OUT OF UNESCO AND INTO BERNE: HAS UNITED STATES PARTICIPATION IN THE BERNE CONVENTION FOR INTERNATIONAL COPYRIGHT PROTECTION BECOME ESSENTIAL?*

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I. INTRODUCTION

The United States is currently a party to the Universal Copyright Convention (Universal Convention)[1] and relies on this treaty for much of its international copyright protection.[2] This Convention is administered through the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[3] Since

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[1] Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, T.I.A.S. No. 3324, 753 U.N.T.S. 368, *reprinted in* M. NIMMER, 4 NIMMER ON COPYRIGHT app. 24 (1985), *amended by* Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, *reprinted in* 4 M. NIMMER app. 25 (1985). The Universal Copyright Convention, commonly referred to as the "UCC," will be cited as the "Universal Convention" throughout this Symposium.

[2] While the Universal Convention provides for a broad basis of the United States' international copyright protection, the United States is also a party to two other multilateral copyright conventions. Pan American Copyright Convention (Buenos Aires), Aug. 11, 1910, 38 Stat. 1785, T.S. No. 593, 155 L.N.T.S. 179, *reprinted in* 4 M. NIMMER, *supra* note 1, at app. 28; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, *opened for signature* Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. No. 7808, 866 U.N.T.S. 67, *reprinted in* 4 M. NIMMER, *supra* note 1, at app. 29. The United States also has bilateral and trilateral treaties with countries not parties to these conventions. *See, e.g.*, Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540; Industrial Property in Korea, May 19, 1908, United States-Japan, 35 Stat. 2041.

[3] M. BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS 58 (1979); *see also* E.

the United States has recently withdrawn from participation in UNESCO,[4] the extent of copyright protection offered American copyright proprietors may be in jeopardy, even though the United States has made it clear that it will fulfill all of its existing treaty obligations.[5] This unstable situation comes at a time when the need for international copyright protection for American art, literature, and high technology[6] has dramatically increased.

Participation in the Berne Convention may afford American copyright proprietors the protection they require. The speakers, whose annotated presentations appear below, are professionals who have researched this question and have provided the reader with their valuable insights on this issue.

A. *The Berne Convention*

In 1886, ten European nations signed the first multilateral copyright treaty in Berne, Switzerland.[7] This treaty is commonly known as the Berne Convention, and since its inception, has had two additions and five revisions. The latest revision was made in Paris in 1971.[8] The Berne Convention has thus far been ratified by seventy-six countries,[9] each of which adheres to the Conven-

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PLOMAN & L. HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 86 (1980).

[4] *U.S. Notifies UNESCO of Intent to Withdraw*, 84 U.S. Dept. of State Bull. No. 2083, 41 (1984); *see also* Gwertzman, *U.S., In Quitting UNESCO, Affirms Backing for U.N.*, N.Y. Times, Dec. 30, 1983, at A1, col. 3.

[5] *See generally infra* text accompanying notes 41-77 (remarks of Harvey Winter).

[6] *See generally* Mellema, *Copyright Protection for Computer Software: An International View*, 11 SYRACUSE J. INT'L L. COM. 87 (1984). The 1976 Copyright Revision Act, as amended, provides copyright protection for computer software. 17 U.S.C. § 117 (1982).

"An operational program stored on magnetic tape or disk, on a diskette, or machine internally, can be copied easily and quickly and without cost, and can then be utilized to the detriment of its author, directly and without particular adaptation." Ulmer & Kille, *Copyright Protection of Computer Programs*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 160 (1983), *quoted in* Mellema, *supra* note 6, at 89 n.11; *see also* Karjala, *Lessons From the Computer Software Protection Debate in Japan*, 1984 ARIZ. ST. L.J. 53.

[7] *See* M. BOGUSLAVSKY, *supra* note 3, at 55.

[8] *Convention Concerning the Creation of an International Union for the Protection* of Literary and Artistic Works, (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971) [hereinafter cited as Berne Convention], *reprinted in* 4 M. NIMMER, *supra* note 1, at app. 27.

