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Recent Development

RECENT DEVELOPMENTS IN COPYRIGHT LAW

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This article reviews selected copyright cases reported in *The United States Patent Law Quarterly*, Second Series, Volume 43, Number 9 through Volume 44, Number 8. It also summarizes key proposed legislation under consideration during the time period covered by those reports. The cases reviewed deal with subjects as sensational as the O.J. Simpson trial, and as mundane as the transfer of a copyright by contract. Many of these cases and legislative materials reflect the continued effort by courts and Congress to address new and difficult problems we face in trying to adapt copyright protection to the digital and information age.

I. Copyrightability

A. Taxonomies

In a strongly worded opinion lauding the merits of taxonomies, the Seventh Circuit in *American Dental Association v. Delta Dental Plans*¹ held that the American Dental Association's (A.D.A.'s) *Code on Dental Procedures and Nomenclature* (Code) was copyrightable subject matter.² The plaintiff A.D.A. had alleged that the defendant Delta had infringed its copyright when it used most of the A.D.A.'s Code with only slight changes to generate its own "Universal Coding and Nomenclature" (Universal Code).³

The A.D.A. Code classifies dental procedures into groups and then assigns them a number, a short description, and a long description.⁴ The district court had held that the taxonomy was not sufficiently original to be copyrightable because nothing remained after the useful aspects were removed.⁵ It had also noted that the Code's nature as the creation of a committee rather than as the result of personal taste and judgment made it uncopyrightable.⁶ In addition, the district court noted *201 that the Code cataloged an entire field of knowledge, and thus did not constitute an original selection of facts.⁷ The district court's reasoning prompted numerous taxonomy-generating organizations to file amicus curiae briefs challenging the holding.⁸

Writing for the Seventh Circuit, Judge Easterbrook warned of the dire consequences such a broad holding would have on other taxonomies and works created by joint effort.⁹ The district court's analysis, the court reasoned, would remove numerous taxonomies from copyright protection, including the A.M.A.'s medical procedure taxonomy, the manuals issued by the Financial Accounting Standards Board, and the West Key Number System.¹⁰ If all works created by committee were held invalid, the court continued, the ETS tests and answers, as well as most computer programs, would be non-copyrightable.¹¹

The court explained that works "need not be aesthetically pleasing to be 'literary' " and that "facts do not supply their own principles of organization. Classification is a creative endeavor."¹² It noted that different groupings and numbering systems could have been chosen, and different descriptions written.¹³ Rejecting the notion that the utilitarian nature of the taxonomy prevented it from being copyrighted, it cautioned against extending to literary works the rather problematic line between copyrightable and non-copyrightable elements of useful articles.¹⁴

The court also rejected the argument that the Code was merely a compilation under Section 103, noting that a work could be a compilation only if its elements existed independently and the taxographer merely put them in order.¹⁵ A taxonomy is a way of describing items in a body of knowledge, Judge Easterbrook instructed, it is not a collection of "bits and pieces of 'reality.' "

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Nor was the taxonomy a non-copyrightable “procedure, process, or system” under Section 102(b), the court continued, but rather was expression that can be put *202 to many uses.¹⁷ Essentially narrowing *Baker v. Seldon*¹⁸ to its facts, the court found that “few ‘how-to’ works are ‘systems’ in *Baker*’s sense.”¹⁹ Thus, the court concluded, as in *Baker v. Seldon*,²⁰ anyone was free to develop forms that use the taxonomy developed by the A.D.A.²¹ However, a person could not copy the taxonomy itself, or republish a derivative work, such as the defendant’s Universal Code, that made use of most of the code with only minor changes.²² Not surprisingly, Judge Easterbrook’s decision preserves the economic incentive for taxonomists to invest the time and money necessary to produce useful paradigms for organizing and communicating knowledge. It appears likely to decrease the incentive for authors to make beneficial revisions to these works, however.

B. Methods of Operation

Declining to follow the First Circuit’s influential holding in *Lotus Development Corp. v. Borland International, Inc.*,²³ the Tenth Circuit held in *Mitel, Inc. v. Iqtel, Inc.*²⁴ that even though an element of a work may be characterized as a method of operation,²⁵ it may “nevertheless contain expression that is eligible for copyright protection.”²⁶

*203 Mitel, a prominent manufacturer of a type of phone equipment known as a call controller, had sought a preliminary injunction against Iqtel for copying portions of its four digit “command controls” that technicians used to program Mitel’s call controllers.²⁷ Because Mitel had a large share of the market for call controllers, most technicians were experienced in operating Mitel’s call controllers and knew its command codes.²⁸ To compete, Iqtel had copied Mitel’s command controls, translated Mitel’s command code into Iqtel command codes, and copied the “value” represented (e.g., 1 = 110 baud, 2 = 300 baud, etc.).²⁹ Iqtel had created its own codes for the first three digits, but it had also designed its machine to accept Mitel’s well-known command control codes and translate them to Iqtel’s codes.³⁰ In addition, Iqtel published an appendix for technicians that converted the codes.³¹

Despite the court’s holding that some elements embedded in a method of operation may be eligible for copyright protection, the court found that Mitel’s particular control codes were non-copyrightable subject matter.³² First, it held that Mitel’s arbitrary assignment of particular numbers to particular functions and its sequential ordering of its command code numerals lacked the modicum of creativity necessary for protection.³³ Next, the court found that Mitel’s selections of particular values to activate its call controller functions reflected a sufficient degree of creativity, but could not be protected under the *scènes a faire* doctrine because they were dictated by external factors, such as the “proclivities of technicians and ... significant hardware, compatibility, and industry requirements.”³⁴ The Tenth Circuit warned that a proper *scènes a faire* analysis considers the external factors that dictate the *selection* of similar or identical aspects of a work, but does not consider whether market forces and efficiency considerations justify the *copying* of another’s work.³⁵

*204 C. Derivative Works—Mounting a Work

Section 106(2) of the Copyright Act gives a copyright owner the exclusive right to produce derivative works.³⁶ In *Lee v. A.R.T. Co.*,³⁷ the creator of certain copyrighted notecards and lithographs alleged that the defendant had infringed her exclusive right to authorize derivative works by mounting her notecards and lithographs on ceramic tiles.³⁸ In support of her position, she relied upon two Ninth Circuit decisions³⁹ that found that mounting copyrighted art on ceramic tiles “recast, transformed, or adapted” the work under Section 101’s definition of derivative works.⁴⁰

