

# DEVELOPMENT OF THE BERNE INTERNATIONAL COPYRIGHT CONVENTION AND IMPLICATIONS OF UNITED STATES ADHERENCE

When the United States Senate ratified the Berne Convention,<sup>1</sup> and President Reagan signed the Berne Convention Implementation Act of 1988 into law on October 31, 1988,<sup>2</sup> the United States at long last joined the world's premier multilateral copyright treaty.<sup>3</sup> This event culminated a century of evolution for both the Berne Union and the United States. The Berne Convention evolved from an attempt to create a universal international copyright law to a minimum protection instrument with an emphasis on national treatment and independent protection.<sup>4</sup> For the United States, adherence meant internationalizing its two hundred-year old copyright code. This Comment's purpose is to provide an overview of the Berne Convention's one hundred-year development, and discuss the implications of the United States' recent adherence to the Berne Convention.

## I. DEVELOPMENT OF INTERNATIONAL COPYRIGHT LAW

Copyright laws and theory have varied greatly from country to country, but all have had a common goal: the "exclusive, legally secured, right to publish and sell the substance and form of a literary, musical, or artistic work . . . ."<sup>5</sup> In earlier times, an author's natural right in his work was regarded with little value, and overall, authors' rights played a minor role in copyright law. Sovereigns viewed copyright as a privilege

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1. 134 CONG. REC. S16939 (daily ed. Oct. 20, 1988).

2. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) [hereinafter BCIA 1988].

3. 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 17.01[B][2] (1990) [hereinafter NIMMER].

4. S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 91-92, 95 (1987) (providing an extensive chronology and analysis of the Berne Convention).

5. COPYRIGHT CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 1 (A: Kent & H. Lancour ed. 1972) [hereinafter Kent & Lancour].

granted to the author and his assigns, and laws tied the author's privilege to publishers' financial interests.<sup>6</sup> However, social and economic changes later improved the author's position. The freedom to print without government permission or control developed while pressure to protect individual rights increased.<sup>7</sup>

Britain became the first country to legally recognize the position of the author and his interest. Parliament enacted the Act of Anne in 1710, which gave an author a short protection period, subject to renewal and mandatory registration, if he first published his work in England.<sup>8</sup> The French Revolution further strengthened the author's position when France recognized copyright protection as a right, not a privilege.<sup>9</sup> Gradually, other nations developed domestic copyright laws that varied widely but generally addressed five major topics: (1) types of works protected, (2) length of protection, (3) rights recognized, (4) restrictions on the exercise of those rights, and (5) formalities required for protection.<sup>10</sup> The Berne Convention would deal with these same topics one hundred years later as it struggled to develop a universal international copyright code.

Although the evolving legislation protected works under national law, international copyright law did not yet exist. Countries beyond the king's reach freely copied desired works, and unauthorized reproduction of foreign works became a part of European cultural and social life. This cross border piracy greatly inspired the development of international copyright in the nineteenth century.<sup>11</sup>

While culturally advanced countries contemplated international copyright laws, less advanced countries, including the United States,

6. S. RICKETSON, *supra* note 4, at 3-4. Publishers received their right to copy works from old Star Chamber Ordinances. When newer laws began to recognize authors' rights, publishers advocated those laws that linked their interests to authors' rights and thereby enhanced their financial interests. *Id.* at 4.

7. Abelman & Berkowitz, *International Copyright Law, THE COMPLETE GUIDE TO THE NEW COPYRIGHT LAW* 328-29 (N.Y.L. SCH. L. REV. ed. 1977) (citing 1 S. Ladas, *The International Protection of Literary and Artistic Property* 15, 17 (1938)) (giving an overview of international copyright history and American involvement).

8. R. BOWKER, *COPYRIGHT ITS HISTORY AND ITS LAW* 23-24 (1912) (referencing 8 Anne, c. 19 (1710)). The Act of Anne is also significant because it recognized copyright as an author's as well as a publisher's privilege. The Act is particularly important in United States copyright history since it was the model for early American copyright law. Kent & Lancour, *supra* note 5, at 1-2.

9. S. RICKETSON, *supra* note 4, at 5-6. The French believed authors' rights were a matter of natural law and viewed the revolutionary laws as codification of that natural right. *Id.*

10. *Id.* at 8.

11. *Id.* at 18-19. Many countries did not view unauthorized copying of foreign works as unethical. Some considered it a less expensive way to spread learning. Countries with high levels of literary and artistic production were the most vulnerable, especially if the pirating country was geographically close and the countries shared a common language. *Id.*

resisted the movement. Since these countries were primary importers of literary and artistic works, they enjoyed the inexpensive copies and greater availability that international piracy afforded. However, wider education, increased circulation of the press, and the development of universities, museums, and libraries soon increased the availability of works resulting in a smaller benefit from piracy.<sup>12</sup> Moreover, a demand for international protection of national authors arose as the number of exporters of literary and artistic works increased.

The movement for international protection had a pragmatic and a moral basis. Pragmatically, unauthorized publication of copyrighted works caused countries to lose money and the prestige that came from international recognition of native authors.<sup>13</sup> From a moral perspective, piracy of works unfairly deprived an author of the "fruits of . . . [his] creativity, labour and investment."<sup>14</sup> These two factors created pressure which encouraged the development of international copyright law.

Countries achieved international copyright protection in two primary ways: national laws that protected foreign authors and international agreements such as the Berne Convention.<sup>15</sup> The national laws provided limited protection to foreign authors, but the laws often restricted protection to foreign authors who were domiciled in the country or to foreign works published in that same country. Yet, most countries would grant protection to foreign authors if the country of origin of the foreign work protected their own works.<sup>16</sup>

Since reciprocity could be uncertain, countries made bilateral agreements to assure reciprocal protection for their authors. These agreements often contained the common rules each country followed in copyright protection.<sup>17</sup> By the time of the Berne Convention, a network of conventions, arrangements, and declarations existed between most major European states as well as several Latin American countries. The

12. Abelman & Berkowitz, *supra* note 7, at 331.

13. S. RICKETSON, *supra* note 4, at 19, 21.

14. *Id.* at 19-21. The moral basis of international copyright protection first arose from the French belief that geographical and national boundaries should not restrict an author's natural right in his work. France extended unilateral protection to all works published by foreign authors and did not require reciprocity. *See also* Abelman & Berkowitz, *supra* note 7, at 332-33.

15. S. RICKETSON, *supra* note 4, at 21-37 (discussing the contents of national copyright laws and bilateral agreements).

16. *Id.* at 22-23.

17. *Id.* at 25-26. Common rules between countries reduced the imbalance between national laws that provided differing levels of copyright protection. Without the rules an agreement would hurt authors from a country with a higher level of protection and would be a boon to those from countries offering a lower level of protection. *Id.*

United States, however, remained a major power not involved in international copyright.<sup>18</sup>

Despite this network of bilateral arrangements, reciprocity progressed slowly. Artists and authors recognized the need for more comprehensive and uniform international copyright protection. This awareness culminated in the Berne Convention.

## II. ORIGINS OF THE BERNE UNION

### A. *Two approaches*

Two philosophies emerged as the basis for international copyright law: the universal view and the pragmatic view. The universalists believed that each country should adopt uniform, general laws applicable to both native and foreign authors, and that once countries formulated such legislation, agreements between nations could produce a universal copyright law.<sup>19</sup>

The pragmatists believed that a truly universal law was unlikely since it would require an agreement on the fundamental character of authors' rights, a topic on which nations held widely differing views.<sup>20</sup> Nations with higher protection levels would not relinquish that extra protection, especially as it related to their own authors and artists. The pragmatists offered a compromise approach: Create a universal, but minimum, protection level to which the largest possible number of nations would adhere. While the pragmatists ultimately prevailed at the Berne Convention, the universalists exerted sufficient influence that the Convention could be regarded as a limited universal copyright code as well.<sup>21</sup>

### B. *Early conferences*

A number of early conferences showed the growing interest in universal copyright law and set the stage for the Berne Union. The 1858 Brussels Congress on Literary and Artistic Property was one of the first

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18. *Id.* at 29-30, 38; Abelman & Berkowitz, *supra* note 7, at 332.