[9] Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burkina Faso [formerly Upper Volta], Cameroon, Canada, Central African Republic, Chad, Chile, Congo, Costa Rica, Cyprus, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Greece, Guinea, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Ivory Coast, Japan, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mexico, Monaco, Morocco, the Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Surinam, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zaire, Zimbabwe. 4 M. NIMMER, *supra* note 1, at app. 22.

tion's precepts[10] and respects the copyright laws of each member nation.[11]

Shortly after the Berne Convention was promulgated, the United States Congress considered becoming a signatory to this treaty,[12] but no action was taken. In 1909, when the United States copyright law was revised,[13] Congress had the opportunity to bring American copyright law in line with the laws of the Berne Convention signatory nations. However, this alignment did not occur.

The United States' interest in becoming a party to the Berne Convention was renewed in the 1920's.[14] This interest waned, however, when the 1928 Rome Revision to the Berne Convention granted a "moral right" to authors.[15] Since the United States recognizes only economic rights,[16] and not moral rights, the 1928 revision made the Berne Convention even less compatible with United States copyright law and policy.

However, American authors who wish to obtain international copyright protection under the Berne Convention may do so by using the so-called "back door to Berne." The Berne Convention recognizes copyrights made in accordance with the laws of a signatory nation or material published in a signatory nation.[17] American authors, by having their work simultaneously[18] published or copyrighted in a nation which is a signatory to the

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[10] *See generally* Berne Convention, *supra* note 8.

[11] *Id.* at art. 5.

[12] *See generally* M. BOGUSLAVSKY, *supra* note 3.

[13] Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101-810 (1982, Supp. I 1983, & Supp. II 1984)).

[14] 2 A. FISHER, MEMORIAL EDITION, STUDIES ON COPYRIGHT 1106 (1963).

[15] The Berne Convention defines moral rights as follows:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed . . . .

Berne Convention, *supra* note 8, at art. 6*bis*.

[16] The United States has traditionally recognized economic rather than moral rights because of the United States Constitution. The Constitution states that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

[17] *See* S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 104 (1983); *see also* 3 M. NIMMER, *supra* note 1, at § 17.04[D] (1985).

[18] "Simultaneously" means within 30 days. S. STEWART, *supra* note 17, at 105.

Berne Convention and in the United States are thus afforded the full protection of the Convention.

When the copyright laws of the United States were again revised in 1976,[19] the Register of Copyrights considered the term of copyright protection to be the "foundation of the entire bill."[20] It was felt that this revision would put United States copyright law in line with the copyright laws of the Berne Convention participants and "[w]ithout this change, the possibility of future adherence to the Berne Copyright Union would evaporate."[21]

B. *The Universal Copyright Convention*

After World War II, the United States Congress recognized the need to have worldwide international copyright protection. Since it was apparent that the Copyright Act of 1909 was inconsistent with the Berne Convention's precepts, Congress spearheaded a drive for another multilateral copyright treaty. This activity culminated in the creation of the Universal Convention in 1952.[22]

The Universal Convention afforded the copyright owner the protection of the country in which the copyright was formally obtained,[23] but did not define that protection.[24] It also required certain formalities.[25] The Berne Convention, on the other hand, had virtually done away with all formalities[26] and had clearly specified the extent of protection provided.[27] Because the Universal Convention allowed participation by countries whose laws afforded weak copyright protection[28] and did not specify the scope of protection it granted,[29] the Universal Convention was considered much weaker than the Berne Convention.[30]

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19 17 U.S.C. §§ 101-810 (1976) (subsequent history omitted).

20 H.R. No. 1476, 94th Cong., 2d Sess. 133 (1976), *reprinted in*, 1976 U.S. CODE CONG. & AD. NEWS 5659, 5749 [hereinafter cited as H.R. Rep. No. 1476].

21 H.R. Rep. No. 1476, *supra* note 20, at 135.

22 Universal Convention, *supra* note 1.

23 *Id.* at art. II.

24 *See generally* Universal Convention, *supra* note 1.

