how to industry often fall through the cracks of the classical bipolar structure enshrined in existing international conventions, including the TRIPS Agreement.\textsuperscript{198} Policymakers charged with the task of restructing the world's intellectual property system have yet to grasp the true nature of the problems that limit the flow of investment to incremental innovation under present-day conditions. As a result, the bases for healthy competition in an integrated world market risk being constantly undermined by a chronic shortage of natural lead time and by a welter of anticompetitive trade restraints that Polemica tinkering with an obsolete historical construct tends to engender. Sooner or later, unless legislators combat these twin evils in the interests of a more rational and constructive approach that seeks to place both innovators and borrowers in a win-win position over time,\textsuperscript{199} an increasingly discredited intellectual property system risks collapsing of its own protectionist weight.

\textsuperscript{198} See supra text accompanying notes 6-10, 18-44.
\textsuperscript{199} See Legal Hybrids, supra note 11, at 2555 ("Default liability rules that improve on existing trade secret laws should . . . promote the interest of the relevant technological community as a whole and the larger public interest with which they must be reconciled . . . Determining the interest of the technical community initially requires a recognition that most of its members do not perceive immutably either the category of innovators or that of borrowers; they shift back and forth between these categories at different phases in the evolution of particular types of innovation").

A FUTURE WITHOUT FORMALITIES*

IRWIN KARP**

I. COPYRIGHT FORMALITIES—PRACTICAL CONSIDERATIONS

In today's global economy, fair and uniform intellectual property protection in all nations is essential to sustain trade growth. A majority of industrialized countries and many developing nations participate in the international protection of copyrightable works through the Berne Convention for the Protection of Literary and Artistic Works ("Berne" or "Berne Convention"), a multilateral treaty for copyright protection that forbids formalities for copyrightable works.\textsuperscript{1} For more than a century, the United States had refused to join the Berne Convention.\textsuperscript{2} Instead, the U.S. chose to maintain copyright laws that, by Berne standards, did not adequately protect works of foreign authors.\textsuperscript{3} As a result, twenty-four of the countries that ratified Berne thus far never had a legal obligation to protect the interests of American copyright holders until the U.S. joined the Berne Convention.\textsuperscript{4}

Formalities such as the notice requirement,\textsuperscript{5} manufacturing clause,\textsuperscript{6} copyright renewal,\textsuperscript{7} and registration requirements—\textsuperscript{8} as a

\textsuperscript{*} This article is adapted from Mr. Karp's speech at Copyright in the Twenty-First Century, a symposium held on April 12, 1994, sponsored by the Cardozo Arts & Entertainment Law Journal. The article was edited from the transcript and its footnotes researched by Laura Eng.

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\textsuperscript{4} See supra note 5, at 21.


condition for suit and for the collection of statutory damages and attorneys fees—distinguished U.S. copyright law from the myriad of copyright laws under which American texts are protected around the world. Recently, however, the U.S. has progressed toward the elimination of copyright protection formalities, such as the requirement of copyright notice to secure and preserve copyright protection in this country, and the renewal requirement. American intellectual property owners who suffered substantial monetary losses abroad from the lack of multinational protection were the primary impetus for U.S. access to the Berne Convention. Adherence to Berne will ensure that U.S. authors receive needed protection in foreign nations. This article will address the issue of copyright formalities in the future.

Formalities make it extremely difficult for authors to preserve their rights. As a result, one of the most significant requirements of the Berne Convention is that no member country may condition enjoyment of copyright protection on formalities. Thus, the U.S.'s admission to Berne required elimination of the formalities present in U.S. copyright law. An additional basis for the U.S.'s gradual progression toward a less stringent copyright environment was that the U.S. was unique in its imposition of formalities and the resulting destruction of domestic copyright protection for thousands of foreign authors.

14 Copyrights, Senate Passes Legislation Passing Way to U.S. Membership in Berne Convention, supra note 2.
15 One example is the requirement that authors place copyright notices on all published copies of a work. 17 U.S.C. § 401(b) (setting forth the requirements of a proper copyright notice). In most cases, publication of a work anywhere in the world without a proper copyright notice results in an automatic forfeiture of U.S. copyright protection. See Reichman & Bresler, supra note 1.
17 Reichman & Bresler, supra note 1; see Wineburg, supra note 16, at 8; Copyrights, Senate Passes Legislation Passing Way to U.S. Membership in Berne Convention, supra note 2.
18 See Reichman & Bresler, supra note 1.