In an opinion written by Judge Easterbrook, the Seventh Circuit rejected the Ninth Circuit’s reasoning and concluded that the mounting was not a derivative work under Section 106(2).⁴¹ Focusing again on the parade of horrors that would follow a contrary ruling, Judge Easterbrook analogized the mounting of artistic work onto tiles to the framing of a picture that does not recast, transform, or adapt the picture.⁴² Judge Easterbrook noted that the Ninth Circuit itself recognizes that a museum does not violate Section 106(2) every time it reframes a painting, and concluded that A.R.T.’s use of epoxy resin to mount the art in lieu of a frame was “a distinction without a difference.”⁴³

D. Derivative Works—Costumes

Derivative works can be copyrighted under Section 103(a),⁴⁴ but only to the extent of the author’s contribution to the work as distinguished from the preexisting *205 material.⁴⁵ In *Entertainment Research Group v. Genesis Creative Group*,⁴⁶ the Ninth Circuit appears to have raised the standard for obtaining a copyright for a derivative work created in a different medium than

the original work. In this case, the court rejected a test that finds derivative work copyrightable if the form of the derivative work and the form of the underlying work (e.g., three dimensional versus two-dimensional, plastic versus paper, etc.) are sufficiently different.⁴⁷ Instead, the court adopted the Second Circuit's *Durham* test, which holds that to support a copyright, the original aspects of a derivative work: (1) must be more than trivial; and (2) must reflect the degree to which the derivative work relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.⁴⁸

In *Entertainment Research*, the plaintiff had created and obtained copyright registrations for several three dimensional costumes based upon the famous copyrighted characters of his clients, such as "Toucan Sam", "Dough Boy," and "Cap'n Crunch."⁴⁹ Considering the first prong of the *Durham* test, the Ninth Circuit found that the plaintiffs costumes were not protectable derivative works, since the differences in form, texture, and proportionality between the costumes and their two-dimensional counterparts stemmed from functional considerations.⁵⁰ The court instructed that such functional differences are not properly considered in determining whether differences between the original and the subsequent work are more than trivial.⁵¹

In analyzing the second prong of the *Durham* test (the effect on the scope of copyright protection for the original material), the court was influenced by its conclusion that granting Entertainment Research a copyright in its costumes would have the practical effect of giving them a de facto monopoly on all inflatable costumes depicting the underlying copyrighted characters.⁵² If the derivative copyrights were granted, the owner of the underlying copyrights would be deterred from issuing licenses to other manufacturers of three-dimensional costumes for fear *206 that the licensee would face a copyright infringement suit from Entertainment Research.⁵³ Such a monopoly would clearly affect the scope of the copyright protection in the preexisting material.⁵⁴ Since a person cannot have a monopoly on a media, the court explained, copyright protection was improper.⁵⁵

II. Infringement

A. Revision of a Collective Work

The United States District Court for the Southern District of New York in *Tasini v. New York Times*⁵⁶ rejected the claims of freelance writers that the licensing of their articles without their permission for use in on-line databases and CD-ROMs violated their copyrights.⁵⁷ The plaintiffs had licensed their articles for use in the defendants' newspapers and magazines. However, the defendants had subsequently licensed the contents of these newspapers and magazines for use in on-line databases, such as LEXIS/NEXIS, and on CD-ROMs, without the freelance writers' permission.⁵⁸ The court found that the plaintiffs had not explicitly transferred electronic rights to their articles,⁵⁹ but that use of the articles comprising the original collective work in on-line databases and CD-ROMs did not violate the copyrights in the articles because the databases and CD-ROMs were "revisions" of collective works under Section 201(c).⁶⁰

In analyzing the plaintiffs' claims, the court adopted a broad definition of the term "revision" under Section 201(c) in that the new work must be "recognizable" as a version of the preexisting work.⁶¹ Holding that the analysis of "revision" under Section 201(c) was almost identical to that for infringement of a collective work, the court considered: (1) whether the original compilation possessed significant original *207 elements of arrangement or selection; and (2) whether the electronic databases at issue preserved these original elements under the "substantial similarity" test.⁶²

In its analysis, the court warned that "[a]lthough relatively little creativity is required to give rise to an original selection within a compilation of collective work, great care is required to preserve that original selection or arrangement in a subsequent work."⁶³ Here, the original selection had been preserved because users accessed the articles through databases consisting only of articles in a particular periodical or periodicals, and each article accessed is identified by publication, issue, and page number.⁶⁴ The court found that such association with a particular publication enhanced the value of a particular article,⁶⁵ and was sufficient to constitute a revision under the Second Circuit's formulation in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*⁶⁶ Even though the photographs, captions, and page lay-outs were lost, these changes were only a "peripheral" concern.⁶⁷ The court warned, however, that it was not establishing a hard and fast rule that where either the selection or arrangement is preserved, the resulting work qualifies as a revision.⁶⁸ There are certain circumstances, it explained, where one of these aspects is preserved but the work nonetheless may be so different that it cannot be considered a revision.⁶⁹

III. Fair Use

A. Use of a Copyrighted Work as a Background in Television or Film

In *Sandoval v. New Line Cinema*,⁷⁰ the United States District Court for the Southern District of New York found that a fleeting, background use for less than thirty seconds of the plaintiff's unpublished photographs in the movie *Seven* was a fair use.⁷¹ While the court considered the four fair use factors set forth in *208 Section 107—the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the market for the original work—it emphasized that the fourth factor, the effect on the market, is “arguably” more important than the first three.⁷² The court found that the photographs in *Seven* were not recognizable by the public; only after repeated and intense scrutiny could the court identify one.⁷³ It then concluded that such use could not have adversely affected the market for the plaintiff's photographs, and that the use was therefore a fair use.⁷⁴

Less than a month later, however, the Second Circuit found that the recognizable use of a copyrighted poster in a television show for a total of twenty-seven seconds was not a fair use. In *Ringgold v. Black Entertainment Television*,⁷⁵ the defendants had used a poster of the plaintiff's *Church Picnic* story quilt design⁷⁶ in an episode of a television sitcom.⁷⁷ The poster was shown in a church with two of the sitcom's main characters standing next to it.⁷⁸ In reviewing the district court's contrary decision, the Second Circuit offered considerable guidance to courts undertaking the four-part fair use analysis in cases involving the use of copyrighted artwork as part of a set design.