25 The formalities mandated by the Universal Convention include: notice of claim of copyright, the symbol "©", name of the copyright proprietor, and the year of first publication. *See* E. PLOMAN & L. HAMILTON, *supra* note 3, at 59.

26 *See* Berne Convention, *supra* note 8, at art. 5(2).

27 *Id.* at arts. 1-20.

28 S. STEWART, *supra* note 17, at 137.

29 *See* Universal Convention, *supra* note 1, at art. X.

30 *See* S. STEWART, *supra* note 17, at 137-38; *see also* M. BOGUSLAVSKY, *supra* note 3, at 26.

C. *United States Participation in the Berne Convention?*

UNESCO provides the Secretariat of the Intergovernmental Copyright Committee (ICC)[31] which is the governing body of the Universal Convention. This means that UNESCO is essentially responsible for administering the treaty.

On December 29, 1983, the United States announced that it was giving the required one-year notice of its intent to withdraw from UNESCO.[32] According to a State Department spokesman, the decision to withdraw was made because "UNESCO has extraneously politicized virtually every subject it deals with, has exhibited hostility toward the basic institutions of a free society, especially a free market and a free press, and has demonstrated unrestrained budgetary expansion."[33] Representatives of the United States Department of State have announced that the United States will continue to honor its UNESCO treaty obligations;[34] however, as a result of the United States' withdrawal,[35] it no longer participates in the organization which administers the Universal Convention from which Americans derive most of their international copyright protection.

Americans' need for international copyright protection has reached a zenith. In addition to traditional copyrightable material, such as books and art, which have been exported by Americans, protection extends to computer software and the myriad audiovisual works which are beamed around the world by satellite.[36] The negative economic impact which could result from Americans losing control of their exported intellectual property could be devastating. The economic damage, which could affect the entire American economy, should be the focus of the United States Congress when it addresses the current state of international copyright protection.

The high technology industries are currently experiencing a decline in product demand. The Darwinian process of the survival of the fittest is presently culling the weaker businesses. If

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[31] Universal Convention, *supra* note 1, at art. XI.

[32] Gwertzman, *supra* note 4, at A1, col. 3. The United States made it clear, however, that the withdrawal would be limited to UNESCO and would not extend to the United Nations or other United Nations organizations. *Id.*

[33] *Id.* at A4, col. 5; *see also* Lewis, *Since '45, UNESCO Has Been A Political Battlefield*, N.Y. Times, Dec. 30, 1983, at A4, col.1.

[34] *See generally infra* text accompanying notes 41-77 (remarks of Harvey Winter).

[35] *U.S. Confirms Withdrawal from UNESCO*, 85 U.S. Dept. of State Bull. No. 2095, 36 (1985) (text of Secretary Schultz's letter to Amatou-Mahtar M'Bow, Director General, UNESCO); *see also* Ayres, *U.S. Affirms Plan to Leave UNESCO at End of Month*, N.Y. Times, Dec. 20, 1984 at A1, col. 6.

[36] *See generally* Mellema, *supra* note 6.

America is to remain technologically competitive, it will be necessary to foster technology-based businesses by affording them sufficient protection to exploit their products. This will of necessity include international copyright protection.

The extent of international copyright protection for American authors has been at issue for years. The United States' withdrawal from UNESCO has occurred at a time when the United States is experiencing a technological explosion. Thus, the issue of United States international copyright protection has reached critical proportions and must be addressed. The Berne Convention may offer American copyright proprietors the foundation of international copyright protection that is essential for global trade in high technology. The speakers at this Symposium will explore the possibility of having the United States become a party to the Berne Convention.

II. THE SYMPOSIUM

Professor DuBoff

It is said that if there are two copyright lawyers in a room, you will usually find at least three opinions. That is customarily the case. However, this appears not to be so in connection with the Berne Convention. This Convention was promulgated almost a century ago.[37] It was considered by two separate requests before Congress in 1935,[38] but was not adopted by the United States.[39] There are many provisions of the Berne Convention

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[37] *See* M. BOGUSLAVSKY, *supra* note 3, at 55; *see also supra* note 7 and accompanying text.

