented power to diffuse information—and misinformation." *Id.* at 253-54.

[5] Error correction is easier in the digital realm; this presents a double-edged sword for those whose sole allegiance is to the dissemination of truth. *See* David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1, 17 n.70 (1996) [hereinafter Nimmer, *Brains*].

the name of "copyright management information." As we shall see in a moment, the Diplomatic Conference that took place in December 1996 in Geneva, Switzerland, brings us into the heart of that realm. In particular, for the WIPO Copyright Treaty [6] to emerge from that conference requires all signatory states to implement a particular version of copyright management information.

The first question to confront about that terminology is: What is it? Lest this terrain be viewed as something wholly novel—an extraneous graft onto the native copyright tree—one must hasten to add that rights management information already forms part of U.S. copyright law, albeit tucked away in the more obscure reaches of the statute.

In the U.S. context, we reach back to the Audio Home Recording Act of 1992 to explicate the theme.[7] That piece of legislation was drafted to counter the threat from digital audio tape ("DAT").[8] If DAT players were freely available, the threat was posed that their perfect audio quality would decimate the entire record industry. One user could buy a factory compact disc and pass it along to friends, who could make perfect copies that in turn could be passed on to more friends, who could make copies of copies of copies until, in the ultimate analysis, there would be no need for anyone to buy another factory original.[9]

The solution that was engineered to meet that threat consisted of a technical scheme.[10] Under the Audio Home Recording Act of 1992, DAT players may be sold and legitimately operated to produce unlimited first-generation copies. Once those first-generation copies are made, however, they themselves cannot be utilized to make later-generation copies. Instead, through a series of controls embedded into the machinery, attempts to make such later-generation copies are forestalled.

Although those circumstances are rather technical, suffice it to say that the DAT recorders must carry "flags" to indicate whether a work is protected by copyright and what generation a particular work is. Thus, if a work is coded as in the public domain, then it can properly generate first-, second-, third-, and fourth-generation copies, and so on. On the other hand, to the extent that a work is coded as protected by copyright, then it is sub-

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[6] The text of that Treaty can be found on the server for the World Intellectual Property Organization. *See* WIPO Copyright Treaty (visited Apr. 11, 1998) <http://www.wipo.org/eng/diplconf/distrib/94dc.htm>.

[7] A portion of that law mandates that "copyright and generation status information be accurately sent, received, and acted upon between devices." 17 U.S.C. § 1002(a)(2) (1994 & Supp. I 1995); *see* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8B.03[C][1] (1997) [hereinafter NIMMER ON COPYRIGHT].

[8] *See* 2 NIMMER ON COPYRIGHT, *supra* note 7, § 8B.01[A].

[9] For a discussion of the early litigation involving this issue, see *id.*

[10] For further discussion and analysis of each aspect of the Audio Home Recording Act of 1992, see *id.* §§ 8B.01-8B.08.

ject to restrictions, allowing originals to be copied only into first-generation reproductions and blocking the reproduction of further copies.

These flags usher us into the world of copyright management information. The electronic fields that identify whether a work is protected by copyright and what generation of copy it is represent the first foray under U.S. law into that realm.

The sequel to that 1992 enactment is the Digital Performance Right in Sound Recordings Act of 1995, which, incidentally also constituted the first amendment to U.S. copyright laws explicitly aimed at the Internet.[11] The 1995 amendment embroidered on the prior 1992 scheme of copyright management information. In particular, it provided that sound recordings made available over the Internet must preserve certain relevant information for the purposes of copyright management.[12]

The amendment itself contemplates rights management information as to the title of sound recordings and the featured artist who performs on it.[13] That last provision mandating attribution harmonizes nicely with the sensibilities that moral rights should be respected in the copyright context.[14] Curiously, however, this 1995 scheme does not extend to information on a work's copyright protection—the very information that underlay the Audio Home Recording Act of 1992, as just noted above.

Thus, in both 1992 and 1995, Congress already embodied into the statutory scheme various requirements relating to rights management information. The first enactment, however, was limited to the realm of digital music; the second was limited to sound recordings. Neither embodied any provisions as to rights management information outside their circumscribed ambits.

The innovation of the new WIPO Copyright Treaty is that it applies rights management information across the realm of copyrightable works.[15] In particular, it provides as follows:

> Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts . . . :
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> (i) to remove or alter any electronic rights management information without authority . . . .[16]

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[11] *See* H.R. REP. NO. 104-274, at 27 (1995), *reprinted in* 1975 U.S.C.C.A.N 356, 374. For a full discussion of this enactment, see 2 NIMMER ON COPYRIGHT, *supra* note 7, §§ 8.21-8.24.

[12] *See* 17 U.S.C. § 114(d)(2)(E). The law imposes no affirmative obligation to encode copyright management information. But it requires that, when such information is in fact included in a work, it be appropriately respected, included, and transmitted. *See id.*; 2 NIMMER ON COPYRIGHT, *supra* note 7, § 8.22[C][1][b].

[13] *See* 2 NIMMER ON COPYRIGHT, *supra* note 7, § 8.22[C][1][b].

[14] *See* 3 NIMMER ON COPYRIGHT, *supra* note 7, § 8D.02[D][4].

[15] *See supra* note 6.