Contrary to the reasoning in *Sandoval*, the Second Circuit instructed that the primacy of the fourth fair use factor of the effect on the market had been “considerably modulated”⁷⁹ by the Supreme Court's instruction in *Campbell v. Acuff-Rose Music, Inc.*⁸⁰ that “all four factors are to be weighed together, in light of the purposes of copyright.”⁸¹ When considering the first factor of the use's purpose, the Second Circuit warned that a court should not ignore the illustrative categories of fair use found in Section 107 simply because they are not exclusive.⁸² It held that *209 the lower court in *Ringgold* had been incorrect to rely upon the incidental nature of the use of the poster in the sitcom scene—this point could be made about almost any use of art in a film or television production.⁸³ The court found that the defendants' use of *Church Picnic* superseded the purpose of the original poster since it served exactly the same decorative function, with no added intention to criticize or comment.⁸⁴ Thus the first factor tipped in favor of the plaintiff.⁸⁵ It did not matter that the poster was not used to encourage viewers to watch the sitcom.⁸⁶

In its analysis of the fourth fair use factor, the effect on the potential market, the Second Circuit held that the district court had improperly focused this portion of its analysis on the lack of impact on poster sales. Rather, it should have focused on any “traditional, reasonable or likely to be developed” markets for the work.⁸⁷ Here, such unrestricted copying would have an adverse effect on the potential market for licensing of the work for set decoration.⁸⁸ The court then remanded the case to the district court so that the fact finder might again consider the fair use question in light of its guidance.⁸⁹

B. Shareware

Shareware is a type of software that is initially distributed to users for free so that they may evaluate it. If they like the software and wish to continue to use it, however, the users must then pay the copyright owner a fee.⁹⁰ The authors of shareware encourage its free distribution in the hope of enticing more people to buy *210 the program.⁹¹ In *Storm Impact Inc. v. Software of the Month Club*, the United States District Court for the Northern District of Illinois considered cross-motions for summary judgment in a case raising the novel question of whether a company that screens the latest shareware programs each month and transmits the “best” 25% by CD-ROM or disc to its paying subscribers violates the copyrights of the programs' creators, or if such a use is a fair use under Section 107 of the Copyright Act.⁹²

In its analysis of the first fair use factor of the purpose and character of the use, the court considered: (1) whether Software of the Month Club's (SOMC's) use transformed the original, and (2) the profit or non-profit character of its use.⁹³ The court held that SOMC's exact reproduction of the shareware in a compilation was not a transformation, and that while SOMC profited from its business of screening shareware, it could not be said to have profited from the exploitation of the copyrighted material without paying the customary price, because the shareware was available for free on the Internet.⁹⁴ Thus, the commercial nature of SOMC's use benefited neither side.⁹⁵

The court then held that the second factor, the nature of the copyrighted work, favored the plaintiff Storm Impact since the programs were original creative works, not facts or news.⁹⁶ According to the court, the third factor, the amount and substantiality of the copying, also favored Storm Impact since SOMC copied the entire program for the identical purpose Storm Impact created it as shareware—to allow users to sample the program before buying it.⁹⁷ Thus, SOMC’s version merely superseded the original and was thus “not reasonable in light of the purpose of the copying.”⁹⁸ The court was not persuaded by SOMC’s rather compelling argument that Storm Impact *required* all users who redistribute its software to copy it without modification.⁹⁹

*211 However, the court then determined that it was not prepared to rule upon the fourth fair use factor, the use’s effect on the potential market, without further development of the record.¹⁰⁰ In support of its argument that SOMC had harmed its market, Storm Impact had alleged that its customers were upset that (1) they had paid SOMC for its screening service and still had to pay Storm Impact to use the software and (2) SOMC provided poor quality technical advice regarding loading of the CD-ROMs onto their computers.¹⁰¹ SOMC countered that its service had a positive impact on Storm Impact’s sales, since customers who would not take the time to sort through numerous shareware programs would try the limited ones that SOMC recommended, and some would then buy the software.¹⁰² In light of the importance of this fourth factor and the unresolved factual disputes, the court denied summary judgment to either side.¹⁰³

IV. Collateral Estoppel and Res Judicata

In *Computer Associates International, Inc. v. Altai, Inc.*¹⁰⁴ the Second Circuit found that neither res judicata nor collateral estoppel barred a plaintiff who had lost an action for infringement of its U.S. copyright from pursuing an action in a foreign court for violation of its foreign copyright.¹⁰⁵ In *Computer Associates*, the plaintiff had sued the defendant for infringement of its U.S. copyright in a software program in federal court and had lost.¹⁰⁶ The plaintiff then sued the defendant and its French distributor in France, alleging that they had infringed the plaintiff’s French copyright in the same program.¹⁰⁷ The court concluded res judicata did not apply to bar the French action for two reasons. First, the plaintiff had not established that both actions were based upon the same transaction.¹⁰⁸ The plaintiff had filed its French action after its U.S. action, and it was possible that the French action was based on *212 events that occurred after the plaintiff filed its U.S. action.¹⁰⁹ Second, the U.S. court would not have had personal jurisdiction over the French defendant, and res judicata cannot be invoked where the first court would not have had the power to award the full measure of damages sought in the second action.¹¹⁰

The court also held that collateral estoppel did not bar the French action, explaining that where the governing legal standards are significantly different in both actions, the issues cannot be identical.¹¹¹ It held that even though both cases involved copyrights in identical software, the defendant had not proven that the U.S. and the French copyright standards were equal.¹¹² The only evidence the defendant had offered was that neither standard protects ideas.¹¹³ The Second Circuit found such a meager showing entirely insufficient¹¹⁴ and declined to enjoin the French action.¹¹⁵ The opinion strongly suggests that a foreign suit for copyright infringement will never be barred by collateral estoppel due to the difficulty of establishing that the two standards are equivalent.

V. Personal Jurisdiction and Privilege

The United States District Court for the Eastern District of Virginia in *Kulik Photography v. Cochran* held that use of a copyrighted photograph by attorneys representing a criminal defendant at trial was a fair use, basing their decision upon privilege and constitutional concerns.¹¹⁶ In *Kulik*, the owner of the copyright in a photograph used by F. Lee Bailey and Johnny Cochran in the defense of O.J. Simpson sued Cochran and Bailey in Virginia for violation of his copyright, alleging that they had caused the photograph to be displayed on television in Virginia without his permission.¹¹⁷ The district court noted initially that there was no personal jurisdiction in Virginia over the defendants, because even if they knew the *213 photograph was going to be broadcast in Virginia, the television stations were neither their agents nor under their control.¹¹⁸ Thus, the defendants could not reasonably foresee being sued in Virginia for that act.¹¹⁹ Moreover, venue was improper because the defendants could not be “found” in Virginia, nor did a substantial part of the events occur there.¹²⁰

Rather than transfer the case, however, the court chose to reach the merits. It looked to provisions in Virginia and California law, and found that the showing of the photographs was privileged because it took place during a judicial proceeding.¹²¹ Moreover, the broadcast of the trial was a fair use for news purposes under 17 U.S.C. § 107.¹²² The court’s decision was

influenced by its view that to prohibit attorneys from using an admitted piece of evidence in their closing argument because it was the subject of a copyright would be an ill-advised elevation of the copyright laws over the constitutional rights of defendants.¹²³