21 425 F.2d 399.
22 Id. at 403.
23 Id. at 403.
24 Id. at 403. Counsel for Goodis argued that copyright divisibility existed in reality and the nonsensical theory of indivisibility of copyright should not deprive Goodis of protection. Also at issue was a dispute between Warner Brothers and Goodis over whether the contract for movie rights to Dark Passage entitled Warner Brothers to have a television series on the novel. The contract between Goodis and Warner Brothers contained additional specially negotiated clauses to cover radio and television broadcast rights. Id. at 399. The Second Circuit panel reversed and remanded, holding that the "contract involves factual determinations which should not have been made on a motion for summary judgment . . . ." Id.
25 The doctrine of indivisibility "resists partial assignments of copyrights and requires a
authors of their copyright interests in circumstances similar to that in *Goodid.*

Another case involved the estate of Bertold Brecht, the famed German playwright. The plaintiff, Stefan Sebastian Brecht, son of Bertold Brecht, sought to enjoin the defendants from fulfilling announced plans to produce and stage the English version of Bertold Brecht’s German play, *Mother Courage.* Bertold Brecht died intestate in the United States. The defendants argued that no one inherited the copyright, since should the “author proprietor [die] during the original term of the copyright the work is in the public domain until the right to renew accrues at the expiration of the original term . . . .” They reasoned that the old copyright law did not mention intestacy, but only permitted the transfer of a copyright by will or contract. The defendants, however, were the first and the last litigants to raise this issue in court, because the judge summarily dismissed the argument with a footnote that essentially said it was silly.

III. THE GOLDEN RULE IN ACTION

It has taken approximately one hundred years to purge the U.S. Copyright Act of the complex provisions that burdened artists. One such formality, the manufacturing clause, provided that foreigners could receive U.S. copyright protection only if they first published their works in the U.S. or Canada. Congress enacted the clause primarily as a tariff measure to protect domestic printers, but it cost thousands of American and foreign authors their copyrights. Finally, the clause was eliminated prospectively in the 1976 Act. Subsequently, however, Congress took backwards steps by responding to the pressure of PAC contributors and arguments from the AFL-CIO and other printing industry representatives. The resulting bill, enacted in 1982, extended the manufacturing clause for four years. Moreover, in 1986, Congress introduced and prepared to pass a bill to reinstate the clause permanently in the U.S. copyright law.

In response, the European Community members complained about the impropriety of the U.S.’s manufacturing clause and promulgated a list of American products that they would boycott and embargo should Congress extend the manufacturing clause. Potential damage ranged from $500 to $500 million. Under the “golden rule,” the Europeans only threatened to do to the U.S. what the U.S. would have done to all countries by reinstating the manufacturing clause. In response to the threatened embargo, lobbyists for the jeopardized American producers descended upon Congress and successfully fought to defeat the bill that would reinstate the manufacturing clause. The European Community’s form of abiding by the golden rule through reciprocity ultimately improved American copyright law. The manufacturing clause experience illustrates how the golden rule can be used to improve the American copyright structure.

Another formality that should be eliminated is section 412, which limits the circumstances in which authors may collect statutory damages or attorneys fees. If section 412 is not eliminated, the same type of pressure through reciprocity may again be used against us. If the U.S. is not violating the Berne Convention by


Daniel, supra note 35, at 916.


Daniel, supra note 35, at 916.

Id.

The statute provides that no statutory damages or attorneys fees will be awarded for "any infringement of copyright in an unpublished work commenced before the effective date of its registration or for "any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work." 17 U.S.C. § 412 (1988 & Supp. V 1989).

See Karp, *Hearings, supra note 19.*
imposing section 412, then every other country is in a position to enact a reciprocal registration clause providing that a foreign work first published in a country requiring registration as a condition for copyright must have been registered in the host country. Among the hosts of such clauses would be Thailand, Singapore, and other countries that had been pressured by American trade representatives and industry lobbyists to improve their copyright laws. American authors then will be forced to comply with the very laws the U.S. imposed on those beyond its borders. Undoubtedly, section 412 would disappear quickly as domestic copyright holders, who seek protection in foreign countries, lobby Congress to eliminate the law that caused the reciprocal copyright barriers abroad.