This treaty requirement is not limited to digital music or sound recordings, as were previous U.S. enactments. That conclusion emerges most clearly by consulting the pertinent treaty definition:

> As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.[17]

A necessary concomitant to rights management information, both as reflected in the treaty and in the predecessor U.S. statute from 1992, is that it must prohibit any disabling of the mechanism to safeguard the sanctity of that information.[18] Were the matter otherwise, then the entire scheme could be rendered nugatory—hackers could simply engineer around the generation reader, for instance, in order to produce third- or sixth- or other later-generation copies, instead of limiting the production to first-generation copies as the statute intended.

An additional concomitant to the treaty text is that those who violate the prohibition on disabling the technology are subject to criminal penalties.[19] Thus, the entire weight of the state is intended to be brought down on miscreants who subvert its strictures.

The WIPO treaty's innovation in this realm, as already noted, is to universalize the requirement of copyright management information, as well as to add criminal sanctions to its enforcement. No longer does it apply, as under the 1992 and 1995 U.S. copyright amendments, simply to the musical realm. Instead, countries that wish to adhere to this latest instrument of international copyright law[20] must incorporate into their laws provisions for this type of copyright management information as to all types of works exploited over the Internet. In addition, the new WIPO Copyright Treaty, as

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[16] WIPO Copyright Treaty, art. 12(1) ("Obligations concerning Rights Management Information"). Again, the point is worth reiterating that this language does not affirmatively require any party to affix rights management information. It simply requires that such information as has been encoded be faithfully preserved. *See supra* note 12.

[17] WIPO Copyright Treaty, art. 12(2).

[18] *See* 17 U.S.C. §§ 1002(c), 1002(d)(1); 2 NIMMER ON COPYRIGHT, *supra* note 7, § 8B.03[D][1]-[2].

[19] Interestingly, however, the Audio Home Recording Act of 1992 did not contain any criminal penalties. *See* 2 NIMMER ON COPYRIGHT, *supra* note 7, § 8B.07[B].

[20] The treaty itself is scheduled to take effect as soon as a sufficient number of nations ratify it. *See* WIPO Copyright Treaty, art. 21.

well as the WIPO Performances and Phonograms Treaty,[21] both envision that copyright management information will apply, of course, to all countries of the world, not only to the United States.[22]

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My own view of this innovation is that it has much in theory to commend it; yet many dangers in application are also posed, against which the utmost vigilance is required. Before ventilating some cautions with the WIPO approach, one overarching question about the diplomats assembled at the Geneva Diplomatic Conference is whether they were forward looking in universalizing the requirements of copyright management information.

When Waldseemüller made his celebrated 1507 map, he placed Amerigo Vespucci (Americus Vespucius) on it facing west. To face east toward the Old World, he resurrected from antiquity the illustrious figure of Claudius Ptolemaeus. Of course, the Ptolemaic world view is now best known for its mistake in cosmology, having been supplanted in the interim by the Copernican correction. The question that arises concerning the WIPO diplomats is whether they were looking forward or looking backward.

In America, we often refer to the "laboratory of the states."[23] That catchphrase refers to differing schemes in the fifty states that constitute the separate jurisdictions of our nation. Successful experiments in one state can be widely adopted, whereas failures in other states can be shunned. The same dynamic applies to national copyright schemes. Those features that work in one country can be exported to all. Those features that fail in their track record can be relegated to deserved obscurity.

Gauged by the standard of the laboratory just mentioned, what does the current experimental data tell us about copyright management information? Sadly, the answer is either that it has failed or, at the very least, has not succeeded to date. For in reviewing the jurisprudence arising under U.S. copyright law, one thing about the recent copyright management information laws is immediately apparent: No published cases whatsoever have ever confronted them. Instead, the elaborate rules concerning copyright management information adopted into U.S. law have remained virtually a dead letter, as far as practical impact is concerned.

But does paucity necessarily translate into nonexistence of a practical impact? It could be, to the contrary, that the law is so successful that it has engendered complete compliance, thus obviating the need for any lawsuits!

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[21] The 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions also promulgated the text for that other instrument of international law. *See* WIPO Performances and Phonographs Treaty (visited Apr. 11, 1998) <http://www.wipo.org/eng/diplconf/distrib/95dc.htm>.

[22] *See* WIPO Performances and Phonograms Treaty, art. 19 ("Obligations concerning Rights Management Information").

[23] *See, e.g.*, Thomas F. Cotter, *Pragmatism, Economics, and the* Droit Moral, 76 N.C. L. REV. 1, 96 (1997).

That last argument is internally coherent. Nonetheless, my experience in the field suggests that it in fact is in error and that in this instance paucity does indicate a lack of a practical import.[24] I have given advice to clients on a broad panoply of issues but seldom about anything relating to the Audio Home Recording Act of 1992 and never about its requirements for copyright management information. But turning to the subject matters about which I have rendered advice, one consideration remains invariable: When real world economic stakes are at issue, the fact that a statute seems to address conduct explicitly and minutely constitutes no bar to parties adopting a novel interpretation of the statutory language so as to avoid its thrust. In sum, I find it hard to believe that the nonexistence of litigated cases and personal client advice in this sphere simply reflects the docile acceptance of widespread actors who are meticulously following the statutory dictates.

When one confronts the epochal decision of what legal doctrines to institute on a transnational basis, it would seem typically a good idea to build upon successful foundations. Those experiments that have fared well in the laboratory of states or nations can rise to take their rightful place. In contrast to that ideal, it is not comforting to realize that the decision to enshrine copyright management information moves forward based not on the success of the experiment; instead, it proceeds in the face of a complete absence of experimental data, in my own country at least.