19. S. RICKETSON, *supra* note 4, at 39-40. This view incorporated the French doctrine that the author had a natural right of property in his work, which existed before, and separate from, any man-made rules or laws. *Id.*

20. *See generally id.* at 40-41 (discussing the pragmatic viewpoint). Pragmatists also noted that nations varied widely as to the amount of recognition given authors' rights. Those states with a greater concern for the public's interests emphasized users' interests as much as authors' rights. *Id.*

21. *Id.* at 41. Common law countries and the United Kingdom usually followed the pragmatic view; the French speaking countries adhered to the universal philosophy. *Id.*

such meetings.<sup>22</sup> Although the Congressional debates showed a commitment to international copyright protection, wide differences of opinion on certain issues still remained.<sup>23</sup> The conference resolutions provided a rudimentary outline of a universal copyright law program, and contained many items that nations would incorporate into their national laws and bilateral agreements prior to the Berne Convention.<sup>24</sup>

Similar conferences were held in 1861 and 1877, yet no substantial results appeared until 1878 when two congresses emerged. The first, an international literary congress, urged states to incorporate international copyright features into domestic laws.<sup>25</sup> The second congress, an international artistic conference, paralleled the universal approach and advocated a universal copyright law.<sup>26</sup>

The International Literary Congress, which evolved into l'Association Littéraire et Artistique Internationale (ALAI), urged France to convene a conference to form a uniform copyright convention.<sup>27</sup> Although France did not respond, Switzerland did and became the first country to move positively toward an international copyright convention. In 1883, the Swiss hosted a conference to discuss a possible union for the international protection of literary property. Three days of intense debate produced a draft convention of ten articles, most of which survived the next three years and later formed the basis of the Berne Convention.<sup>28</sup>

The conference delegates agreed to an underlying principle of national treatment based on publication or performance location and not the author's nationality. Literary and artistic works published in one country would receive the same treatment as native works, provided that the authors complied with the formality requirements of the publishing

22. Abelman & Berkowitz, *supra* note 7, at 333 (citing COMPTE RENDU DES TRAVAUX DU CONGRÈS DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 324, 350 (1859)).

23. S. RICKETSON, *supra* note 4, at 42. One highly debated point was the duration of protection. Opinions ranged from perpetuity to fixed-length protection. *Id.*

24. *Id.* at 45.

25. *Id.* at 46-47 (citing ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE-SON HISTOIRE, SES TRAVAUX (1878-1889) 1-12 (1889) [hereinafter HISTOIRE]). The Congress believed that national legislatures should protect authors' rights in their works, and that the rights should be perpetual. *Id.*

26. *Id.* at 47 (citing L'UNION INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES; SON FONDATION ET SON DÉVELOPPEMENT: MÉMOIRE 1886-1936 26 (1936)).

27. S. RICKETSON, *supra* note 4, at 47-48 (citing HISTOIRE, *supra* note 25, at 12ff). The 1878 International Literary Congress formed the International Literary Association, which was open to all literary societies and authors. The Association later changed its name to l'Association Littéraire et Artistique Internationale (ALAI). The ALAI was formed to protect literary property principles and organize regular relations between literary societies and writers of all nationalities. By 1883, ALAI had become the leading proponent for fuller copyright relations. *Id.*

28. *Id.* at 50-51.

country.<sup>29</sup> To further the national treatment concept, delegates agreed that foreign authors were entitled to seek the same civil relief for infringement that nationals could seek under their own national law.<sup>30</sup>

The draft convention was relatively limited compared to many existing bilateral agreements. It recognized authors' rights in their works, but it did not mention the duration of those rights, the works each country would recognize, production rights, or moral rights.<sup>31</sup> In short, the conference reflected the pragmatists' approach—a minimum international protection scheme.

Following the ALAI conference, the Swiss government sent the convention text to "all the civilized countries" inviting them to a diplomatic conference to negotiate an international copyright treaty.<sup>32</sup> Although the Swiss invitation did not generate enthusiasm in the United States, enough countries replied favorably and Switzerland held the first of three Berne diplomatic conferences.<sup>33</sup>

### C. Berne conferences

The first Berne conference was held from September 8th to 19th, 1884, with delegates from ten countries attending.<sup>34</sup> The conference's draft document reiterated the ALAI national treatment approach to an author's literary and artistic rights, and made such treatment a cornerstone of the Berne Convention. However, the drafting commission proposed that protection last only as long as protection in the author's own country. This duration provision was a compromise between a

29. *Id.* at 51. The delegates also agreed that authors would receive exclusive translation rights as long as a right in the original work existed. *See generally id.* at 49-55 (discussing the background and work of the 1883 conference).

30. *Id.* at 52. The delegates decided an unauthorized adaptation of a work was also an infringement subject to the same recourse as other infringements. There was no discussion of the definition of adaptation and later conferences debated the issue extensively. *Id.*

31. *Id.* at 53.

32. Bogsch, *The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works*, 22 *COPYRIGHT* 295-96 (1986) (summary of the first 100 years of Berne Convention history and accomplishments).

33. *Id.* at 296. The United States said customs duties would complicate any international copyright scheme because copyright involved the manufacturer of paper, castor, or printing equipment, and persons involved in the printing process, as well as the author. *Id.*

34. S. RICKETSON, *supra* note 4, at 57-58 (citing ACTES DE LA CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES DROITS D'AUTEUR RÉUNIE À BERNE DU 8 AU 19 SEPTEMBRE 1884, 15-20 (1884) [hereinafter ACTES 1884]). The countries were Austria-Hungary, Belgium, Costa Rica, France, Germany, Great Britain, Haiti, the Netherlands, Sweden-Norway, and Switzerland. Italy, Paraguay, and Uruguay had nominated delegates, but they could not attend at the last minute. Many attendees were diplomats, but there was a high level of knowledge and familiarity with international copyright protection issues. *See generally id.* at 55-71 (discussing the conference history and analyzing conference accomplishments).

uniform protection term and purely national treatment, which could give works longer protection in a foreign country than the country of origin.<sup>35</sup>

In a separate set of proposals, delegates acknowledged both a goal of universal international copyright codification and a fear that a universal code might prohibit some countries from joining the Union. Delegates argued that an international code would eventually evolve and that the Convention's role should be to pave the way by outlining the desired features of such a code.<sup>36</sup> The delegates then put forth the principle that authors' rights in their works should be for life plus thirty years, and that authors' translation rights should be assimilated as completely as possible into their reproduction rights. Conference diplomats accepted these proposals and thereby agreed to guarantee at least a minimum protection level.<sup>37</sup> This guarantee of authors' rights formed the basis of international copyright law which exists today.

The second conference met in Berne from September 7th to 18th, 1885,<sup>38</sup> with twenty-six delegates from sixteen countries in attendance, including the United States.<sup>39</sup> The conference delegates faced two choices: (1) have a convention with a substantial degree of unity, that lesser developed countries would not join, or (2) have a less restrictive convention to which more countries would adhere.<sup>40</sup> The new draft, which showed more compromise than the 1884 draft, reflected the decision to follow the latter route and offered a minimum standard that would not discourage countries with lower copyright protection levels from signing.<sup>41</sup> This decision marked another cornerstone of the Berne Convention—minimum level guidelines to encourage maximum membership.

35. *Id.* at 62-63. Drafters restricted exclusive translation rights more than ALAI participants when they limited the rights to ten years following first publication in a Berne Union country. *Id.* at 64.

36. *Id.* at 69-70 (citing ACTES 1884, *supra* note 34, at 65) (the entire text of the proposals).

37. *Id.* at 70 (citing ACTES 1884, *supra* note 34, at 66).

38. Bogsch, *supra* note 32, at 296.

39. S. RICKETSON, *supra* note 4, at 72 (citing ACTES DE LA 2ME CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES RÉUNIE À BERNE DU 7 AU 18 SEPTEMBRE 1885, 7 (1885)). The following countries sent delegates: Argentina, Belgium, France, Germany, Great Britain, Haiti, Honduras, Italy, the Netherlands, Paraguay, Spain, Sweden, Norway, Switzerland, Tunisia, and the United States. *Id.*

40. *Id.* at 73-74. *See generally id.* at 72-78 (analyzing the Conference issues).

41. *Id.* at 77-78. The 1885 draft clarified that the laws of the author's country related to publication in a member country only as to compliance with formalities and protection length; otherwise laws of the publishing country applied. Delegates fixed translation rights at ten years after publication, but noted the period was a minimum time only. The draft deleted any reference to whether the source of the reproduced newspaper or periodical article was required. The draft also declared that non-essential changes to a work which did not give it the character of a new work should be regarded as unauthorized appropriations. *Id.* at 74-76.

Since the proposals were still only drafts, the Swiss government agreed to call a third and final conference to translate the drafts into a formal diplomatic instrument.<sup>42</sup> Three draft texts now existed: the Convention, the Additional Article, and the Final Protocol. Twelve countries attended the meeting, but the United States and Japan attended only as observers.<sup>43</sup> Ten countries signed the Convention on September 9, 1886, and nine of the signatory states ratified the Convention.<sup>44</sup> With this ratification the Berne Union emerged and the growth of a major force in international copyright began.

### III. DEVELOPMENT OF THE BERNE CONVENTION

One reason for the Berne Convention's continuing influence and vitality is the periodic revisions that have allowed the Union to modernize and meet the challenges of an ever-changing copyright world.<sup>45</sup> These revisions have occurred in 1896,<sup>46</sup> 1908,<sup>47</sup> 1928,<sup>48</sup> 1948,<sup>49</sup> 1967,<sup>50</sup> and 1971,<sup>51</sup> with one minor addition in 1914.<sup>52</sup> All revisions are relevant because a particular text only applies to the countries who

42. Bogsch, *supra* note 32, at 296. The Conference convened on September 6, 1886, in Berne.

43. S. RICKETSON, *supra* note 4, at 79 (citing ACTES DE LA 3ME CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES RÉUNIE À BERNE DU 6 AU 9 SEPTEMBRE 1886, 7-8 (1886)).