VI. Transfer of a Copyright

It is a well-established rule of construction that where a contract is ambiguous regarding the transfer of an object embodying a copyrighted work, it is read to have transferred only the material object and not the copyright itself.¹²⁴ Recognizing this rule, the United States District Court for the Southern District of New York in *Shugrue v. Continental Airlines, Inc.* nonetheless found that the only reasonable interpretation in a non-consumer setting of contract language transferring “all right, title and interest ... in and to all programs and software” is that the copyright was transferred, not merely a license to use the software.¹²⁵ At least two courts have agreed with this interpretation of similar language in a contract involving *214 software,¹²⁶ while the United States District Court for the Northern District of Illinois has disagreed.¹²⁷

VII. Merger Doctrine

On remand from the Second Circuit, the United States District Court of the Northern District of New York in *Hart v. Dan Chase Taxidermy Supply Co.*¹²⁸ reexamined the evidence and again concluded that the plaintiff’s fish forms used in taxidermy for the mounting of fish heads and skin were non-copyrightable because the forms merged with the idea of a life-like fish.¹²⁹ The Second Circuit had remanded the case with instructions that the district court not consider the doctrine of merger in the initial copyrightability stage, but that it delay such analysis to the infringement stage so that the court would have the benefit of both the defendant’s and the plaintiff’s forms in making the decision.¹³⁰ The district court considered the plaintiff’s, the defendant’s and independent carvers’ forms and again concluded that the options for portraying a fish are so limited that to afford copyright protection to the plaintiff’s fish forms would afford protection to the idea of replicating a realistic fish itself.¹³¹ Thus, the doctrine of merger properly applied to prohibit copyrightability of the fish forms.¹³²

VIII. Injunctions

In *Balsamo/Olson Group v. Bradley Place*,¹³³ the defendant admitted to copying the plaintiff’s architectural plans for low income housing and agreed to *215 most of the plaintiff’s requests to cease copying the plans in the future.¹³⁴ After finding a reasonable likelihood of success on the merits, irreparable harm, and that the public’s interest would be served by preventing such copying, the court nonetheless declined to enjoin the defendant’s continued use of the plans to complete six housing units, concluding that the balance of harms weighed against issuing an injunction.¹³⁵ It explained that there would be considerable hardship to non-parties, such as the senior citizens who were planning to move in to the apartments, as well as to institutional investors who might shy away from future low-income projects.¹³⁶ The court noted that monetary damages were available, and issued a preliminary injunction requiring court review and approval of non-ordinary course of business transactions by the defendant.¹³⁷ The court also required that the defendant’s profits be held in escrow pending a decision on the merits.¹³⁸

Three months later, the Ninth Circuit in *Cadence Design Systems, Inc. v. Avant! Corp.*¹³⁹ held that a defendant cannot rebut the presumption of irreparable harm by showing the adequacy of monetary damages.¹⁴⁰ In *Cadence*, the defendants had copied part of the plaintiff’s software used in the design of computer chips, and had later tried to go back and surgically remove the copied portions, substituting their own code.¹⁴¹ The court suggested that a defendant might rebut the presumption of irreparable harm that arises from a showing of a likelihood of success on the merits in a copyright infringement claim by establishing that (1) the plaintiff’s product is no longer on the market;¹⁴² (2) the plaintiff is guilty of undue delay in asserting its rights;¹⁴³ (3) the plaintiff will suffer no or de minimis harm;¹⁴⁴ or (4) the defendant acted with innocent intent, due to a lack of copyright notice, and that there would be harm to the public as a result of an injunction.¹⁴⁵

*216 The Ninth Circuit criticized the lower court for being “strongly influenced” by evidence that an injunction would be devastating to the defendants’ business.¹⁴⁶ The appellate court warned that an analysis of the balance of harms should not consider any harm to the defendant’s business caused by the loss of the use of a deliberately plagiarized product.¹⁴⁷ The court remanded the case to the district court to determine whether the defendant’s software infringed the plaintiff’s copyright.¹⁴⁸ If so, the Ninth Circuit directed the district court to issue a preliminary injunction.¹⁴⁹

IX. Proposed Legislation

A. The Collections of Information Antipiracy Act¹⁵⁰

The Collections of Information Antipiracy Act (House Bill 2652) is designed to protect databases by filling the gap left by the Supreme Court's 1991 holding in *Feist Publications, Inc. v. Rural Telephone Service, Co.*¹⁵¹ that the "the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts."¹⁵² The proposed Act imposes liability on [a]ny person who extracts, or uses in commerce, all or a substantial part of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to harm that other person's actual or potential market for a product or service that incorporates that collection of information and is offered by that other person in commerce.¹⁵³

Unlike a similar bill proposed last year in an attempt to protect the contents of databases (House Bill 3531),¹⁵⁴ the Collections of Information Antipiracy Act appears to be rooted in an unfair competition approach more akin to the Lanham Act *217 than to the Copyright Act.¹⁵⁵ Accordingly, it has done away with the twenty-five year term of protection proposed in House Bill 3531 in favor of imposing no limits on the term of protection.¹⁵⁶ The new bill provides exceptions from liability for, inter alia: the independent gathering of information; the extraction and use of information for nonprofit, educational, scientific, or research purposes; and the extraction and use of information for the sole purpose of verifying its accuracy or for news reporting.¹⁵⁷ The proposed statute does not protect government-generated databases or computer programs.¹⁵⁸ Penalties under the proposed bill range from civil damages, injunctions, impoundment, and attorney's fees to criminal fines up to \$500,000 and/or imprisonment for up to ten years for a second or subsequent offense.¹⁵⁹ The House Subcommittee on Courts and Intellectual Property held a hearing on the proposed bill on October 23, 1997.¹⁶⁰

B. Vessel Hull Design Protection Act¹⁶¹

In an attempt to override the Supreme Court's decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*¹⁶² that state laws providing protection from the copying of boat hulls were preempted by federal patent laws,¹⁶³ on October 22, 1997, Representative Howard Coble (R-NC) introduced the Vessel Hull Design Protection Act, House Bill 2696.¹⁶⁴ The proposed act would add a new Chapter 12 to Title 17 that provides for ten years of protection for "the original designs" of vessel hulls or their components which make the vessel "attractive or distinctive in appearance."¹⁶⁵ Designs would be protected from "plug-copying," but not from reproduction by way *218 of illustration for the purpose of education.¹⁶⁶ Sellers and distributors who acted without knowledge that the design was protected and had been copied would not be liable.¹⁶⁷ In order to receive protection, applicants would be required to register with the Copyright Office within a year of the design's publication.¹⁶⁸