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We have now defined what copyright management information is. The question remains: What role does it serve? The answer: the role of the copyright middleman. Today, that middleman is exemplified by any one of the following:

- Amsterdam boasts many secondhand book stores, at which volumes sold in the immediate or distant past can be browsed, rummaged, and ultimately bought with no royalty payable to the original copyright owner or publisher.[25]
- The Virgin Megastore off of Dam Square seems to have millions of titles. That is a gigantic middleman between copyright owners and consumers.
- The newspaper boy who delivers copies of *Het Parool* or a kiosk where magazines are for sale also qualify as a copyright middleman.
- Perhaps even Holland's treasured collection, the Rijksmuseum, deserves that label.[26]

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[24] Conflicting lessons can be drawn from both an absence of litigation and a surfeit of infringement actions. *See* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 85 (1995).

[25] On the Continent, the pertinent doctrine is called "exhaustion." In the United States, by contrast, it goes under the name of the "first-sale doctrine." *See* 17 U.S.C. § 109 (1994).

[26] A more discerning analysis, I believe, would disqualify the Rijksmuseum from the status of middleman. Although it purveys access to works of authorship no less than do the kiosk or Virgin Megastore, a crucial distinction pertains here: between art and artifact. *See* NIMMER ON COPYRIGHT, *supra*

In a world of copyright management information, the money that one would spend at the kiosk or the Virgin Megastore will disappear. Perhaps even the entry fee for the Rijksmuseum will no longer pertain in the brave new world of copyright management information.[27]

Instead, the specter arises that money to be channeled to copyright owners will take the form of cybercash—proceeds collected directly from consumers and thereafter distributed directly to copyright owners. That cybercash would be gauged by the amount of usage that the particular copyrighted work garnered. In particular, the determination of how much usage occurred for any individual work would take place via its pertinent copyright management information. Through this methodology, to cite the title of an oft-quoted article, "the answer to the machine is in the machine."[28]

If implemented on the ultimate basis, an indissoluble genealogical bond would link artist, or at least transferee copyright owner, to artistic progeny. Not only would my articles, when read by professors or printed out by practitioners, generate royalties to me, but any exploitation whatsoever could potentially become a cybercash-generating event.

Unconstrained by current technological limitations, our imagination can roam free. My own hope is that codex books,[29] acrylic canvases, and the rest will be with us for a long time to come. But for current purposes, let us indulge in the radical thought experiment that tangible copies cease and access becomes entirely virtual.[30]

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note 7, § 8D.06[A][2]. Consider that a "Renoir nude might sell at auction for $23 million, although the information on the canvas, when printed on a poster, might sell at the museum store for $10." MICHAEL L. DERTOUZOS, WHAT WILL BE: HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES 53 (1997).

[27] Based on the distinction that Dertouzos draws in the preceding note, I would actually *not* expect entry fees to the Rijksmuseum to suffer because the Internet would offer no substitute to individuals who want access to the original artifact hanging on the walls. I was, therefore, surprised to see that Dertouzos himself repeatedly invokes the specter of visiting museums on a virtual basis. *See* DERTOUZOS, *supra* note 26, at 279, 282, 286 ("I could attend cathedral services in Athens from my living room; sip ouzo and eat olives on my porch while singing native songs with my old classmates, who would be sipping ouzo in Plaka; visit the Knossos Museum in Crete . . . .").

[28] Charles Clark, *The Answer to the Machine is in the Machine*, *in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 139 (P. Bernt Hugenholz ed., 1996). That essay, together with others that plow the same field, is cited in Nimmer, *Brains*, *supra* note 5, at 37 n.163.

[29] "[T]he books that call to me from the shelves, one always asking to be read more deeply, another chanting to me of my childhood . . . ." DAVID ABRAMS, THE SPELL OF THE SENSUOUS: PERCEPTION AND LANGUAGE IN A MORE-THAN-HUMAN WORLD 52 (1996). "In contrast to the apparently unlimited, global character of the technologically mediated world, the sensuous world—the world of our direct, unmediated interactions—is always local." *Id.* at 266; *see id.* at 115. For an even stronger paean to the printed book, see generally SVEN BIRKETS, THE GUTENBERG ELEGIES: THE FATE OF READING IN AN ELECTRONIC AGE (1994).

[30] Even at that juncture, there may be a role for the middleman as a gatekeeper, a trusted brand name, someone who has presifted a vast bulk according to set criteria, a certifier of authenticity or wor-

In that world, an example could be that *Nimmer on Copyright* exists on the Web subject to a "digital watermark" that could track its later utilizations with a fine degree of granularity. We would then reach a universe in which even excerpting a paragraph out of it and inserting it into a brief, which might then be filed with the pertinent court, could itself set in course a chain of events that would ultimately deposit a few guilders[31] in my Swiss bank account.[32] One can magnify this example throughout the realm of music, movies, mysteries, and others, to apprehend the vastness of its theoretical scope.

We can now appreciate why disabling the strictures of copyright management information is tantamount to theft. For it deprives the copyright owners of the potential source of revenue deriving from exploitation of their works—not in the form of sales at kiosks or at megastores, but instead from newfangled exploitation directly off the Internet.