44. Berne Copyright Union Item A-1 Berne Convention, Additional Article and Final Protocol, Sept. 9, 1886, 3 UNESCO Copyright Law & Treaties of the World [hereinafter CLTW], at n. 1. The following countries signed the Convention: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia. All signatories ratified the Convention within the mandated one year except Liberia which did not ratify it for another 20 years. *Id.* art. XXI; Berne Copyright Union, Item A-2 States Which Have Adhered to the Convention, Additional Article, and Final Protocol, Sept. 9, 1886, 3 CLTW, at 1.

45. Item A-1 Berne Convention 1886, *supra* note 44, art. XVII; Abelman & Berkowitz, *supra* note 7, at 335.

46. Berne Copyright Union Item B-1 Paris Additional Act and Interpretive Declaration May 4, 1896, 3 CLTW [hereinafter Item B-1 Paris Additional Act 1896].

47. Berne Copyright Union Item C-1 Berlin Convention, Nov. 13, 1908, 3 CLTW [hereinafter Item C-1 Berlin Convention 1908].

48. Berne Copyright Union Item E-1 Rome Convention, June 28, 1928, 3 CLTW [hereinafter Item E-1 Rome Convention 1928].

49. Berne Copyright Union Item F-1 Brussels Convention, June 26, 1948, 3 CLTW [hereinafter Item F-1 Brussels Convention 1948].

50. Berne Copyright Union Item G-1 Stockholm Act, July 14, 1967, 3 CLTW [hereinafter Item G-1 Stockholm Act 1967].

51. Berne Copyright Union Item H-1 Paris Act, July 24, 1971, 3 CLTW [hereinafter Item H-1 Paris Act 1971].

52. Berne Copyright Union Item D-1 Berne Additional Protocol, Mar. 20, 1914, 3 CLTW [hereinafter Item D-1 Berne Additional Protocol 1914].

adhere to it.<sup>53</sup> For this reason, a broad overview of the one hundred-year development of the Berne Convention is helpful.

#### A. *Paris, 1896*

The Final Protocol of the 1886 Convention provided that the First Revision Conference be held in Paris within four to six years of the date the Convention came into force.<sup>54</sup> Delegates desired an early revision conference in order to maintain the momentum of the international copyright union and encourage countries to adhere to it. However, delegates did not meet until 1896 and several countries made it immediately clear they did not want major changes to the Convention.<sup>55</sup> Consequently, Convention amendments were limited in scope.

Delegates clarified that "published" meant published for the first time in a Berne Union country.<sup>56</sup> Delegates also amended Article III to give protection to the non-Union authors themselves rather than grant a privilege to the publisher.<sup>57</sup> The Conference also expanded authors' exclusive translation rights.<sup>58</sup>

Once delegates formulated the amendments, the form of the revision became an issue. The revisions could have been incorporated into an entirely new convention, or they could have been put into a separate act, leaving the 1886 Convention intact. Although the first alternative was simpler, the latter helped those countries who had to obtain parliamentary approval before they could sign the new text.<sup>59</sup> The delegates ultimately drafted a separate act and allowed members to adhere to it by written notification.<sup>60</sup> By adopting separate instruments that countries could

53. Item C-1 Berlin Convention 1908, *supra* note 47, art. 27. If a Berne Union country does not sign a particular revision, it is only bound to the earliest revision signed by it and the other country. *Id.*; Abelman & Berkowitz, *supra* note 7, at 335.

54. Item A-1 Final Protocol 1886, *supra* note 44, ¶ 6, at 5.

55. S. RICKETSON, *supra* note 4, at 82 (citing ACTES DE LA CONFÉRENCE DE 1896, 35-36 (1897) [hereinafter ACTES 1896]). Primary opponents of change were Norway and Great Britain. *Id.*

56. Item B-1 Paris Additional Act 1896, *supra* note 46, art. I, ¶ 1.

57. *Id.* ¶ 2; R. BOWKER, *supra* note 8, at 321.

58. Item B-1 Paris Additional Act 1896, *supra* note 46, art. I, ¶ 3. Delegates extended translation rights throughout the entire term of the author's right in his original work. However, the right for any language expired if the author did not provide for a translation into that language within ten years after publication of the original work. *Id.*; R. BOWKER, *supra* note 8, at 321-22.

59. S. RICKETSON, *supra* note 4, at 82, 85. Union members could not come to a unanimous decision on several items, which meant some states did not accept certain amendments. If the delegates incorporated the changes into a new convention, the convention would be limited to those who could agree to the amendments and the Union would be more restricted. *Id.* at 82.

60. Item B-1 Paris Additional Act 1896, *supra* note 46, art. III.

accept or reject, the delegates replaced one Union with several unions. Their attempt to keep membership open to as many nations as possible ran counter to the Convention's goal of one universal copyright union.<sup>61</sup>

### B. Berlin, 1908

The 1896 Conference delegates set the next revision meeting for Berlin in six to ten years,<sup>62</sup> but they did not convene until 1908. Conference delegates amended the Convention and adopted a single text into which they incorporated the previous texts.<sup>63</sup>

The revisions reflected several trends that had developed in international copyright law. First, a trend toward national treatment evolved. The Convention now gave authors, who were subjects of Berne Union countries, the same rights regarding works first published in a Union country as that country gave its own authors.<sup>64</sup> Second, a trend away from formalities developed. Enjoyment of Berne Convention protection was no longer subject to performance of formalities, such as registration.<sup>65</sup> Third, the Convention acknowledged the trend toward independent protection by making the exercise and enforcement of rights a matter of national law in the country where the author claimed protection.<sup>66</sup>

Other changes included the protection of architectural works, the protection of translation rights in a language even if the author did not provide a translation within ten years of original publication, and the genesis of a uniform duration period for authors' rights.<sup>67</sup> Article 19 emphasized that the Berne Convention was a minimum protection scheme.<sup>68</sup> Article 27 noted that although the new text replaced the old, the old text stayed in force with regard to those states not ratifying the

61. S. RICKETSON, *supra* note 4, at 82-83, 85-86. The delegates in effect created two unions. One union consisted of those states that signed the revised text. The other was a larger union consisting of those who accepted only the original 1886 Convention plus those in the first group who were also signatories of the 1886 text. *Id.*

62. *Id.* at 87-88 (citing ACTES 1896, *supra* note 55, at 146-47).

63. Bogsch, *supra* note 32, at 296.

64. Item C-1 Berlin Convention 1908, *supra* note 47, art. 4; S. RICKETSON, *supra* note 4, at 91. This meant an author could get longer protection in a foreign country than in the country in which he was a national. *Id.*

65. Item C-1 Berlin Convention 1908, *supra* note 47, art. 4.

66. *Id.*

67. *Id.* arts. 2, 7, 8. Earlier texts were silent on the duration of authors' rights in their works. Article 7 made the author's life plus 50 years the Berne yardstick. The article recognized that many domestic laws were less than 50 years and it held that protection should not exceed the term fixed by the country of origin. *See generally* S. RICKETSON, *supra* note 4, at 87-96 (discussing other Convention amendments).

68. Item C-1 Berlin Convention 1908, *supra* note 47.

new Act.<sup>69</sup> Despite the fragmentation caused by Article 27, the Convention moved further toward international copyright codification because member nations with differing national copyright laws agreed to give a minimum protection level to authors.<sup>70</sup>

### C. 1914 Protocol

The 1914 Additional Protocol did not require a revision conference and was passed to meet a limited need. The Convention gave protection to authors from non-Union countries who first published or simultaneously published their works in a Berne Union country.<sup>71</sup> This provision provided some incentive for non-Union countries to join the Convention and receive full protection for unpublished works. However, the non-Union countries often did not reciprocate with adequate protection for Union member authors. This imbalance became a problem for Canada which provided the "back door"<sup>72</sup> to Berne for many American authors.<sup>73</sup> When Canada refused to ratify the 1908 Convention, Union members passed the Berlin Additional Protocol, which allowed a Union country to restrict protection of a non-Union author whose country failed to protect Union country authors adequately.<sup>74</sup> This continual threat of retaliation factored into the United States' decision to join the Berne Union some seventy-five years later.

### D. Rome, 1928

The next revision conference was to occur in Rome within ten years of the 1908 conference, but World War I delayed the conference until May 1928.<sup>75</sup> The conference disappointed those who wanted further unification of international copyright law, but it did make two important additions to the Convention: moral rights and radio broadcasting rights.<sup>76</sup> Recognition and protection of moral rights gained favor in a growing

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69. *Id.*

70. See *supra* note 61 and accompanying text.

71. Item B-1 Paris Additional Act 1896, *supra* note 46, art. I, ¶ 2; Item C-1 Berlin Convention 1908, *supra* note 47, art. 5.