IV. IMPACT OF COPYRIGHT FORMALITIES

America’s formalities not only have enraged foreign copyright owners, they frequently have failed to serve the public interest. Often they are used to deceive rather than to inform. For example, a member of the Author’s Guild received a letter from the Copyright Office informing her that she could not renew her copyright in a successful children’s book because it was a work made for hire. The Copyright Office sent her a copy of the certificate of registration filed by the publisher, Western Publishing Company (“Western”), which classified the book as a work for hire. Unfortunately for Western, the author preserved her correspondence file, which included: (1) a letter she sent with the completed story to Western proposing that they publish it, (2) their letter rejecting the proposal, and (3) a letter from Western two years later offering to purchase the rights. Obviously, this was not a work made for hire. The author, who originally had sold her rights for $300, eventually obtained a copyright certificate, sued Western, and settled the case for several thousand dollars.

This is not an isolated case. There are countless registrations in the Copyright Office for literary works in which publishers incorrectly characterize them as works made for hire. A further example of the registration system’s ineffectiveness is that people who had no interest in a motion picture often were able to obtain registrations of a claim to its renewal copyright. Indeed, such movies include some of the most successful pictures currently distributed on video cassette.

V. THE LIFE PLUS FIFTY RULE: A RELIABLE ALTERNATIVE

Some individuals question the effectiveness of the “life plus fifty” rule. The rule, which states that copyrights expire fifty years after an author’s death, inevitably raises issues of accurate and efficient determination of the date of death. A simple solution, however, is to contact a public library reference service that records such information. When necessary, the reference service may use an author’s date of disappearance as the date of death if the actual date of death is unknown. Individuals may question the use of such data, especially when anthologies and directories may list the author’s birth date and date of disappearance with a question mark. Nonetheless, people usually do know when authors of individually created works die. Additionally, so long as a reputable standard directory indicates that an author disappeared on a certain date, litigants easily can convince courts that the copyright term is measured from that date. Thus, the “life and fifty” rule is a sensible alternative to stringent copyright formalities that deprive authors of copyright protection.

VI. CONCLUSION

Copyright law is characterized by a very flexible and adaptable

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49 Section 412 probably violates Berne, in that several years ago the Copyright Office in a pamphlet told foreign publishers and authors all over the world that if they did not register in the U.S. prior to an infringement, they would be denied what are often the only effective remedies—statutory damages and attorneys fees—to protect their right. RALPH OMAN, U.S. COPYRIGHT OFFICE, THE BENEFITS OF COPYRIGHT REGISTRATION IN THE UNITED STATES: WHY FOREIGN AUTHORS SHOULD REGISTER THEIR WORKS WITH THE U.S. COPYRIGHT OFFICE (1992).


51 17 U.S.C. § 502(a) (1988) (stating that copyrights are protected for the life of the author plus fifty years). See Scorsia, supra note 44, at 905 n.6; A. Samuel Oddi, A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit, Beyond Obfuscation: Invention Protection in the Twenty-First Century, 58 ARIZ. L. REV. 1007, 1118 (1989); Lech, supra note 11, at 65. One example is the late Mr. Herbert Tenser, who served on the copyright subcommittee of the House of Representatives at the beginning of the copyright revision process. Mr. Tenser expressed doubts about the effectiveness of the “life and fifty” rule, since difficulties might arise when discerning the date of death.

45 For example, when Mr. Tenser called a library reference service to request information about author Ambrose Bierce’s death, the service claimed that his death occurred in 1914. In reality, Bierce was last seen alive in 1914. This date was a reasonable approximation of the date of his death, however, as a logical inference given his advanced age at the time that he disappeared.
set of rules. Over the years, advances in telecommunications and newer forms of transmission and distribution have challenged the copyright law.\textsuperscript{47} Certainly, copyright law cannot accommodate all forms of transmission in the same way or by the same procedures. Nonetheless, with respect to some of the greatest innovations of all time—the printing press, motion pictures, radio, and television—copyright, both in the U.S. and abroad, has adapted itself sufficiently well without the formalities to make it the best alternative as an incentive for creation by independent authors.

\textsuperscript{47} Television and cable were among the earlier technologies that copyright law accommodated.