At a House Subcommittee on Courts and Intellectual Property hearing on House Bill 2696 held October 23, 1997, the Register of Copyrights Marybeth Peters recommended to the panel, inter alia, that the bill be amended to exclude utilitarian elements from protection, to delete language requiring applicants to choose between copyright and design right protection, and to clarify that the Register is not required to examine other designs to determine originality, attractiveness, or distinctiveness.¹⁶⁹

C. No Electronic Theft Act¹⁷⁰

Both the House and Senate have passed the No Electronic Theft Act, which provides stiff criminal penalties for willful copyright infringement by electronic or other means, regardless of commercial gain.¹⁷¹ The proposed act is intended to close the loophole exposed by the decision in *United States v. LaMacchia*.¹⁷² In *LaMacchia*, "a computer bulletin board operator who provided users with free unauthorized copies of copyrighted software escaped prosecution under the Federal Wire Fraud Statute because his activities lacked the necessary element of commercial gain."¹⁷³ The No Electronic Theft Act imposes penalties for copying or distributing, within a 180 day period, one or more copies or phonorecords which *219 have a total retail value of over \$1,000.¹⁷⁴ Penalties include fines and/or jail terms ranging from one to six years for repeat offenders.¹⁷⁵

The act also adds a definition of "financial gain" to Section 101 of the Copyright Act that "would mean 'receipt, or the expectation of receipt, of anything of value, including the receipt of other copyrighted works.'" ¹⁷⁶ This "expectation of

receipt” language was added to address concerns that it might be difficult to prove the actual receipt of money.¹⁷⁷

D. Phonorecords Sold Prior to 1978

On November 13, 1997, the President signed into law the Technical Copyright Corrections Bill,¹⁷⁸ including the amendment “[t]he distribution before January 1, 1978[] of a phonorecord shall not for any purpose constitute a publication of the musical work embodied therein.”¹⁷⁹ This amendment overrules the Ninth Circuit’s decision in *La Cienega Music Co. v. ZZ Top*¹⁸⁰ that the pre-1978 sale of a phonorecord was a publication that required compliance with the copyright statute’s notice requirements.¹⁸¹

E. Senate Bill to Tie GSP Benefits to Implementation of GATT-TRIPS¹⁸²

Although the GATT-TRIPS agreement signed by 108 countries on April 15, 1994 provides transition periods for implementation of the TRIPS standards—five years for developing countries and eleven years for least developed countries¹⁸³—Senator Frank Lautenberg (D-NJ) has introduced a bill that would require participants in the Generalized System of Preferences (GSP) program (involving *220 duty-free export privileges), to expedite their compliance with TRIPS standards.¹⁸⁴ The bill, entitled the “Rights of Intellectual Property Owners Fairness Facilitation Act of 1997” (RIP-OFF), would require developing countries to comply with TRIPS within a year of RIP-OFF’s passage; least developed countries would have until January 1, 2000.¹⁸⁵ In addition, to continue to be eligible for the GSP program, a country would have to fully comply with the terms of any bilateral or other multilateral intellectual property agreement it has with the United States.¹⁸⁶

F. Digital Era Copyright Enhancement Act¹⁸⁷

The Digital Era Copyright Enhancement Act is intended “to amend the Copyright Act to better accommodate the Internet environment” and to implement the recently negotiated WIPO Performances and Phonograms treaty.¹⁸⁸ Although the United States already is largely in compliance with the heightened protections afforded intellectual property under the treaty, in order to be fully compliant, the United States must take action to prohibit the circumvention of copyright protection systems.¹⁸⁹ Several bills have addressed this issue, such as House Bill 2281 and Senate Bill 1121,¹⁹⁰ which prohibit the distribution of devices that could be used for circumvention,¹⁹¹ and Senate Bill 1146,¹⁹² which would prohibit only the actual circumvention of anti-copying technology where that circumvention would facilitate or constitute copyright infringement.¹⁹³ The Digital Era Copyright Enhancement Act, like Senate Bill 1146, also rejects the device approach of House Bill 2281 and Senate Bill 1121, focusing instead on a standard based on conduct.¹⁹⁴

*221 In addition, House Bill 3048 “reaffirms the applicability of the fair use and first sale doctrines in the digital network environment.”¹⁹⁵ For example, “libraries would be permitted to use digital technologies for preservation ... and archival purposes.”¹⁹⁶ The bill also addresses the practice of using “shrink wrap” or “click-on” licenses to limit consumer rights through non-negotiated terms.¹⁹⁷ Copyright owners often insert these non-negotiated terms in an effort to apply favorable state law that eliminates rights and privileges the user would have under the copyright laws, such as the fair use privilege.¹⁹⁸ House Bill 3048 would preempt such state law where it was designated in non-negotiable license terms.¹⁹⁹

Footnotes

^{a1} Arnold, White & Durkee, Austin, Texas. The author gratefully acknowledges the critical review of this article by Neil Netanel, Assistant Professor, The University of Texas School of Law; Of Counsel, Arnold, White & Durkee.

¹ 126 F.3d 977, 44 U.S.P.Q.2d (BNA) 1296 (7th Cir.1997), *rev’g*, 39 U.S.P.Q.2d (BNA) 1714 (N.D.Ill.1996).

² *Id.* at 981, 44 U.S.P.Q.2d at 1300-01.

³ *Id.* at 977-78, 44 U.S.P.Q.2d at 1297.

4 *Id.* at 977, 44 U.S.P.Q.2d at 1297.

5 39 U.S.P.Q.2d at 1721.

6 *Id.* at 1726-27.

7 *Id.* at 1725.

8 126 F.3d at 978, 44 U.S.P.Q.2d at 1298.

9 *Id.* at 978-79, 44 U.S.P.Q.2d at 1298.

10 *Id.* at 978, 44 U.S.P.Q.2d at 1298.

11 *Id.*

12 *Id.* at 979, 44 U.S.P.Q.2d at 1298.

13 *Id.*, 44 U.S.P.Q.2d at 1299.

14 *Id.* at 980, 44 U.S.P.Q.2d at 1299-1300.

15 *Id.* (citing 17 U.S.C. § 103 (1994)).

16 *Id.* at 980, 44 U.S.P.Q.2d at 1299.

17 *Id.* at 980-81, 44 U.S.P.Q.2d at 1300 (citing 17 U.S.C.A. § 102(b) (West 1996 & Supp.1998); *Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 480-82, 39 U.S.P.Q.2d (BNA) 1444, 1449-51 (7th Cir.1996) (holding that mere recipes are not copyrightable)). The court noted that the A.D.A. Code, unlike a recipe, did not come with instructions for use. *Id.*

18 101 U.S. 99 (1879) (particular expression of an idea such as double-entry accounting is copyrightable, but means of putting idea into practice, such as blank forms using terminology from copyrighted work, is not copyrightable).