72. The simultaneous publication provision was known as the "back door" to Berne. See 3 NIMMER, *supra* note 3, §§ 17.01[C][1][b], 17.04[D] (explaining the back door policy).

73. S. RICKETSON, *supra* note 4, at 97-98. Canada became a "common gateway" for American authors but restrictive United States copyright laws made it difficult for Canadian authors to receive protection in the United States. When Great Britain met with its Dominions to discuss ratification, Canada refused to allow ratification as far as it was concerned. *Id.*

74. Item D-1 Berne Additional Protocol 1914, *supra* note 52, ¶ 1.

75. Bogsch, *supra* note 32, at 296.

76. S. RICKETSON, *supra* note 4, at 101 (discussing conference work).

number of countries. Although members from common law countries generally opposed the move, delegates agreed to a compromise article.<sup>77</sup> Article 6bis recognized the author's right to claim authorship of a work, and object to any distortion, mutilation or prejudicial modification of that work. The article left the exercise and enforcement of moral rights to each state.<sup>78</sup> Article 6bis became a principal stumbling block for United States adherence to the Berne Union because United States copyright code did not recognize an author's moral rights in his works.<sup>79</sup> The conference also recognized an author's exclusive right to authorize communication of his work to the public via radio communication.<sup>80</sup>

### *E. Brussels, 1948*

Thirty-five member nations attended the next revision convention in Brussels along with observers from eighteen other states, including the United States.<sup>81</sup> This convention was the last conference to have a strong European orientation with emphasis on authors' rights.<sup>82</sup> Although original founders of the Union remained in force, new technological developments produced a group of powerful special interests wanting access to copyrighted material.<sup>83</sup> Moreover, new diverse membership, including governments of emerging nations, generated a desire that the Convention give greater recognition to the general public's access right to copyrighted material.

The Brussels Conference refined and consolidated the accomplishments of the Berlin and Rome conferences, and changes to the Rome text were not fundamental enhancements of authors' rights.<sup>84</sup> The con-

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77. *Id.* at 102-03. Common law countries often did not directly protect an author's moral rights in their copyright laws. They protected them through alternative legal remedies. *Id.*

78. Item E-1 Rome Convention 1928, *supra* note 48.

79. Kent & Lancour, *supra* note 5, at 8.

80. Item E-1 Rome Convention 1928, *supra* note 48, art. 11bis(1).

81. S. RICKETSON, *supra* note 4, at 107 (citing DOCUMENTS DE LA CONFÉRENCE RÉUNIE À BRUXELLES DE 5 AU 26 JUIN 1948, 14-15 (1951) [hereinafter DOCUMENTS 1948]).

82. S. RICKETSON, *supra* note 4, at 108-09, 113. One indication of the shift in orientation was the use of English by a majority of delegates instead of French, the traditional Berne Union language. Although English had always been the largest language group within the Union, the 1948 conference was the first time the majority of diplomats used English to conduct Union business. *Id.*

83. *Id.* at 108, 113. Their interests were in users' rights as to radio and television broadcasts, retransmissions of works, loud speaker communication, recording devices, and cinematography. See Item F-1 Brussels Convention 1948, *supra* note 49, arts. 11bis, 14.

84. Works protected under Article 2 now included cinematographic works without qualifications and photographic works. Delegates amended Article 6bis to maintain moral rights for Union members after an author's death at least until the copyright expired. The lawful use of copyrighted works in Article 10 now included short quotations from newspapers, articles, and periodicals, and

ference reflected a need to balance intrinsic authors' rights against the interests of a variety of users in order for Union membership to remain attractive to the largest possible number of nations. The ultimate result was the modification of a core concept in Berne Convention copyright philosophy—protection of authors' rights in their works.<sup>85</sup>

#### F. Stockholm, 1967

The next revision conference was in Stockholm, from June 11th to July 14th, 1967.<sup>86</sup> This conference covered not only substantive revisions of the Berne Convention, but also structural and administrative changes that allowed the Union to work with the newly created World Intellectual Property Association.<sup>87</sup>

Except for the Protocol concerning developing countries,<sup>88</sup> substantive changes were limited.<sup>89</sup> This Protocol recognized the growing pressure to give some kind of special concession to developing countries who wanted cheaper, more available copies of works.<sup>90</sup> It permitted developing nations, for the first ten years they were a Union member, to shorten the protection term for Berne works, grant non-exclusive translation and reproduction licenses under specific conditions, allow non-profit broadcasting of works, and use works in "teaching, study and research in all fields."<sup>91</sup> Despite this attempt to accommodate developing nations, the Protocol never came into force. Article 28(1)(b) allowed nations to ratify the Act in part or in whole<sup>92</sup> and many nations did not want to sign an Act containing terms that lowered their own authors' protec-

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the source of excerpts and quotations had to be acknowledged. Article 11 strengthened exclusive authors' rights to authorize public performance of their works by protecting the rights explicitly and not just recognizing them under national law. Item F-1 Brussels Convention 1948, *supra* note 49.

85. S. RICKETSON, *supra* note 4, at 108-09, 113.

86. Bogsch, *supra* note 32, at 298.

87. S. RICKETSON, *supra* note 4, at 115, 119-20.

88. Item G-1 Stockholm Act 1967, *supra* note 50, Protocol Regarding Developing Countries, at 17-21. [hereinafter Protocol 1967].

89. Article 3(1)(a) made an author's nationality the general requirement for protection, so that any national of a Berne Union country had his unpublished works as well as his published works protected. Article 9 expressly acknowledged an author's reproduction rights, rather than dealing with lawful borrowings and adaptations. Article 6bis became a general moral rights protection article without a time limit when delegates deleted the reference to an author's lifetime. Also, Article 7 fixed a protection term of 50 years for cinematographic and 25 years for photographic works rather than leaving such protection to national law. Item G-1 Stockholm Act 1967, *supra* note 50.

90. S. RICKETSON, *supra* note 4, at 122-23.

91. Protocol 1967, *supra* note 88, art. 1, at 17-20.

92. Item G-1 Stockholm Act 1967, *supra* note 50; S. RICKETSON, *supra* note 4, at 123.

tion.<sup>93</sup> The result was another revision conference in 1971 to address the problems of developing nations.

The most significant changes to the Convention text were in Articles 22 through 26, and the amendments were closely related to a new convention which established the World Intellectual Property Organization (WIPO).<sup>94</sup> Because the Stockholm Conference dealt with the establishment of the WIPO, its official title was the "Intellectual Property Conference of Stockholm."<sup>95</sup>

### G. Paris, 1971

Soon after the Stockholm Conference closed, it became clear that the Protocol Regarding Developing Countries would prevent many nations from ratifying the Stockholm Act because the Protocol's exceptions went too far.<sup>96</sup> Developed nations wanted to retain protection for their authors, and developing states feared losing protection altogether if they could not find a solution acceptable to developed countries. Delegates formulated the Paris Act, which accommodated the developing nations by shifting the Convention's emphasis back toward the developed nations and authors' rights.<sup>97</sup>

## IV. SUBSTANTIVE PROVISIONS OF THE BERNE CONVENTION

### A. General

The Berne Convention is an agreement between nations that imposes on each member the obligation to protect authors' and artists' rights in their works. This obligation entails taking measures necessary to "ensure the application of this Convention" and to be in a position to effect the Convention under domestic laws.<sup>98</sup> Nations have generally met the obligation in two ways. Some countries incorporate the treaties into their domestic law and the treaty terms are generally applicable to individuals

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93. S. RICKETSON, *supra* note 4, at 124 (citing BODENHAUSER, RECORDS OF THE PARIS CONFERENCE 1971, WIPO 33 (1974)).

94. The Berne Convention created an Assembly of all Union members to meet once every three years and to be responsible for the overall administration of Union business. A smaller Executive Committee of rotating membership would meet more frequently to handle matters between Assembly meetings. An International Bureau would take over the administrative tasks, with the new WIPO actually carrying out the tasks. Item G-1 Stockholm Act 1967, *supra* note 50, arts. 22, 24; S. RICKETSON, *supra* note 4, at 123.

95. Bogsch, *supra* note 32, at 298.

96. *Id.*

97. S. RICKETSON, *supra* note 4, at 124-25. The United States recently ratified the Paris Act. *Id.*

98. Item H-1 Paris Act 1971, *supra* note 51, art. 36(2).

without additional domestic legislation whereby the convention is self-executing. Other nations, including the United States, require domestic legislation to effect the Convention and the treaty provisions are only effective to the extent domestic legislation allows.<sup>99</sup>

Ratification of the Berne Convention means countries become members of the Berne Union.<sup>100</sup> The Union is an on-going association of states whose existence does not depend on the addition or departure of any one state, and whose membership is open to any state willing to assume Convention obligations.<sup>101</sup> Unlike many international unions, it does not perform any specific executive function related to its goal (international copyright protection), nor does it initiate wide scope projects, nor provide an international registry service. The Union does perform a legislative function through its revision conferences and a quasi-executive judicial function by interpreting the Convention provisions. However, the Convention charges members, rather than the Union, with providing international copyright protection through domestic laws.<sup>102</sup> This charge makes national treatment one foundation of the Berne Convention.