[38] On April 18, 1935, the Senate Committee on Foreign Relations reported favorably on adherence to the Berne Convention. On April 19th, the Senate voted to ratify the Convention but this vote was reconsidered and the Convention was put back on the executive calendar by unanimous consent to await action on a bill introduced by Senator Duffy. A. GOLDMAN, HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954 (1955), *reprinted in* SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, 86th Cong., 1st Sess. 1, 8-9 (Comm. Print 1960), *reprinted in* G. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1 (1976); *see also*, Gabay, *The United States Copyright System and The Berne Convention*, 26 BULL. COPR. SOC'Y U.S.A. 202, 204 (1979) [hereinafter cited as Gabay]. On June 17, 1935, a revised version of an earlier bill was introduced and reported favorably by the Senate Committee on Patents. S. Rep. No. 896, 74th Cong., 1st Sess. (1935); *see also* A. GOLDMAN, HISTORY OF U.S.A. COPYRIGHT LAW REVISION, at 9. During the Senate debate, certain amendments were added to the bill; one restored the requirement of domestic manufacture for foreign works which apparently would have precluded adherence to the Berne Convention. On August 7, 1935, at the end of Congress' first session, the Senate passed the bill with those amendments. A. GOLDMAN, *supra*, at 9.

[39] After the First World War, a growing demand abroad for American works emphasized shortcomings in our international copyright relations. This gave rise to a movement to have the United States adhere to the Berne Convention. However, adherence to the Berne Convention required many fundamental changes in the United States'

that have been extremely influential in affecting the course of United States copyright law. When the Copyright Act of 1976 was being considered, many provisions contained within it were apparently aimed at United States participation in the Berne Convention.[40] Since that time, the United States has not realized that expectation. Harvey J. Winter, Director of the Office of Business Practices of the United States Department of State; Lewis Flacks, Policy Planning Advisor for the Register of Copyrights; and Michael Keplinger of the Office of Legislation and International Affairs for the Patent and Trademark Office, will address the question of United States participation in the Berne Convention.

Mr. Winter

The general subject that we are to address today, as Professor DuBoff has indicated, is the question of United States adherence to the Berne Convention. More than a century ago, in 1883, a conference at Berne, Switzerland began consideration of what ultimately was to become the Berne Convention for the Protection of Literary and Artistic Works.[41] A draft convention, prepared by the International Literary and Artistic Association, was the basis for a discussion at the 1883 conference,[42] and the government of Switzerland agreed to circulate it to the governments of "all civilized countries." Presumably, the United States received a copy, even though at that time we were probably one

copyright law and efforts to revise the law resulted in conflicts between authors and publishers on the one hand, and users of copyrighted material, *e.g.*, broadcasters, movie producers, and record manufactures on the other. *Id.* Major issues on which these two groups differed were revisions considered essential for the United States to adhere to the Berne Convention. *See infra* note 40.

[40] Some of the major changes in the United States Copyright Act, which worked toward resolving areas of conflict with the Berne Convention, included the duration of copyright and changes in copyright formalities such as notice, registration, and manufacturing requirements. For example, before the 1976 revision of the Copyright Act, a book or periodical in the English language was required to be manufactured in the United States in order to receive full copyright protection; failure to comply could have resulted in complete loss of protection. *See infra* note 53. The 1976 Copyright Act, 17 U.S.C. § 601, considerably limited this requirement, thus reducing its impact. *See* Gabay, *supra* note 38, at 207.

[41] *See* M. BOGUSLAVSKY, *supra* note 3.