19 126 F.3d at 981, 44 U.S.P.Q.2d at 1300.

20 *Id.* (citing *Baker*, 101 U.S. at 104 (blank forms are not copyrightable, even where they capture the essence of a copyrightable work)).

21 *Id.*

22 *Id.*

23 49 F.3d 807, 816, 34 U.S.P.Q.2d (BNA) 1014, 1022 (1st Cir.1995) (otherwise protectable expression that is embodied in a method of operation is excluded under Section 102(b) from copyright protection because it is part of the method of operation), *aff'd without opinion*, 516 U.S. 233 (1996).

24 124 F.3d 1366, 1372, 44 U.S.P.Q.2d (BNA) 1172, 1177 (10th Cir.1997).

25 Section 102(b) of the Copyright Act provides: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, or illustrated, or embodied in such work.” 17 U.S.C. § 102 (1994).

26 124 F.3d at 1372, 44 U.S.P.Q.2d at 1177.

27 *Id.* at 1368, 44 U.S.P.Q.2d at 1173-74.

28 *See id.* at 1369, 44 U.S.P.Q.2d at 1175.

29 *See id.* at 1368-69, 44 U.S.P.Q.2d at 1174-75.

30 *Id.*

31 *Id.* at 1369, 44 U.S.P.Q.2d at 1175.

32 *Id.* at 1373, 44 U.S.P.Q.2d at 1178.

33 *Id.* at 1373-74, 44 U.S.P.Q.2d at 1180.

34 *Id.* at 1375, 44 U.S.P.Q.2d at 1180.

35 *Id.*

36 *See* 17 U.S.C.A. § 106(2) (West 1996 & Supp.1998).

37 125 F.3d 580, 44 U.S.P.Q.2d (BNA) 1154 (7th Cir.1997).

38 *Id.* at 580, 44 U.S.P.Q.2d at 1154.

39 *See* *Munoz v. Albuquerque A.R.T. Co.*, 829 F.Supp. 309, 314 (D.Alaska 1993), *aff'd without opinion*, 38 F.3d 1218 (9th Cir.1994); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343-44, 8 U.S.P.Q.2d (BNA) 1171, 1172 (9th Cir.1988).

40 125 F.3d at 580-81, 44 U.S.P.Q.2d at 1154. 17 U.S.C. § 101 defines a “derivative work” as follows: “A ‘derivative work’ is a work

based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed or adapted....” 17 U.S.C.A. § 101 (West 1996 & Supp.1998).

41 125 F.3d at 582-83, 44 U.S.P.Q.2d at 1155-56.

42 *Id.* at 582, 44 U.S.P.Q.2d at 1155.

43 *Id.* at 581, 44 U.S.P.Q.2d at 1154-55.

44 17 U.S.C. § 103(a) (1994).

45 *Id.* § 103(b).

46 122 F.3d 1211, 43 U.S.P.Q.2d (BNA) 1705 (9th Cir.1997), *petition for cert. filed*, 66 U.S.L.W. 3492 (U.S. Jan. 1, 1998) (No. 97-1175).

47 *Id.* at 1219-20, 44 U.S.P.Q.2d at 1711-12 (rejecting the test for copyrightability of derivative works created by the Southern District of California in *Doran v. Sunset House Distrib. Corp.*, 197 F.Supp. 940, 131 U.S.P.Q. (BNA) 94 (S.D.Cal.), *aff'd*, 304 F.2d 251, 134 U.S.P.Q. (BNA) 4 (9th Cir.1962)).

48 *See Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909, 208 U.S.P.Q. (BNA) 10, 14 (2d Cir.1980).

49 122 F.3d at 1218, 44 U.S.P.Q.2d at 1710.

50 *Id.* at 1223, 44 U.S.P.Q.2d at 1714.

51 *Id.* at 1222, 44 U.S.P.Q.2d at 1713.

52 *Id.* at 1224, 44 U.S.P.Q.2d at 1715.

53 *Id.*

54 *Id.*, 44 U.S.P.Q.2d at 1715-16.

55 *Id.*, 44 U.S.P.Q.2d at 1716.

56 972 F.Supp. 804, 43 U.S.P.Q.2d (BNA) 1801 (S.D.N.Y.1997).

57 *Id.* at 806, 43 U.S.P.Q.2d at 1802-03.

58 *Id.* at 806-09, 43 U.S.P.Q.2d at 1803-06.

59 *Id.* at 810-11, 43 U.S.P.Q.2d at 1807.

60 The author of a collective work that includes copyrighted works does not obtain rights in the underlying works. However, 17 U.S.C. § 201(c) (1994) gives authors of collective works the limited privilege of producing revisions of the collective work, including reproductions of the underlying copyrighted materials, as long as the underlying material is not altered. 972 F.Supp. at 819, 43 U.S.P.Q.2d at 1814.

61 *Id.* at 820, 43 U.S.P.Q.2d at 1815.

62 *Id.* at 821-22, 43 U.S.P.Q.2d at 1816.

63 *Id.* at 823, 43 U.S.P.Q.2d at 1817.

64 *Id.* at 823-24, 43 U.S.P.Q.2d at 1818.

65 *Id.* at 824 n. 14, 43 U.S.P.Q.2d at 1818 n. 14.

66 *Id.* at 825, 43 U.S.P.Q.2d at 1819 (citing *Key Publications, Inc. v. Chinatown Today Publ'g Enters., Inc.*, 945 F.2d 509, 514, 20 U.S.P.Q.2d (BNA) 1122, 1125 (2d Cir.1991) (where a work has both an original selection and an original arrangement, even if the original arrangement is sacrificed, a “substantial similarity” persists)).

67 *Id.* at 824, 43 U.S.P.Q.2d at 1919.

68 *Id.* at 825, 43 U.S.P.Q.2d at 1819-20.

69 *Id.*, 43 U.S.P.Q.2d at 1820.

70 973 F.Supp. 409, 43 U.S.P.Q.2d (BNA) 1949 (S.D.N.Y.1997).

71 *Id.* at 410, 43 U.S.P.Q.2d at 1949.

72 *Id.* at 414, 43 U.S.P.Q.2d at 1953 (citing 17 U.S.C. § 107 (1994)).

73 *Id.* at 411, 43 U.S.P.Q.2d at 1950.

74 *Id.* at 414, 43 U.S.P.Q.2d at 1953.