The Berne Convention is an idealistic framework and not a universal copyright code. It provides minimum level guidelines for its members and symbolizes an ideal—universal, uniform copyright protection for authors throughout the Union.<sup>103</sup> Appreciation of the Berne Convention requires understanding the Convention definition of three key terms: authors, works, and rights.

### *B. Authors*

To become a "Berne" author, one of two prerequisites must be met. The author must be a national or habitual resident of a Berne Union country, or he must first publish his work in a Union country, or publish it simultaneously in a Union and non-Union state.<sup>104</sup> This means the prerequisites for protection will vary with the nature of the author. The criterion for Union authors is nationality or residence. For non-Union authors, the criterion is place of first publication.<sup>105</sup>

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99. S. RICKETSON, *supra* note 4, at 130-32. The United States has done this by amending Title 17 of the U.S. Code with the Berne Implementation Act of 1988. *Id.*

100. Item H-1 Paris Act 1971, *supra* note 51, art. 1.

101. *Id.* arts. 29, 35.

102. See S. RICKETSON, *supra* note 4, at 146-56 (discussing the concept of the term union in relation to the Berne Union).

103. *Id.* at 151.

104. Item H-1 Paris Act 1971, *supra* note 51, art. 3(1).

105. See generally S. RICKETSON, *supra* note 4, at 157-227 (analyzing persons protected under

Nationality in a Berne Union country enhances the scope of protection because the Convention protects both the published and unpublished works of a Union author. Non-Union authors, on the other hand, only have their published works protected, and this protection requires that the work be first published in a Berne state or published simultaneously in a Union and non-Union country.<sup>106</sup> Simultaneous publication for Convention purposes is publication in two or more countries within thirty days under the Paris Act and on the same day under the Rome text.<sup>107</sup> The Union hopes that the provision will encourage non-Union members to join the Union to achieve better protection for their own authors. Members believe that as more nations join, the Convention comes closer to becoming a universal copyright code.

### C. Works

A work protected by the Berne Convention must be a "literary and artistic work," which means a "personal creation or . . . intellectual creation within the sphere of letters and the arts."<sup>108</sup> The Convention defines works in two parts: the general definition including "every production in the literary, scientific and artistic domain" and the specific listing of examples following the words "such as."<sup>109</sup> In the general definition, production simply means the work has to exist in order to be protected, and the terms literary, scientific and artistic are broadly interpreted.<sup>110</sup> The general definition contains no standard of excellence or purpose, so the quality of the work is of no consequence in receiving protection.<sup>111</sup> A final caveat is that Berne works, before being protected, must be "fixed in some material form."<sup>112</sup>

Article 2(1) specifically lists the wide range of works that the Berne Convention protects.<sup>113</sup> The words "such as" indicate that the list is not exhaustive and countries may protect more works than those outlined by

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the Berne Convention).

106. Item H-1 Paris Act 1971, *supra* note 51, art. 3(1).

107. *Id.* art. 3(4); Item E-1 Rome Convention 1928, *supra* note 48, art. 4(3); Abelmen & Berkowitz, *supra* note 7, at 336-37.

108. S. RICKETSON, *supra* note 4, at 231 (citing DOCUMENTS 1948, *supra* note 81, at 95).

109. Item H-1 Paris Act 1971, *supra* note 51, art. 2.

110. S. RICKETSON, *supra* note 4, at 232-33.

111. *Id.* at 231.

112. Item H-1 Paris Act 1971, *supra* note 51, art. 2(2). Although a number of Berne members want to eliminate the requirement that works be fixed in "writing or otherwise," many nations are not prepared to abolish this requirement because the existence of a non-material work is difficult to prove. A mandatory abolition might drive some members out of the Union and discourage others from joining. S. RICKETSON, *supra* note 4, at 242-43.

113. Item H-1 Paris Act 1971, *supra* note 51.

the Convention. However, Union members must protect the works the article actually enumerates.<sup>114</sup> As technological advances occur, Convention revisions extend mandatory coverage to include new forms of artistic and literary works.<sup>115</sup> Today, technology is stretching the outer limits of what is artistic and literary, and one of the challenges facing the Berne Union is how far to extend Berne coverage without lowering protection of traditional works.<sup>116</sup>

The Convention makes protection of works outside its scope a matter of national law. For example, Article 2(4) leaves the protection of laws, court orders and other official documents to national law.<sup>117</sup> Article 2bis(1) extends optional coverage to political speech and speeches made during legal proceedings.<sup>118</sup> The Convention also leaves determination of whether lectures and addresses delivered in public may be reproduced by the press, broadcast, or wire communications to national legislatures.<sup>119</sup>

Additional works are likewise excluded from Convention protection. The Convention may specifically exclude works, such as "news of the day and miscellaneous facts,"<sup>120</sup> or the subject matter of certain works may remain outside the Convention altogether. Sound and television broadcasts, sound recordings, and interpretations of performing artists represent the most prominent examples of matters outside Union consideration.<sup>121</sup> Other excluded works include titles, slogans, insubstantial works, and folklore to the extent that it is only protected as an unpublished anonymous work with protection ceasing once it is published.<sup>122</sup>

114. *Id.* arts. 2(1), 2(6). See also S. RICKETSON, *supra* note 4, at 234-36 (discussing the effect of Article 2(1)).

115. The enumerated works of Article 2(1) include *books, pamphlets, and other writings*; oral works; *dramatic or dramatico-musical works*; choreographs and entertainment in dumb shows; *musical compositions (with or without words)*; cinematographic works, photographic works, applied art works; *works of drawings, painting, architecture, sculpture, engravings and lithography, illustrations, maps, plans, sketches, and three dimensional works relative to geography, topography, architecture or science*. Italicized items are those from the original 1886 list. Item A-1 Berne Convention 1886, *supra* note 44, art. IV; Item H-1 Paris Act 1971, *supra* note 51, art. 2(1).

116. See S. RICKETSON, *supra* note 4, at 895-900 (discussing the problem of computer software and its impact on traditional Berne Convention protection).

117. Item H-1 Paris Act 1971, *supra* note 51.

118. *Id.*

119. *Id.* art. 2bis(2).

120. *Id.* art. 2(8).

121. These items receive specific protection in other multilateral conventions and will not likely be included in Berne Convention coverage. See, e.g. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication, Oct. 29, 1971, 26 U.S.T. 309, T.I.A.S. 7808.

122. S. RICKETSON, *supra* note 4, at 312, 313-15. The Convention also excludes some works of non-Union authors if the works do not fall within the definition of "published." The Conven-

Since published works are the only works for which non-Union authors receive protection, the term "published works" is of key importance to non-Union authors. Berne defines "published works" as those published with the consent of the author with copies in sufficient quantity to satisfy the "reasonable requirements of the public."<sup>123</sup> The Convention leaves the definition of copies to national laws, which vary greatly.<sup>124</sup> As to the quantity, the Convention's reasonable requirement takes into account that a certain work may appeal to a limited audience and have a small demand, or the work may be by an unknown author. The Convention does not deny publication if the small quantity is reasonable under the circumstances. Lastly, the convention considers the work available to the public if there is no limitation on who has access to the work.<sup>125</sup>

#### D. Rights

The Berne Convention protects an author's personal rights as well as his works. Because the Convention seeks to establish the minimum rights each nation views as essential, the Paris Act contains a list of specific rights rather than a general statement.<sup>126</sup> The Convention has added these rights little by little and now protects rights contained in Articles 6bis, 8, 9, 11, and 14.<sup>127</sup>

A principal right the Convention protects is the author's exclusive right of reproduction including any sound or visual recording. Although the reproduced work may be in any manner or form, it must be fixed.<sup>128</sup> The Act does not specify the extent of an author's reproduction rights nor what "elements" of the work it protects, but instead it makes these concerns a matter of national legislation.<sup>129</sup> Reproduction rights also include translations,<sup>130</sup> "adaptations and other alterations" of

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tion does not protect art exhibits or construction of architectural works because copies are not made available to the public. However, when copies such as photographs or prints become available to the public with the artist's consent, these works become published and receive protection. *Id.* at 190-91.

123. Item H-1 Paris Act 1971, *supra* note 51, art. 3(3).

124. S. RICKETSON, *supra* note 4, at 179-80. Several countries do not regard records, piano rolls, film and other non-print or non-graphic reproduction as copies. *Id.*

125. *Id.* at 182-83, 187-88 (discussing interpretation problems associated with the concepts of "sufficient quantity" and "made available to the public").

126. *Id.* at 367.