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Before exploring the potential dark side of this new world of copyright management information, it is worth noting an important glitch in terminology. (Having excoriated Waldseemüller for the mischief of his word usage, I am vulnerable to heightened scrutiny on the subject.) Though styled *copyright* management information, the legal interest that this information serves actually lies elsewhere.

To appreciate this perspective, consider the prohibition under current U.S. law of descrambling encrypted satellite signals. Although the subject purloined signals may contain copyrighted information—the nightly news or *Austin Powers*, for example—the legal prohibition on decryption does not form part of Title 17 of the United States Code, wherein the Copyright Act is codified. Instead, it is part of the Telecommunications Act in Title 47.[33] For the gravamen of the offense in this realm deals with the communications violation, rather than the copyright violation that it facilitates.

The same dynamic strikes me as applicable to the realm of rights management information. Essentially, the world of the Internet allows users to

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thiness. Nicholas Negroponte summarizes these uses as a "sister-in-law," after his own, who offers movie critiques to anyone who will listen.

[31] But what of the fair-use doctrine and limitations for usages for scholarly purposes? Should not those doctrines relieve users of the obligation to pay even a penny for my thoughts when used to argue a point of law in a judicial forum? For my musings on the application of those exceptions to these realms, see *infra* text accompanying notes 42-46.

[32] In fact, NIMMER ON COPYRIGHT currently resides on the Net, subject to full-searching capabilities. *See* <http://www.matthewbender.com/cgi-bin/folioisa.dll/465.nfo/query=*/toc/{@1}?>. Given the clunkiness of our era, however, far from that circumstance having generated massive francs for my Swiss bank account, I am still waiting for any customer's usage of these bits on the Internet to generate two bits in my pocket. Of course, it also lacks any "digital watermark," meaning that those who copy the work off the Internet and then subsequently repurpose it currently escape my most vigilant tracking.

[33] Federal Communications Act of 1934, 47 U.S.C. § 605(a), (e)(4) (1994).

encrypt their works or to insert them into secure envelopes.[34] For those technical schemes to function as intended, the sanctity of the encryption or of the envelope must be respected. But that legal doctrine more closely resembles historic protection under the telecommunications law, or even more pointedly, the "Jesse James Act" forbidding armed postal robbery,[35] than it does the balance of Title 17. For that reason, labeling it as simply "rights management information" would be more accurate than leaving in the additional invocation of the *copyright* rubric.

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Let us now enter this new world of copyright management information. A fascinating article by Julie Cohen has paved the way.[36] Its most aggressive implementation, she posits, would "create a record each time the work is used and notify the copyright owner if additional 'usage rights' are sought. This vision of the future of copyright management could entail total loss of reader anonymity in cyberspace."[37]

Imagine for a moment that I wish to read *The Turner Diaries*.[38] That work, it should be emphasized, is not the reminiscences of internationalist Ted Turner[39] and his recently-celebrated altruism in donating one billion dollars to the United Nations.[40] Instead, the book is an anti-internationalist screed that many view as the blueprint for the infamous Oklahoma City bombing, worst mass murder in the history of the United States.[41]

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[34] *See* DERTOUZOS, *supra* note 26 at 233; MARK STEFIK, INTERNET DREAMS: ARCHETYPES, MYTHS, AND METAPHORS 224-38 (1996).

[35] 18 U.S.C. § 2114 (1994). Note that this statute carries a mandatory 25-year sentence. In the days in which I served as a federal prosecutor, the nondiscretionary severity of that punishment made it unique in the criminal code; subsequently, the drug war has added so many mandatory Solonic flourishes to Title 18 that Jesse James is relegated to preschool status in the current environment.

[36] *See* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); *see also* Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27 (1995).

[37] Cohen, *supra* note 36, at 985.

[38] *See id.* at 1014.

[39] I have been retained over time to represent many of the various Turner companies. *See, e.g.*, Cable News Network, Inc. v. Video Monitoring Servs. of Am., Inc., 959 F.2d 188 (11th Cir. 1992) (en banc). My in-house counterparts at that time were barred, under penalty of a mythic $50 fine, from using the word "foreign" in any of their conversations. For Turner companies exerted international scope and were no more proprietary to the United States of America than to, for example, Iraq. Indeed, precisely those sensibilities emerged during the Gulf War, when the company tried to maintain objectivity.

[40] David Rohde, *Ted Turner Plans a $1 Billion Gift For U.N. Agencies*, N.Y. TIMES, Sept. 19, 1997, at A1.

[41] Apropos of *The Turner Diaries*, some bibliophoric ruminations: my own taste runs toward the sentiment that nothing can match a "good ol' book," and that all the gigabytes of interactivity in the (disembodied) universe are a pale substitute for that traditional medium. *See generally* CHARLENE SPRETNAK, THE RESURGENCE OF THE REAL: BODY, NATURE, AND PLACE IN A HYPERMODERN WORLD (1997). It must equally be acknowledged, however, that some codex books are bad; indeed, some are

Contrast the world of today with the world of Net access. Today, I could browse a copy of *The Turner Diaries* that happens to show up at a secondhand book store. After a brief review, I could decide to reject it and put the volume back on the shelf with disdain.

Alternatively, if determined both to read the book but not to fund terrorism, I could go to a local library and check it out. In the United States, library rentals do not generate any copyright royalties.[42] But libraries, too, are middlemen.[43] Therefore, in a world of complete Net access, they also are headed for potential extinction.