[42] The International Congress of the International Literary and Artistic Association in Rome in 1882 proposed a resolution for the formation of an international union and the first draft of the Convention was produced. The guiding principle was that "all authors, of whatever nationality, of works published in a contracting state, should be assimilated in the other countries of the Union to the national authors of that country without being subject to any formalities whatsoever." S. STEWART, *supra* note 17, at 88. The program was devised in three "diplomatic conferences" held in Geneva between 1884 and 1886. *Id.*

of the largest pirates of British works in the world.[43]

Preparatory intergovernmental meetings were held in 1884 and 1885 and a diplomatic conference was held on September 9, 1886, at which the Berne Convention was signed as the first multilateral copyright treaty in history. The United States was invited to participate in the Conference, but the Secretary of State declined because the question of international copyright protection, then pending before the Congress, had not advanced far enough to be sure of its enactment.[44] The 1886 text of the Berne Convention consisted of a few important, basic principles, of which the most important was "national treatment."[45]

The history of international copyright during the nineteenth century in the United States is not one of which we can be proud. The first United States copyright law, enacted in 1790,[46] gave copyright protection only for those works of United States citizens and residents which were published in the United States.[47] This situation generally endured for the next century. As a consequence, foreign works, especially those of British origin, were not protected in the United States and, thus, were widely pirated.[48] During the last half of this century, and especially after the Civil War, numerous attempts were made to establish international copyright protection in the United States, but none were successful until the enactment of the Act of March 3, 1891.[49] This Act was revised in 1909,[50] and remained the law of the land until the Copyright Act of 1976.[51] The Copyright Act of 1909

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[43] *English literature, particularly the novel, flourished in the post-revolutionary* period and it is estimated that "almost half of the best sellers in the United States between 1800-1860 were pirated" mainly from English works which were sold at low prices in the United States. *Id.* at 25 (citation omitted).

[44] It was not until 1891 that Congress extended the provisions of United States copyright law to foreign citizens. *See infra* note 49.

[45] The principle of national treatment is currently covered in Article 5(1) of the Berne Convention. It means that authors of Union works, *i.e.*, works protected by the Convention, enjoy in all Union countries, other than the country of origin of the work, the same protection as citizens of that country, as well as the rights specifically granted by the Convention. *See infra* notes 87-91 and accompanying text.

[46] Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790) (subsequent history omitted).

[47] *Id.* at § 1.

[48] *See supra* note 42.

[49] Act of March 3, 1891, ch. 565, § 13, 26 Stat. 825 (1891) (subsequent history omitted). This Act extended the provisions of the copyright laws of the United States to citizens and subjects of a foreign state or nation, so long as that state or nation granted United States citizens the same benefits as it did to its own citizens. Additionally, if that foreign state or nation was a party to an international agreement providing for reciprocity in the granting of copyright, the United States could, at its option, become a party to such an agreement.

[50] Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (1909) (subsequent history omitted).

[51] *Copyright Act*, 17 U.S.C. §§ 101-810 (1976) (*subsequent history omitted*).

retained the rigid notice formalities[52] and the "manufacturing clause"[53] of the 1891 Copyright Act, both of which were major obstacles to United States adherence to the Berne Convention, and in a sense remain so today.

During the 1920's and 1930's there was a strong interest in the private sector for the adherence of the United States to the Berne Convention because of the increasing use of American copyrighted works abroad.[54] There was also a good deal of Congressional interest,[55] but no concrete results. Some of the pressure for United States adherence to the Berne Convention was relieved by the so-called "backdoor approach" whereby a simultaneous publication of a United States copyrighted work in a Berne signatory country, such as Canada, provided protection for that work in all of the member states of the Berne Convention.[56]

The inability of the United States to participate in the worldwide Berne Convention undoubtedly led to the movement in the United States to negotiate the Universal Convention in 1952.[57] The Register of Copyrights at that time and one of the principal architects of the Universal Convention, Arthur Fisher, indicated that he regarded the Universal Convention as a bridge to the Berne Convention.

When the Universal Convention entered into force for the United States in 1955, the bilateralism of our relations from 1891 to 1955 virtually came to an end. Moving ahead to the present

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[52] Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077 (1909) (subsequent history omitted).