127. Item H-1 Paris Act 1971, *supra* note 51. See also S. RICKETSON, *supra* note 4, at 364-476 (discussing protected rights).

128. Item H-1 Paris Act 1971, *supra* note 51, art. 9(1).

129. *Id.* arts. 9(2), 11, 11bis, 11ter, 14.

130. *Id.* art. 8.

works,<sup>131</sup> and access rights to original works after an author no longer has the property rights.<sup>132</sup> The Convention also confers on authors all rights of distribution and subsequent disposal,<sup>133</sup> but the extent to which individual national laws protect these rights varies widely.<sup>134</sup> Distribution rights include the author's right to seize "infringing" copies; national legislation further determines how the seizure will take place.<sup>135</sup>

Another set of rights which the Berne Convention has protected since the Rome Act is moral rights. The Convention recognizes an author's right to claim authorship and object to any modification of his work that might prejudice his honor or reputation.<sup>136</sup> These rights are independent of the author's economic rights and can even be exercised after his economic rights have expired. The rights can also continue after an author's death, but if national laws prohibit such extension, the cease upon the author's death.<sup>137</sup>

While moral rights receive national treatment, domestic laws in the country where the author claims protection govern any redress of grievances.<sup>138</sup> This protection need not be incorporated into national copyright laws, but can be achieved in other ways such as through a defamation action in court.<sup>139</sup> The inclusion of moral rights in the Berne Convention was one of the principal obstacles to United States' adherence.<sup>140</sup>

#### *E. Other*

Two other substantive elements of the Berne Convention should be mentioned: The type of protection the Convention provides and the Convention's impact on national laws.

131. *Id.* art. 12.

132. *Id.* art. 6bis(2).

133. *Id.* arts. 14(1), 14ter, 16.

134. A number of Union states protect lending rights which keep an author from losing revenues if third parties borrow his works rather than purchase them. A much smaller number protect the author's right of subsequent disposal, which allows an author to share in revenues of subsequent sales of his work. S. RICKETSON, *supra* note 4, at 400-02.

135. Item H-1 Paris Act 1971, *supra* note 51, art. 16.

136. *Id.* art. 6bis(1).

137. *Id.* art. 6bis(2).

138. *Id.* art. 6bis(3).

139. S. RICKETSON, *supra* note 4, at 475.

140. Roberts, *Senate to Ratify Century Old Pact on Artistic Rights*, L. A. Daily J., Oct. 14, 1988, at 1, col. 6 (reporting on the resolution of issues leading to the United States adherence to the Berne Convention). The United States met the Berne requirement by interpreting domestic statutes and common law to protect these rights without actually including moral rights in its revised copyright laws. *Id.*

Berne protection rests on three principles: National treatment, independence, and absence of formalities.<sup>141</sup> The principle of national treatment means any Union or non-Union author in a Berne Union country shall enjoy the same protection rights for his works that the state grants to its nationals.<sup>142</sup> Article 5(3) states clearly that an author's protection is only to the extent that domestic law allows; however, Article 5(1) mandates that Union members provide protection rights to their nationals. The net effect is that authors who publish in Union countries, other than the country of origin, receive a minimum protection level because they are treated as nationals.<sup>143</sup>

The second principle, independent protection, increases the strength of national treatment. This principle eliminates the need for any reference to the law of the country of origin because an author no longer has to meet the formality requirements in that country in order to get protection in another Berne Union state.<sup>144</sup> The third principle, absence of formalities, assures that formalities are not required to receive Berne Convention protection. The only formalities an author must meet are those required for protection in his own country.<sup>145</sup>

As to the Berne Convention impact on national laws, the Union requires that members offer at least minimum copyright protection, although members are free to apply higher protection levels than the Convention mandated minimum.<sup>146</sup> Article 19 does not say whether member states can give protection where the Convention explicitly prohibits it,<sup>147</sup> but debate through the years seems to indicate that granting such protection would be against the Convention.<sup>148</sup> The minimum protection requirement reflects the pragmatic approach to international copyright and is one reason for the steady increase in Berne Union membership.

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141. 3 NIMMER, *supra* note 3, § 17.01[B]; S. RICKETSON, *supra* note 4, at 91, 195-204.

142. Item H-1 Paris Act 1971, *supra* note 51, art. 5.

143. 3 NIMMER, *supra* note 3, § 17.01[B][1]; S. RICKETSON, *supra* note 4, at 206.

144. Item H-1 Paris Act 1971, *supra* note 51, art. 5(2). Before the Convention, an author could lose protection by failing to meet a minor formality in the country of origin. S. RICKETSON, *supra* note 4, at 200-04 (discussing the development of independence of protection).

145. Item H-1 Paris Act 1971, *supra* note 51, arts. 5(2)-5(3).

146. *Id.* art. 19.

147. The Convention explicitly prohibits protection in these instances: (1)"News of the day and miscellaneous facts," in Article 2(8), (2)Quotations from an Article 10(1) public work, 3)Reproduction of musical recordings without permission for two years after a country adheres to the Convention, in Article 13(2). Item H-1 Paris Act 1971, *supra* note 51, at 2, 5-6.

148. S. RICKETSON, *supra* note 4, at 680-82.

## V. THE UNITED STATES REFUSAL TO JOIN THE BERNE CONVENTION

Although the Berne Union grew in membership and prestige during its first one hundred years, the United States did not join the Union until 1988. American interest in the Berne Convention dated back to 1885,<sup>149</sup> but a number of reasons precluded adherence until recently.

A. *United States Code*

The principal reason for the delay involved the need to change United States copyright law in order to allow the United States to join the Union.<sup>150</sup> The United States Copyright Code reflected a fundamental policy difference between the Berne Union, which emphasized exclusive authors' rights,<sup>151</sup> and the United States Constitution,<sup>152</sup> whose purpose was to see that works would be available to the public.<sup>153</sup> Adherence to the Berne Convention required legislation which would change the bias in favor of authors' rights and demolish the formalities system as a condition of copyright.<sup>154</sup>

Conflicts between the Berne Convention and United States copyright codes included registration, notice (formalities), moral rights, and architecture. Formalities presented the most formidable area of conflict because adherence to the Convention threatened a long established formalities system.<sup>155</sup> The Berne Convention explicitly prohibited any formality requirement for works published in countries other than the country of origin, and in the country of origin domestic law governed.<sup>156</sup> The United States Code, on the other hand, required a copyright notice on published works plus registration of a copyright claim with the United States Copyright Office before an author could sue.<sup>157</sup> Furthermore, authors lost certain remedies if registration did not occur within three months of publication.<sup>158</sup> Opposition to changing the

149. R. BOWKER, *supra* note 8, at 324-25.

150. 3 NIMMER, *supra* note 3, § 17.01[B][1]. See also Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 476 (1987) (discussing obstacles to and implications of United States' adherence to the Berne Convention).

151. Item H-1 Paris Act 1971, *supra* note 51, art. 1.

152. U.S. CONST. art. I, § 8, cl. 8.

153. 2 NIMMER, *supra* note 3, § 7.02[A]; Note, *supra* note 150, at 477.

154. 3 NIMMER, *supra* note 3, § 17.01[C][2].

155. *Id.* §§ 7.01, 17.01[C][2].

156. Item H-1 Paris Act 1971, *supra* note 51, art. 5(2).

157. 17 U.S.C. §§ 401-411 (1982).

158. *Id.* § 411.

law came from the Copyright Office which wanted to preserve the status quo.<sup>159</sup> Also, two centuries of copyright formalities built into domestic law were difficult to discard.<sup>160</sup>

The most hotly debated issue at the Congressional hearings<sup>161</sup> involved an author's moral rights versus his economic rights. Article 6bis of the Berne Convention separated the two rights and allowed an author to retain his moral right to preserve his work's integrity, even after his economic right had ceased.<sup>162</sup> The United States Code was based on a system of incentives granted to authors that created limited economic monopolies, and the term "exclusive right" had been interpreted to mean economic right.<sup>163</sup> The transfer of economic rights to a work usually meant the transfer of all rights, including the right to object to changes.<sup>164</sup> United States copyright law had never included a moral rights provision, and objections to adding such a provision ranged from it being "philosophically untenable" to it resulting in "mountains of litigation."<sup>165</sup>

Another troublesome area was the protection that the Berne Convention gave to architects. Convention coverage included architectural structures,<sup>166</sup> but the United States Code did not explicitly mention architecture and common law only protected architectural drawings.<sup>167</sup>

### B. Alternate routes

Besides the reluctance to change domestic copyright laws, two alternate avenues to international copyright protection further mitigated the need to join the Berne Union. The first became known as the "back door" to Berne. United States' authors could receive international copyright protection without American participation in the Berne Union.

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159. Brown, *Adherence to the Berne Copyright Convention: The Moral Rights Issue*, 35 J. COPYRIGHT SOC'Y U.S.A. 196, 199 (1988). The Copyright Office wished to keep some incentive for registration because there is utility in an official registration and registration encourages the deposit of copies in the Library of Congress. *Id.*

160. 3 NIMMER, *supra* note 3, § 17.01[B][1].