In today's world, once I were to check out *The Turner Diaries* from a library, I could write an editorial of condemnation. In that context, I could quote selected paragraphs from the work to prove my point of how venal, twisted, and evil is its *weltanschauung*. My quotation of those selected paragraphs, of course, would find adequate safe harbor under the fair-use doctrine.[44]

Now consider the alternative future that rights management information portends. All books could become available on-line. At that point, the middleman would be gone, as every book would be available for experiencing directly in one's living room or anywhere else an Internet node exists. As a consequence, I could not go to a secondhand book store and browse *The Turner Diaries* before deciding to reject it.[45] Nor could I go to a library in order to acquire it and thus deprive the copyright owner of a stream of revenues. I could not even write the editorial in which I embed selected quotations simply to condemn the author—for the precise act of embedding those quotations poses a risk that the subject material will be picked up by the cybercash filter attuned with an ultrafine degree of granularity to the relevant copyright management information, thereby enriching

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positively evil. *See generally* DANILO KIŠ, THE ENCYCLOPEDIA OF THE DEAD (1989) (extended meditation on *Protocols of the Elders of Zion*).

[42] "A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose." H.R. REP. NO. 94-1476, at 79 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693. This lenity is to be contrasted with a "public lending right" that authors may apply against libraries in some countries. *See, e.g.*, David Vaver, *Canada* § 8[1][d], *in* 1 MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (1992) [hereinafter ICLP]; Herman C. Jehoram, *Netherlands* § 8[1][b], *in* 2 ICLP.

[43] Of course, a library must purchase a book. In theory, massive lending might induce additional sales of the subject title.

[44] *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986) (Jerry Falwell allowed to reproduce Larry Flynt's entire copyrighted advertisement to show the depths to which his opponents had sunk); *cf.* Hustler Magazine v. Falwell, 45 U.S. 46 (1988) (Jerry Falwell not allowed to proceed against Larry Flynt alleging infliction of emotional distress for publication of the same copyrighted advertisement); *see also* THE PEOPLE V. LARRY FLYNT, 365 Sony for Man 666 (Director Miloš Forman allowed to depict both Larry Flynt and Jerry Falwell) (1997).

[45] Another consequence might be that I could not borrow the book from a friend, or lend her a copy in my possession, as would be permitted under current copyright law by virtue of the first-sale doctrine. *See* 17 U.S.C. § 109 (1994).

the very author whom I wish to obliterate. Indeed, wide scale dissemination of my condemnation could bring the author more direct return than his own efforts![46]

Instead of the instrumentalities of current law, the new scheme might simply respond in each and every instance, "The meter is running." The consequences for both author and reader are significant.

* * *

Consider the effect that this new world exerts on numerous realms. I recently read a book entitled *What Will Be*.[47] I discovered the book when logging onto "Amazon.com" and being confronted with an interactive message at the web site proclaiming words to the effect of, "Welcome, David Nimmer. Based on past reading habits, you are likely to enjoy this work; to order, click [HERE]."

In a moment, we will consider the consequences of that type of information on privacy rights. Before reaching that realm, however, it is nourishing to pause for refreshments. If we were engaging in this dialogue over the Internet, I could offer you a cookie; actually, and a bit more ominously, you would perforce be offering me a cookie, even without your knowledge.

What are cookies? A visit to the web site of the Center for Democracy and Technology is instructive.[48] "Cookies" refer to client-side persistent information that allow a web site to learn information about you every time you log on. Amazon's recommendation to me of *What Will Be* might be considered a trivial example.[49] But cookies are far from trivial.

> When you visit a particular web site, for example, the webmaster can determine what files, pictures, or other information you are most interested in (and what you ignored), how long you examined a particular page, image or file, where you came from, where you went to.
>
> Web servers collect transactional information in order to allow the system operator to perform necessary system maintenance, auditing, and other essential system functions. However, when correlated with other sources of personal information, including marketing databases, phone books, voter registration lists, etc., a detailed profile of your online activities can be created without your knowledge or consent.[50]

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[46] The point is that the revenue is generated automatically as the filter detects the subject words scanned by my readers. In this sense the aphomism "there's no such thing as bad publicity," becomes true to an alarming degree.

[47] *See supra* note 26.

[48] *See CDT Privacy Issues* (visited Apr. 11, 1998) <http://www.cdt.org/privacy>.

[49] "If you're a moderate Web surfer, chances are that at this very moment your hard disk is host to about 200 cookies placed there by the various sites that you have visited to, say, get the latest news or conduct a search." Chip Bayers, *The Promise of One (A Love Story)*, WIRED, May 1998, at 134.

[50] *CDT Internet Privacy Issues* (Visited Apr. 11, 1998) <http://www.13x.com/cgi-bin/cdt/snoop.pl>.

What is a party to do? One solution—in fact, the pet solution of the Center for Democracy and Technology—is the Anonymizer:

> By visiting the Anonymizer web site before visiting other web sites, you are assigned an anonymous identity which is revealed (instead of your real identity) as you surf the web. It allows you to surf freely, even if you follow a hypertext link to another web site, without having to worry that the web site you are reading is keeping track of who you are and your interests.[51]

If this sounds like an unalloyed benefit to the user, then it must be too good to be true; it is. For users of the Anonymizer program are barred from accessing much content on the Internet, given safeguards erected on host sites to refuse connections from anonymized hits.[52] The wages of anonymity are death![53]

The cookie crumbles in two directions. Both add to our repast.