75 126 F.3d 70, 44 U.S.P.Q.2d (BNA) 1001 (2d Cir.1997).

76 *Id.* at 72, 44 U.S.P.Q.2d at 1002. The court found that plaintiff had created a new form of artistic expression with her “story quilt designs,” consisting of a painting, a handwritten text, and quilting fabric. *Id.*

77 *Id.*, 44 U.S.P.Q.2d at 1003.

78 *Id.* at 73, 44 U.S.P.Q.2d at 1003.

79 *Id.* at 77 n. 8, 44 U.S.P.Q.2d at 1007 n. 8.

80 510 U.S. 569, 29 U.S.P.Q.2d (BNA) 1961 (1994).

81 *Id.* at 578, 29 U.S.P.Q.2d at 1965.

82 126 F.3d at 78, 44 U.S.P.Q.2d at 1008. The four illustrative categories are: comment or criticism, news reporting, teaching, and scholarship or research. *See* 17 U.S.C. § 107 (1994).

83 126 F.3d at 80, 44 U.S.P.Q.2d at 1009.

84 *Id.* at 79, 44 U.S.P.Q.2d at 1009.

85 *Id.* at 79-80, 44 U.S.P.Q.2d at 1008-09.

86 *Id.*, *but see* Jackson v. Warner Bros., Inc., 44 U.S.P.Q.2d (BNA) 1603 (E.D.Mich.1997). In *Jackson*, two weeks prior to the Second Circuit's *Ringgold* decision, the Eastern District of Michigan relied upon the lower court's decision in *Ringgold v. Black Entertainment Television*, 40 U.S.P.Q.2d (BNA) 1299 (S.D.N.Y.1990), to find that the defendants' use of a painter's works in the Whoopi Goldberg film *Made in America* was a fair use since the painting was not used in ads or made known to prospective movie viewers, was not designed to increase movie sales, and had no measurable effect on the profitability of the movie. 44 U.S.P.Q.2d at 1609. Even though the plaintiff complained (1) that he considered the film culturally exploitative and that he would have never agreed to having his work incorporated in it; and (2) that numerous people had contacted him to express surprise that his work was in the film, the court found that the plaintiff had suffered no demonstrable harm, since actual or potential sales of his paintings were not affected. *Id.* at 1609. Relying entirely on economic considerations, the court afforded no weight to the moral rights that plaintiff wished to assert in his work. *See id.*

87 126 F.3d at 81, 44 U.S.P.Q.2d at 1010.

88 *Id.*

89 *Id.*, 44 U.S.P.Q.2d at 1011.

90 *Storm Impact Inc. v. Software of the Month Club*, 44 U.S.P.Q.2d (BNA) 1441, 1442 (N.D.Ill.1997).

91 *Id.* at 1443.

92 *Id.* at 1442-43 (citing 17 U.S.C. § 107 (1994)).

93 *Id.* at 1444.

94 *Id.* at 1445.

95 *Id.*

96 *Id.* at 1445.

97 *Id.* at 1445-46.

98 *Id.* at 1446.

99 *Id.*

100 *Id.* at 1447.

101 *Id.* at 1446-47.

102 *Id.* at 1446.

103 *Id.* at 1446-47.

104 126 F.3d 365, 44 U.S.P.Q.2d (BNA) 1281 (2d Cir.1997).

105 The doctrine of res judicata states that a final judgment on the merits in an action bars the subsequent litigation of any claims arising from the same transaction or series of transactions which could have been raised in the prior suit. *Id.* at 369, 44 U.S.P.Q.2d at 1283-84. Collateral estoppel applies to bar a party from relitigating in a second proceeding an issue of fact or law that was fully and fairly litigated and actually decided in a prior proceeding. *Id.* at 371, 44 U.S.P.Q.2d at 1285.

106 *Id.* at 367, 44 U.S.P.Q.2d at 1282.

107 *Id.* at 367-68, 44 U.S.P.Q.2d at 1282-83.

108 *Id.* at 370, 44 U.S.P.Q.2d at 1284.

109 *Id.*

110 *Id.* at 370-71, 44 U.S.P.Q.2d at 1284-85.

111 *Id.* at 371, 44 U.S.P.Q.2d at 1285-86.

112 *Id.*, 44 U.S.P.Q.2d at 1286.

113 *Id.*

114 *Id.*, 44 U.S.P.Q.2d at 1285-86.

115 The court explained that while a federal court has the power to enjoin foreign actions between persons subject to its jurisdiction, it does so sparingly and that it would be inappropriate to do so here where the resolution of the United States case would have no bearing on the outcome of the French action. *Id.* at 371-72, 44 U.S.P.Q.2d at 1286.

116 975 F.Supp. 812, 44 U.S.P.Q.2d (BNA) 1318 (E.D.Va.1997).

117 *Id.* at 812-13, 44 U.S.P.Q.2d at 1319.

118 *Id.* at 813-14, 44 U.S.P.Q.2d at 1319-20.

119 *Id.*

120 *Id.*, 44 U.S.P.Q.2d at 1320.

121 *Id.*

122 *Id.* (citing 17 U.S.C. § 107 (1994)).

123 *Id.*

124 977 F.Supp. 280, 285, 44 U.S.P.Q.2d (BNA) 1343, 1347 (S.D.N.Y.1997).

125 *Id.*

126 *Id.* (citing *Relational Design & Tech., Inc. v. Brock*, No. 91-2452-EEO, 1993 WL 191323, at *6 (D.Kan. May 25, 1993) (transfer of “all rights to the completed program with no licensing or royalty fees due” included copyright); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088, 12 U.S.P.Q.2d (BNA) 1241, 1246 (9th Cir.1989) (“in the context of the parties’ entire agreement,” the phrase “all rights of ownership ... plainly encompasses not only copyright ownership, but also ownership of any copies of the software”).

127 *Id.* (citing *Friedman v. Stacey Data Processing Serv., Inc.*, 17 U.S.P.Q.2d (BNA) 1858, 1862 (N.D.Ill.1990) (contract stating that the plaintiff owned software programs “in their entirety” not sufficiently clear to include copyrights in software)).

128 967 F.Supp. 70, 44 U.S.P.Q.2d (BNA) 1214 (N.D.N.Y.1997).

129 *Id.* at 73, 44 U.S.P.Q.2d at 1217.

130 *Id.* at 71, 44 U.S.P.Q.2d at 1216 (citing *Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 322, 39 U.S.P.Q.2d (BNA) 1310, 1313 (2d Cir.1996)).

131 *Id.* at 73, 44 U.S.P.Q.2d at 1217.

132 *Id.*

133 966 F.Supp. 757, 43 U.S.P.Q.2d (BNA) 1760 (C.D.Ill.1997).