161. See SENATE JUDICIARY COMM. ON THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, S. REP. NO. 352, 100th Cong., 2d Sess. 9-11 (1988) [hereinafter S. REP. 352], and HOUSE JUDICIARY COMM. ON THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H. R. REP. NO. 609, 100th Cong., 2d Sess. 32-40 (1988) [hereinafter H. REP. 609] (reports of the hearings).

162. Item H-1 Paris Act 1971, *supra* note 51.

163. Note, *supra* note 150, at 484.

164. Roberts, *supra* note 140, at 1, col. 6.

165. *Id.* at 20, col. 1.

166. Item H-1 Paris Act 1971, *supra* note 51, art. 2(1).

167. 1 NIMMER, *supra* note 3, § 2.08[D][2][a].

However, under this route, the reality that any Berne nation could shut the back door at any time presented a constant danger.<sup>168</sup>

The other avenue to international copyright protection opened when the United States joined the Universal Copyright Convention (UCC).<sup>169</sup> The principal aim of the UCC was to increase the number of states involved in international copyright protection. The United States could join the UCC because it accepted the formalities requirements by those nations whose domestic laws required them as a condition of copyright. Moreover, the UCC did not address moral rights, and it accommodated the protection length provided by United States law.<sup>170</sup> Through the UCC, the United States received international copyright protection which it deemed adequate until recently.

## VI. REASONS FOR UNITED STATES ADHERENCE TO BERNE

Despite the availability of international copyright protection for American authors, and the reluctance to change domestic copyright laws, a number of factors produced a growing demand for membership in the Berne Union. First, the United States found the UCC protection inadequate. The United States did not have copyright relations with twenty-four Berne Union countries who had not ratified the UCC. Furthermore, the UCC required only national treatment of foreign authors without the Berne minimum protection guarantee.<sup>171</sup>

Secondly, the increased piracy of American works, resulting in the loss of billions of dollars to U.S. companies, provided motivation to join.<sup>172</sup> Piracy of U.S. intellectual property, including copyrights, was so widespread that the monetary losses to property owners increased the trade deficit at a time when the deficit was already increasing.<sup>173</sup>

168. Item D-1 Berne Additional Protocol 1914, *supra* note 52, ¶ 1; S. REP. 352, *supra* note 161, at 3-4.

169. Universal Copyright Convention and Appendix Declaration, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3224 [hereinafter UCC].

170. *Id.* arts. III, IV (2). See also 3 NIMMER, *supra* note 3, § 17.01[B][2]; S. RICKETSON, *supra* note 4, at 836, 850-53.

171. S. REP. 352, *supra* note 161, at 2-4. The Senate Report stated that Berne protection was superior because it required that members guarantee well-specified minimum rights to foreign authors, while the UCC only required protection from national laws that were often inadequate. The Report also noted that bilateral agreements, which the United States had with non-UCC members, lacked certainty, had varying standards, and were more likely to be dishonored. *Id.*

172. *Id.* at 2. In 1987 the United States exported over \$1.5 billion in books, sound recordings, motion pictures, and computer software. *Id.*

173. *Id.* The United States Trade Commission estimated that United States companies lost between \$43 billion and \$61 billion during 1986 because of inadequate legal protection for intellectual property. New technologies were especially susceptible to cross-border exploitation, and, as the world's largest exporter of copyright, the United States was suffering in an area that

Third, Berne Union membership would provide a voice in the establishment and management of international copyright standards. In 1984, the United States withdrew from UNESCO, the UCC administrative body, and thereby lost an effective voice in international copyright policy-making. With a major stake in international copyright and intellectual property, the United States needed a way to express American attitudes and protect American interests.<sup>174</sup>

Fourth, Berne membership would lend credibility to American efforts to get the General Agreement of Tariffs and Trade (GATT) to adopt a standard of conduct for protecting intellectual property.<sup>175</sup> United States refusal to join the Berne Union generated criticism that the country was not fully committed to international copyright protection and this criticism complicated GATT talks.<sup>176</sup>

Finally, adherence to the Berne Union eliminated the need for United States' authors to use Berne's back door. This procedure could be expensive, uncertain, and difficult.<sup>177</sup> Furthermore, the Convention's retaliation provision was a constant threat.

These factors finally led the United States to join the Berne Union 102 years after its creation. To meet the Convention requirements, the United States had to substantially change certain parts of its copyright code because Congress concluded that the Berne treaty was not self-executing.<sup>178</sup> The United States could fulfill its obligations under the Convention "only pursuant to appropriate domestic law"<sup>179</sup> and that

routinely generated a trade surplus. *Id.*

174. *Id.* at 4. The Senate Report stated that effective United States participation in formulating international copyright policy was essential. *Id.*

175. 134 CONG. REC. S16939 (daily ed. Oct. 28, 1988) (statement of Senator Pell). Senator Pell argued that the GATT standard could be the minimum economic rights of the Berne Convention. If the United States joined the Berne Union, its trade negotiators could insist that Berne standards suffice for GATT protection requirements. *See also* H. REP. 609, *supra* note 161, at 19-20 (discussing how United States membership in the Berne Union would help GATT negotiations).

176. S. REP. 352, *supra* note 161, at 5. The United States wanted a GATT Code based on Berne-level copyright standards and feared that calling for such a policy from outside the Berne Union would weaken the United States position. *Id.*

177. *Id.* at 3. Simultaneous publication is expensive because Article 3(3) of the Berne Convention defines publication as making a sufficient number of copies available to the public in countries where the work is published. Item H-1 Paris Act 1971, *supra* note 51, at 2. Generally, only large publishers can afford the expense. Also, the 1948 Brussels Convention defines "simultaneous" as publication in two or more countries within 30 days. Item F-1 Brussels Convention, *supra* note 49, art. 4(3). Some countries do not adhere to this text and require publication within a shorter time, which can be difficult to accomplish. *Id.*

178. BCIA 1988, *supra* note 2, § 2(1). A self-executing treaty requires no implementing legislation. *Id.*

179. *Id.* § 2(2).

law had to be amended to meet Berne Convention requirements. When it revised the U.S. Copyright Code through the 1988 Berne Convention Implementation Act (BCIA), Congress made the Berne Convention ineffective under U.S. law.<sup>180</sup>

## VII. IMPLICATION OF UNITED STATES ADHERENCE

### A. *United States Code Changes*

The principal changes in United States copyright code involve formalities: notice, deposit, registration, and recordation.<sup>181</sup> Although copyright notice is no longer mandatory, to encourage voluntary use of copyright notice, the BCIA states that notice absolutely defeats an attempt to mitigate damages by claiming innocent infringement.<sup>182</sup> Congress did retain the deposit requirements, but they now apply to all works, with or without copyright notice.<sup>183</sup> Registration is no longer a prerequisite to a copyright infringement action for published works originating in Berne Union countries, but it is necessary for works originating in the United States.<sup>184</sup> As incentive to register, the Act doubles the statutory damage amounts available to both foreign and American authors who register their works.<sup>185</sup> Doubling statutory damages also increases the value of United States copyright. In addition, recordation of copyright transfers is no longer a condition for bringing suit.<sup>186</sup>

The other major change to United States copyright law is the expansion of protected works to include Berne Convention works.<sup>187</sup> The BCIA explicitly adds protection for architectural blueprints, but it does not protect the shape of the structure itself.<sup>188</sup> Whether the BCIA

180. *Id.* § 2(3).

181. See generally Baumgarten & Meyer, *Effects of U.S. Adherence to the Berne Convention*, 37 BNA'S PAT., TRADEMARK, & COPYRIGHT J. 463-468 (1989) (discussing the effects of the BCIA on United States copyright law); Henn, *Summary of the Berne Implementation Act of 1988*, COPYRIGHT LAW: A PRACTITIONERS GUIDE 26 (Supp. 1989) (an article by article summary of changes to the United States Copyright Code).

182. BCIA 1988, *supra* note 2, §§ 7(a)(2), 7(a)(4); 17 U.S.C. § 401 (1988).

183. BCIA 1988, *supra* note 2, § 8; 17 U.S.C. § 407(a) (1988).

184. BCIA 1988, *supra* note 2, § 9(b)(1)(B); 17 U.S.C. § 411 (1988). The two tier system is a compromise to meet Berne Convention requirements while retaining the benefits of registration — namely a publicly available record of copyright claims. Goldberg & Bernstein, *Berne, Baby, Bernel*, N.Y.L.J., Nov. 18, 1988, at 3, col. 2 (commenting on three requirements of United States copyright law that were subject to the Berne Convention ban on formalities).