* * *

The first aspect is conceptual. Information about me has value—not only to me, but also to those who want to influence me. The Center for Democracy and Technology illustrates some of the potentials and perils here:

> A single piece of information about you can support a tremendous range of activities. For example, if your repeated visits to web sites containing information on cigarettes results in free samples, coupons, or even e-mail to you about a new tobacco product, you may not be concerned. However, if your visits to these web sites result in escalating insurance premiums due to categorization as a smoker—now you're beginning to get concerned.[54]

The perils here are potential costs to users. The concomitant benefits accrue potentially to those who collect information.

Upon reflection, it therefore seems that there are actually (at least) two methods of compensating authors for use of their copyrighted works over the Internet. The first is the "traditional" form of cybercash posited above. The second consists of compensation of a more ethereal variety—in exchange for you allowing me to listen to your song, watch your movie, read your poem, or bask in the sunshine of your sculpture, I am willing to allow you to ascertain various bits of information about me.

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[51] *Id.*

[52] Nonetheless, some sites accept anonymized hits. As to those, the Anonymizer can serve as an effective device for accessing information without leaving telltale, and potentially valuable, tracks.

[53] How jarring to reflect that all of this co-exists in a copyright universe in which the attribution right under Article 6*bis* of the Berne Convention nominally includes the right to anonymity! *See generally* NIMMER ON COPYRIGHT, *supra* note 7, § 8D.01[A].

[54] Bayers, *supra* note 49, at 134.

It would require complete economic upheaval for that latter type of commodity to supplant cold, hard cash, or even cybercash. Yet exactly that revolution is posited in some quarters. Just as our medieval forbears could never envision anything other than land and noble lineage being the basis for wealth and power and, therefore, could not conceive of a money economy, so today perhaps it is similarly difficult for us to imagine the revolution from today's "money economy" to an "attention economy."[55] Yet an article in the December 1997 issue of *Wired* magazine posits exactly that shift.[56] Could cookies be the first harbingers of that change?[57] If one treats the collected data about the "viewer" as part of the compensation to the copyright owner in the newly-emerging information economy, the answer well might be affirmative.

* * *

The second question to arise concerning the Anonymizer directly implicates the legal issues under discussion: Is that Anonymizer itself illegal under the new scheme prohibiting anti-circumvention technology? Is Netscape Navigator, with its embedded option of allowing browsers to reject cookie detectors, similarly an illegal device under the scheme of law re-

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[55] Thought must be given to the connection between the novel attention economy and the far-from-novel existence of commercial broadcast media. For the latter are carried over the air without any royalties paid by consumers; instead they are entirely supported by advertising dollars. In the roughest of manners, it would seem that advertisers pay precisely for attention. *See* Randall Rothenberg, *Bye-Bye*, WIRED, Jan. 1998, at 72 (positing death of all media conglomerates in an era of narrowcasting).

[56] *See* Michael H. Goldhaber, *Attention Shoppers!*, WIRED, Dec. 1997, at 182. On the other hand, for a caveat about citations to *Wired* magazine, see BIRKETS, *supra* note 29, at 210.

[57] Perhaps the shift from money to attention is not so novel, after all. In holding artist Jeff Koons liable for copyright infringement, Judge Cardamone's opinion reeks with contempt from its opening lines:

> The key to this copyright infringement suit, brought by a plaintiff photographer against a defendant sculptor and the gallery representing him, is defendants' borrowing of plaintiff's expression of a typical American scene—a smiling husband and wife holding a litter of charming puppies. The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.

Rogers v. Koons, 960 F.2d 301, 303 (2d Cir. 1992). One could disparage Jeff ("Mr. Banality") Koons further by noting that his wife, with whom much of his *oeuvre* depicts him *in flagrante*, is an Italian porn star turned member of Parliament. But do these slings and arrows diminish the artist? Consider:

> The raw investment of attention, positive or negative, qualifies certain works of art as "players" in the discourse. So, even though it may appear to you that nearly everyone hates Jeff Koons's work, the critical point is that people take the time and effort to hate it, publicly and at length, and this investment of attention effectively endows Koons's work with more importance than the work of those artists whose work we like, but not enough to get excited about.

DAVE HICKEY, AIR GUITAR: ESSAYS ON ART & DEMOCRACY 111 (1997). For a different perspective on Jeff Koons, albeit from a self-confessed "cornball" who grew up where "banality and reality are so indistinguishable, perhaps even co-extensive," see Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 385 n.61, 406-07 (1994) (expressing admiration for Koons' artwork but simultaneously acknowledging him as "that great charlatan of the art world, the master of commodification, the crafter of purple puppies and urine-colored pornography").

quired to be implemented within each nation in order to follow the strictures of the new treaties?

Given that the legal framework on the subject is still in the formative stage,[58] there can be no certain answer.[59] The bill proposed by the Clinton Administration to implement the new WIPO copyright treaties[60] prohibits anyone from attempting to "avoid, bypass, remove, deactivate or impair a technological protection measure, without the authority of the copyright owner."[61] Does the Anonymizer fit into that paradigm? It would seem not, at first blush. Nonetheless, perhaps an argument could be crafted that the cookie detector on a site containing copyrighted works constitutes part of the "terms and condition for use of the work," which qualifies as one subspecies of copyright management information.[62] Putting those provisions together, perhaps an argument could be crafted that the Anonymizer, which defeats this aspect of copyright management information, should be barred under the proposed statute.[63]

It is, at present, far too soon to posit any answers to these questions. But, by now, questions raised by the Anonymizer bring the issue of user privacy unambiguously to the fore.