134 *Id.* at 760, 43 U.S.P.Q.2d at 1762.

135 *Id.* at 764-65, 43 U.S.P.Q.2d at 1765-67.

136 *Id.*

137 *Id.*, 43 U.S.P.Q.2d at 1766.

138 *Id.*

139 125 F.3d 824, 44 U.S.P.Q.2d (BNA) 1201 (9th Cir.1997).

140 *Id.* at 826, 44 U.S.P.Q.2d at 1203.

141 *Id.* at 825-26, 44 U.S.P.Q.2d at 1202.

142 *Id.* at 828, 44 U.S.P.Q.2d at 1205.

143 *Id.* at 829, 44 U.S.P.Q.2d at 1205.

144 *Id.*

145 *Id.* at 829, 44 U.S.P.Q.2d at 1205-06.

146 *Id.* at 830, 44 U.S.P.Q.2d at 1206.

147 *Id.*

148 *Id.* at 831, 44 U.S.P.Q.2d at 1207.

149 *Id.*

150 H.R.2652, 105th Cong. (1997). This bill is discussed in *Legislation: House Bill Would Create New Protection For Databases*, 54 Pat. Trademark & Copyright J. (BNA) 599 (October 23, 1997), and in *Database Protection Bill (H.R.2652)*, 54 Pat. Trademark & Copyright J. (BNA) 611 (October 9, 1997) [hereinafter *Database Protection Bill*].

151 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

152 *Id.* at 359, 18 U.S.P.Q.2d at 1283.

153 H.R.2652 § 2; *see also Database Protection Bill*, *supra* note 150, at 611.

154 Database Investment and Intellectual Property Antipiracy Act of 1996, H.R.3531, 104th Cong. (1996).

155 *Database Protection Bill*, *supra* note 150, at 613.

156 *See* H.R.2652; *Database Protection Bill*, *supra*, note 150, at 611-12. The Act's provisions specify no term of protection.

157 H.R.2652 § 2; *Database Protection Bill*, *supra*, note 150, at 611.

158 H.R.2652 § 2; *Database Protection Bill*, *supra*, note 150, at 611.

159 H.R.2652 § 2; *Database Protection Bill*, *supra*, note 150, at 612.

160 *Electronic Piracy Hull Design Protection, 1997: Hearings on H.R.2652 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997). More testimony was taken on February 12, 1998. *See Electronic Intellectual Property Protection, 1998: Hearings on H.R.2652 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998).

161 H.R.2696, 105th Cong. § 2 (1997); *see generally Bill (H.R.2696) to Protect Boat Hull Designs*, 54 Pat. Trademark & Copyright J. (BNA) 636 (October 30, 1997).

162 489 U.S. 141, 9 U.S.P.Q.2d (BNA) 1947 (1989).

163 *See id.* at 168, 9 U.S.P.Q.2d at 1859.

164 H.R.2696.

165 H.R.2696 § 2; *Legislation: Boat Hull Protection Bill is Introduced and Favorably Reviewed at House Hearing*, 54 Pat. Trademark & Copyright J. (BNA) 626, 627 (October 30, 1997) [hereinafter *Boat Hull Protection Bill*].

166 H.R.2696 § 2; *Boat Hull Protection Bill*, *supra* note 165, at 626-27.

167 H.R.2696 § 2; *Boat Hull Protection Bill*, *supra* note 165, at 627.

168 H.R.2696 § 2; *Boat Hull Protection Bill*, *supra* note 165, at 627.

169 *Electronic Piracy Hull Design Protection, 1997: Hearings on H.R.2696 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Marybeth Peters, Register of Copyrights).

170 H.R.2265, 105th Cong. (1997) (unenacted); *see generally* *Legislation: Clinton Signs Copyright Corrections Bill; Criminal Bill Goes To White House*, 55 Pat. Trademark & Copyright J. (BNA) 56 (November 20, 1997) [[[hereinafter *Legislation: Clinton Signs*]].

171 *Legislation: Clinton Signs*, *supra* note 170, at 56.

172 871 F.Supp. 535, 33 U.S.P.Q.2d (BNA) 1978 (D.C.Mass.1994).

173 *Legislation: Clinton Signs*, *supra* note 170, at 56. The holding of *LaMacchia* is located at 871 F.Supp at 545, 33 U.S.P.Q.2d at 1986.

174 *Legislation: Clinton Signs*, *supra* note 170, at 56.

175 *Id.*

176 *Id.*

177 *Id.*

178 Technical Copyright Corrections Bill of 1997 § 11, Pub.L. No. 105-80, 111 Stat. 1529, 1533-34 (adding a new section 303(b) to Title 17).

179 *Legislation: Clinton Signs*, *supra* note 170, at 56

180 44 F.3d 813, 33 U.S.P.Q.2d (BNA) 1437 (9th Cir.1995), *opinion superseded on other grounds*, 53 F.3d. 950, *cert. denied*, 116 S.Ct. 331 (1995).

181 *Id.* at 815-16, 33 U.S.P.Q.2d at 1439.

182 *Legislation: Senate Bill Ties GSP Benefits To Implementation of GATT-TRIPS*, 55 Pat. Trademark & Copyright J. (BNA) 41, 41 (November 13, 1997) [[[hereinafter *GSP Benefits*]].

183 *Id.*

184 *Id.* (S.1426, 105th Cong. (1997) would amend Section 2462(b)(2) of Title 19).

185 *Id.*; see S.1426 § 3.

186 *GSP Benefits*, *supra* note 182, at 41; see S.1426 § 3.

187 H.R.3048, 105th Cong. (1997).

188 *Digital Era Copyright Bill Addresses Internet and WIPO Treaties*, 55 Pat. Trademark & Copyright J. (BNA) 59, 59 (November 20, 1997) [hereinafter *Digital Era Bill*]; H.R.3048, 105th Cong. (1997).

189 *Digital Era Bill*, *supra* note 188, at 59.

190 WIPO Copyright Treaties Implementation Act, H.R.2281, 105th Cong. (1997); WIPO Copyright and Performances and Phonograms Treaty Implementation Act, S.1121, 105th Cong. (1997).

191 *Digital Era Bill*, *supra* note 188, at 59.

192 Digital Copyright Clarification and Technology Education Act of 1997, S.1146, 105th Cong. (1997).

193 *Id.* § 301.

194 *Digital Era Bill*, *supra* note 188, at 60.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Introduction of the Digital Era Copyright Enhancement Act*, Hon. Rick Boucher, in the House of Representatives, Thursday, Nov. 13, 1997, 55 Pat. Trademark & Copyright J. (BNA) 68, 70 (November 13, 1997).

199 *Id.*