185. BCIA 1988, *supra* note 2, § 10(b), at 2860; 17 U.S.C. § 504(c) (1988). Cf. 17 U.S.C. § 504(c) (1976).

186. BCIA 1988, *supra* note 2, § 5; 17 U.S.C. § 205 (1988).

187. BCIA 1988, *supra* note 2, § 4(a)(1); 17 U.S.C. §§ 101, 104(b) (1988)

188. BCIA 1988, *supra* note 2, § 4(a)(1)(A); 17 U.S.C. § 101 (1988). Only elements that can

complies with the Berne expectation of protection for three-dimensional buildings is questionable,<sup>189</sup> and the Copyright Office is currently studying the question.<sup>190</sup> The expansion of protected works does not include works already in the public domain.<sup>191</sup> For example, an author cannot resurrect lost copyright protection through the new law.

The moral rights issue, a long standing barrier to Berne adherence, brought no change in the United States copyright law. Section 3, which provides that the new Act does not expand or reduce authors' rights as to paternity (right to claim authorship) or integrity (right to object to changes in their works), fails to add moral rights to United States copyright law.<sup>192</sup> Instead, Congress has determined that United States statutes and common law are in full compliance with Berne Convention requirements.<sup>193</sup> In failing to legislate authors' moral rights in their works, many commentators believe that Congress opted to leave the moral rights issue for future Congresses to consider.<sup>194</sup>

### B. Effect on the Berne Union

Although the effect of United States' membership in the Berne Union is unknown, the Union will undoubtedly feel the American presence, which has both positive and negative aspects depending on one's viewpoint. First, the Union should be more effective in its international copyright protection efforts. The United States is a major exporter

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be separately identified from the structure's shape, such as gargoyles on a building, can be copyrighted. 1 NIMMER, *supra* note 3, § 2.08[D][2][b]. See also Leich, *Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L L. 63, 64-68 (1989) (explaining that the standard of separability derives from the standard courts apply to pictorial, graphic, or sculptural works)

189. 1 NIMMER, *supra* note 3, § 2.08[D][2][b] (questioning compliance with the Berne Convention's architecture requirement).

190. Baumgarten & Meyer, *supra* note 181, at 464.

191. BCIA 1988, *supra* note 2, § 12.

192. BCIA 1988, *supra* note 2, § 3(b). See Brown, *supra* note 159, at 200-09 (arguing for protection of moral rights).

193. S. REP. 352, *supra* note 161, at 10; H. REP. 609, *supra* note 161, at 37-38.

194. Declaring that the Berne Convention was not self-executing and not providing for moral rights protection in the BCIA essentially leaves moral rights without effect. See Koeberle, *Play It Again Samantha? Another Argument for U.S. Adherence to Article 6bis of The Berne Convention*, 27 DUQ. L. REV. 609, 622-24 (1989) (arguing that Congress bowed to special interest pressures, closed the door to moral rights, and ignored article 6bis of the Berne Convention); Strauss, *Don't Be Burned by Berne: A Guide to the Changes in the Copyright Law as a Result of the Berne Convention Implementation Act of 1988*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 374, 383-84 (1989) (stating the debate was double talk reflecting no strong Congressional need to resolve the issue). Cf. Guinn, *Berne Implementation Act Confronts Some Key Issues*, N.Y.L.J., Dec. 2, 1988, at 5, col. 6 (arguing that the Congressional finding of compliance with Berne on the moral rights issues may itself create moral rights protection).

of copyright and intellectual property and deals with most nations. By requiring higher protection levels from these nations, the United States enhances the development of a worldwide intellectual property code based on Berne standards. This may be particularly true as the United States urges adoption of Berne standards under GATT.<sup>195</sup>

Similarly, United States' membership may provide an incentive for others to join the Union. Pressure from the United States to comply with Berne requirements can "encourage" those nations trading with the United States to become members.<sup>196</sup> As more nations join the Berne Union, the world moves closer toward a universal copyright code.

United States presence may further internationalize the Union and move it away from its "European roots."<sup>197</sup> Moreover, the United States brings a different set of attitudes and traditions, which may alter the nature of certain concepts. For example, the Berne Convention limits protection to a person whose works are literary or artistic and intellectual.<sup>198</sup> The United States and other common law countries, however, are more willing to consider users' rights and will give protection, under national copyright laws, to matters that are only marginally artistic or literary or intellectual.<sup>199</sup> In short, common law countries will stretch traditional copyright concepts to cover any intellectual creation, to include any creator of such a work, and to consider users' rights on par with authors' rights.

The issue most likely to bring the two differing philosophies into open conflict is inclusion of newer forms of intellectual property within the Berne Convention, primarily computer software.<sup>200</sup> Opponents worry that stretching copyright to include all intellectual creations will violate the original Convention purpose. Proponents argue that protecting newer forms of intellectual property modernizes the application of the Convention, and that restricting the Convention to traditional copyright works

195. S. RICKETSON, *supra* note 4, at 926.

196. *Id.* at 926-27. These tactics may be particularly effective in Asia and the Pacific where America can pressure industrializing nations, who want the benefits of United States trade, to offer Berne level protection to copyrighted works. *Id.*

197. *Id.* at 926. Although the Berne Convention is open to anyone, it has traditionally been a European Convention which member nations have applied to their colonies. *Id.*

198. *Id.* at 893-95. The Convention recognizes technological developments in modes of expression, such as audio and video cassettes, but it does not protect new subject matters that lack literary or artistic elements, such as works with mechanical or industrial natures. *Id.*

199. *Id.* at 900-01. These countries will protect such marginal works as timetables, directories, and numerical sequences in newspaper bingo games. The result has often been the protection of time, labor, and money rather than creativity. *Id.*

200. See *supra* note 116. The case of computer software represents the dilemma the Berne Union faces with a number of new technological forms. *Id.*

may limit the Union's influence and prestige in a world where new forms of intellectual property are pervasive. Until the United States joined the Berne Union, common law attitudes had little influence on the Convention. However, United States adherence could change this pattern and present a challenge to the basic tenets of international copyright established by the Berne Convention.<sup>201</sup>

Another concern United States' adherence raises is the implementation of Convention obligations. The Convention simply provides that members shall adopt measures necessary to ensure conformity with Berne Convention requirements. It does not provide a procedure for ensuring proper implementation or for reviewing a country's instrument of accession.<sup>202</sup> The result is that prospective members determine if their laws are compatible with the Convention.<sup>203</sup> United States' compliance with the Convention has been questioned as to architectural protection and moral rights,<sup>204</sup> but Congress concluded that the United States complied with the Berne Convention requirements.<sup>205</sup> If other nations perceive that the United States has not made its laws compatible with the Convention and that Union members will accept Convention breaches, the Convention will arguably be less effective. Under these circumstances, the Union will find it difficult to insist on strict compliance.

#### VIII. CONCLUSIONS

After one hundred years the Berne Convention has emerged as the premier international copyright convention adhered to by most major powers adhere, with the notable exception of Russia and the Peoples Republic of China.<sup>206</sup> The United States recognized Berne's superior protective powers and changed parts of its two hundred year old copyright law to meet Berne membership requirements. The Convention has continually adapted to changing world conditions and has moved from a Utopian attempt at universal copyright codification to a guide of what minimum international copyright protection should entail. The Union's

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201. *Id.* at 926.

202. Item H-1 Paris Act 1971, *supra* note 51, art. 32, at 15.

203. S. RICKETSON, *supra* note 4, at 927-28. In the United States the President and Congress, with the advice of the Ad Hoc Working Group on United States Adherence to the Berne Union, determined which United States copyright laws complied with Convention requirements and which ones needed modification. Karp, *United States Adherence to the Berne Convention*, 249 CURRENT DEVELOPMENTS IN COPYRIGHT LAW 299-304 (1988).

204. *See supra* notes 189, 190, 194, and accompanying text.

205. *See supra* note 194 and accompanying text.

206. Berne Convention for the Protection of Literary and Artistic Works, reprinted in Henn, *supra* note 181, at 43-49.

goal of providing uniform protection of authors' rights in their literary and artistic works through national treatment has been the basis of international copyright for a century.

However, a true universal copyright code can only be achieved if most countries of the world adhere to the Berne Union and a number of nations still do not. To achieve this goal the Union has attempted to accommodate new members and has overlooked certain breaches of Convention requirements, especially when the prospective member is one of the world's major powers. Some fear this policy will compromise basic Berne copyright concepts. Others view the changes as a positive accommodation of the twentieth century.

United States membership vividly illustrates the dilemma the Berne Union faces. United States adherence strengthens the Union because it is one of the most influential countries in the world. However, certain American traditions conflict with basic Berne concepts. If these common law attitudes prevail, or at a minimum, force a compromise of traditional Berne standards, the nature of international copyright will change. If the old traditions remain unchanged, Berne risks becoming a narrowly tailored Convention covering only one sector of modern copyright and becoming out of step with the practice of many of its members. Ideally, the Union members will find a compromise that keeps the Convention together, moves closer toward a universal copyright code through membership growth, and protects an author's right to publish and sell the fruits of his creativity in a way which will benefit the public. If the Union can meet these challenges successfully, the Convention's next one hundred years should be as successful as its first century.

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