* * *

Sweeping aside the cookie crumbs, let us revert to Amazon's recommendation to me of *What Will Be*, leading to my purchase of that book.

That particular experience represents the positive side of great corporate entities tracking my predilections. But consider the negative flip side that exists in a world of ubiquitous copyright management information. Let us start with the philosophical:

> When you are being observed, you naturally identify with the observer's viewpoint, and add that alongside your own viewpoint on your action. This double vision makes your act different, whether the act is making love or taking a drive.[64]

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[58] For a preliminary analysis, see "WIPO Treaty Countdown," 1998 special supplement to NIMMER ON COPYRIGHT, *supra* note 7.

[59] For an argument that that conclusion could indeed pertain under a previous recension of the bill's language, see James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 HARV. J.L. & TECH. 47, 106 (1996).

[60] *See* S. 1121, 105th Cong. (1997); H. R. 2281, 105th Cong. (1997) [hereinafter House WIPO bill].

[61] House WIPO bill, *supra* note 60 (proposed addition of 17 U.S.C. § 1201(a)(3)(A)).

[62] *Id.* (proposed addition of 17 U.S.C. § 1202(c)(4)).

[63] The argument is posited in the text as a thought experiment, not necessarily as a plausible reading of the bill in its current formulation. For the argument draws upon disparate portions of that bill and combines them promiscuously. Thus, the question contemplated is not whether an argument could be made for liability of the Anonymizer under the current bill, but whether, under the still unknown final text to be formulated, that argument would be credible.

[64] Reiman, *supra* note 36, at 38. A radically different view of the Panopticon that philosopher Reiman fears is invoked by another philosopher: the worldview of Alaska's Koyukon Indians, who "live in a world that watches, in a forest of eyes." ABRAMS, *supra* note 29, at 69. For that indigenous tribe,

In that way, a risk of infantilizing the life of the mind is posed—turning humans from rugged individuals into bland cogs unable to do aught but conform.[65]

The other aspect of the risks here are more down to earth. After I read *The Turner Diaries*, my name could be put on the mailing list for every right-wing kookie (as opposed to "cookie") organization under the sun. Indeed, such organizations as World Association of Recidivist Terrorists ("WART") would pay dearly for a list of their sympathizers, evidenced by such proclivities as reading *The Turner Diaries*; conversely, left-wing extremist organizations would be equally happy to pay to know who is fellow-traveling with their favorite authors.[66]

We must now consider forthrightly the effect of rights management information on the right that Julie Cohen posits to read anonymously. At present, federal law prevents videostore owners from publicizing their customers' rental preferences.[67] State law similarly bars revelation of the books checked out from a local library.[68] Thus, to the extent that someone at the corner store were to proclaim (fictitiously, I might add) that "pseudointellectual David Nimmer is in fact a Jackie Chan/Steven Seagal devotee," or even worse "inevitably ends up in a particular fetishistic corner of the X-rated section," then those revelations are illegal.

By the same token that I do not want my video preferences at a given store proclaimed, it is all the more objectionable to make available a full and comprehensive list of everything that I have ever read, or viewed, or listened to over the years. When the government has available to it an unexpurgated printout of each and every word, note, and image that has entered my brain for the past dozen years, then the era of Big Brother will have dawned.[69]

Thus, instead of fearing the specter that right-wing mailings will result from my review of *The Turner Diaries*, an even graver concern is implicated here: My reading and browsing activities in order to write the edito-

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however, far from feeling dehumanized by being watched from above, their integral involvement with their environment, it is claimed, heightens their sense of moral responsibility. *See id.* at 153.

[65] Reiman, *supra* note 36, at 40.

[66] Julie Cohen focuses on *The Turner Diaries*. *See* Cohen, *supra* note 36, at 1014. An author with different political sensibilities could view with parallel disdain works lionized in left-wing quarters, such as MICHEL FOUCAULT, WHAT IS AN AUTHOR?, *cited in* David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139, 139 n.1 (1992).

[67] *See* 18 U.S.C. § 2710 (1994) ("Wrongful disclosure of video tape rental or sale records").

[68] *See* Cohen, *supra* note 36, at 1031 nn.211-13 (collecting citations).

[69] Special prosecutor Kenneth Starr is evidently attempting to accelerate the process: "[T]he independent counsel investigating President Clinton's relationship with Monica S. Lewinsky, has broadened his search into her book buying by subpoenaing Barnes & Noble, the nation's largest bookstore chain, for information about the former White House intern's purchases." Doreen Carvajal, *Testing of a President: The Investigation*," N.Y. TIMES, Apr. 2, 1998, at A20.

rial of condemnation could end up putting me on the FBI watch list![70] At this point, we are confronting the potential for a serious First Amendment violation. And looking beyond the First Amendment, which governs solely within the United States, the issue is joined of privacy regulations throughout all the countries on earth serviced by the World Wide Web.[71]

* * *

The possible dangers from this new regime of copyright management information thus seem broad and far-reaching. They range from the sacrifice of privacy to the loss of "fair use" quotation privileges to the trampling of basic First Amendment protections of freedom of speech and of association.[72]

Nonetheless, these dangers are anything but categorical and inexorable. They represent simply one possible path whereby newly-created rights could be abused to the detriment of society. A parallel timeline exists into the future, by contrast, in which copyright management information is used benignly. Under this alternative scenario, copyright owners will wish to encourage browsing of their works and indeed will structure their availability on the Internet precisely to facilitate that goal.[73] The concerns of the content communities, it is further posited, will lie solely in the realm of collecting copyright royalties. Not wishing to arouse public indignation through revelations of charting usages via vast databases that detail who has read what, they will therefore scrupulously respect freedom of speech and of association—and the right to read anonymously—in cyberspace. Equally loath to upset the traditional apple cart of fair use, they will set the meter to a coarse degree of granularity, thereby allowing isolated paragraphs to be quoted freely by others without generating any copyright royalties. Yet another possibility is that the glut of information collected on the Net will prove overwhelming, defeating through sheer bulk the most resolute of Orwellian aspirations.[74]

Which of these rival visions of the future will prove accurate? At present, there is no way to tell. Thus, in evaluating the bills pending before

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[70] Or is it graver? Some can spend a whole lifetime on the FBI watch list in blissful ignorance. But few can evade the nightly dinnertime ring of the telemarketers!

[71] We thus enter the current joust between the United States and the European Union over the latter's Privacy Directive. "In cyberspace, the European rules may create new headaches for Web sites that use cookies or profiling systems .... 'If the data collected by a cookie or profile links to the name of a specific European individual, it can trigger the directive.'" Simon Davies, *Europe to U.S.: No Privacy, No Trade*, WIRED, May 1988, at 135.

[72] Parallel concerns find ventilation in Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L L. 441, 493-96 (1997).

[73] *See generally* Nimmer, *Brains*, *supra* note 5, for an extended meditation on that theme.

[74] We revert here to Amazon.com, invoked above to introduce cookies. "Amazon.com execs will admit privately that the company's growth has outstripped its ability to warehouse, let alone mine, the data it collects. For the moment, most of that information—surprise!—simply disappears into Amazon.com's hard disks." Bayers, *supra* note 49, at 134.

Congress, we should proceed with our eyes open.[75] It may be that the proposals for rights management information currently on the table are appropriate and must simply be fine-tuned in order to avoid the baleful consequences imagined above. Or it may be that strict safeguards must be legislated simultaneously with the standards governing copyright management information. These are the thoughts that should engage our policymakers and legislators as the current bills wend their way through Congress.

* * *

Personal privilege moves me to advance one additional aspect of the matter. To the extent that the messianic age does not dawn at the turn of the millennium and instead a dystopia emerges of privacy trampled and First Amendment violations run amok, wherein does the fault lie? The blame under that scenario, I would submit, does not stem from copyright law and its inadequate transportation into the volatile environment of the Internet.[76] Instead, the blame under that scenario should rest soundly on the *sui generis* system of rights management information itself. As previously noted, that scheme is connected to the copyright sphere only adventitiously; it fits more naturally into regulation of the telecommunications industry. I therefore issue an advance plea of exoneration for those whose name is intimately associated with copyright not to be blamed for whatever travails might emerge under even the darkest vision of rights management information.[77]

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These particular ruminations are enough to realize that, as new worlds are mapped, we must enter them gingerly.[78] Many opportunities are posed here, but an equal number of dangers also loom. One concern that should

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[75] *See* GEORGE B. DELTA & JEFFREY H. MATSURA, LAW OF THE INTERNET § 1.01 at 1-3 (1998) ("The authors believe that the Internet and all of the world's other data networks will soon become as ubiquitous and as thoroughly integrated into the social and commercial fabric of the world as the telephone is today.").

[76] *See generally* Nimmer, *Brains*, *supra* note 5 (defending application of copyright law to volatile productions).

[77] One school of thought decries the notion that copyright exploitation is even implicated on the Internet. However, that school of thought itself supports a new *sui generis* regime to regulate cyberspace. *See* citations in *id.* at 38 n.164. The flaws associated with the dystopian potential avenue of rights management information would seem to represent nothing other than the failure of that particular *sui generis* approach to technological regulation in the Internet context.

[78] A final reflection comes to mind, apropos of the Tropen Instituut—when I first appeared at that site, it was to debate John Perry Barlow about the wisdom of traditional copyright law, particularly as transported to the Internet. Before the debate began, my wife and I toured the Tropen Museum. Each exhibit there featured beautiful masks, puppets, and other indigenous art collected over the decades; there was no unifying theme to the collection, except for the sad comment at the end of each exhibit, whether from Central America, the South Pacific, Southeast Asia, or other parts of the globe: with the advent of television, the artforms of centuries past are dying out. *See* JERRY MANDER, IN THE ABSENCE OF THE SACRED: THE FAILURE OF TECHNOLOGY AND THE SURVIVAL OF THE INDIAN NATIONS (1991). *See generally* ABRAMS, *supra* note 29; BIRKETS, *supra* note 29.

be on all of our minds is that we do not wish to replicate the example of Martin Waldseemüller, lest five centuries from now, some speaker at a conference on Lord-knows-what planet remembers us and invokes our name only for the errors that we may have committed at this crucial instant, five decades into the dawn of a new era.