Generally, the notice requirement of § 9 consisted of the word "copyright" or a designated abbreviation or variation thereof, *e.g.*, in certain pictoral, graphic, and sculptural works the symbol "©" would suffice. Additionally, the name of the copyright owner was required, and if the work was a printed, literary, musical, or dramatic work, the year in which the copyright was secured by the publication was required. *Id.* at § 18. Furthermore, there were requirements as to the placement of the notice. In the case of a book or other printed publication, the copyright notice had to be placed on the title page, or the page immediately following the title page. In the case of a periodical, the notice had to appear either on the title page, or on the first page of text of each separate number or under the title heading and in a musical work the notice had to appear on the title page or on the first page of music. *Id.* at § 19; *see also* 2 M. NIMMER, *supra* note 1, at §§ 7.07 to .11.

[53] Under the "manufacturing clause" of the 1909 Act, subject to certain exceptions, any printed book or periodical in the English language had to be printed from typeset made in the United States, or by a lithographic or photoengraving process wholly performed in the United States. Additionally, the printing of the text and binding of such books had to be performed within the United States. Copyright Act of 1909, ch. 320, § 15, 35 Stat. 1078-79; *see also* 2 M. NIMMER, *supra* note 1, at § 7.23.

[54] *See supra* note 39.

[55] *See supra* note 38.

[56] *See supra* notes 17-18 and accompanying text.

[57] *See* Universal Convention, *supra* note 1.

time—and skipping such important events as the negotiation of the ill-advised Stockholm Protocol to the Berne Convention at a diplomatic conference in 1967,[58] at which the United States was only an observer[59]—the question of United States adherence to the Berne Convention has been under varying degrees of study and interest, in both government and private sectors. Although it was certainly not an overriding consideration, the United States' intention to withdraw from UNESCO, as announced by Secretary of State George P. Schultz in December 1983,[60] focused attention on our international copyright relations under the Universal Convention. That intention renewed interest in the possibility of United States adherence to the Berne Convention, since UNESCO serves as the Secretariat for the Universal Convention.[61]

With the actual withdrawal of the United States from UNESCO in December 1984,[62] one must question the possible effects of that withdrawal on the international copyright objectives of the United States. Perhaps the most important question concerns the effects of withdrawal on our membership in the Universal Convention. The Department of State's Assistant Legal Advisor for United Nations Affairs concluded that "the rights and obligations of the United States under the UNESCO sponsored conventions to which it is already a party . . . would not be affectd by future withdrawal from the organization."[63]

For the short-term, adverse effects of the withdrawal from UNESCO will probably be minimal. The long-term effect is another question, and it clearly points out the desirability of taking a fresh look at the matter of United States adherence to the other worldwide copyright agreement, the Berne Convention. In the post-war years, the most serious consideration of this matter took place in June 1978, at a meeting of a "Group of Consultants" convened by the World Intellectual Property Organization

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58 The Stockholm Intellectual Property Conference of 1967 was scheduled with the assumption that it would be concerned entirely with the issue of further detailed revisions of the Brussels text of the Berne Convention. Shortly before this Conference began, however, additional subjects were added to the agenda including the controversial Protocol Regarding Developing Countries which became the real issue at Stockholm. *See* Ringer, *The Stockholm Intellectual Property Conference of 1967*, 14 BULL. COPR. SOC'Y U.S.A. 417 (1967). A crucial issue of the Protocol "was the extent to which a developed country would be bound to allow the use of its works in a developing country under the Protocol." *Id.* at 428.

59 *Id.* at 420.

60 *See supra* note 4 and accompanying text.

61 Universal Convention, *supra* note 1, at Resolution Concerning art. XI.

62 *See supra* note 35 and accompanying text.

63 Department of State Memorandum (October 19, 1983) (classified document).

(WIPO).[64] WIPO is a United Nations Specialized Agency and is the Secretariat for the Berne Convention.[65] The emphasis and thrust of this organization is toward intellectual property protection which covers not only copyrights, but also patents and trademarks. The basic purpose of the 1978 meeting of the Group of Consultants was:

> to examine the compatibility of the new Copyright Law of the United States of America . . . with the Stockholm/Paris text of the Berne Convention for the Protection of Literary and Artistic Works . . . in order to develop thoughts for the case [sic] the United States of America would contemplate accession to the Berne Convention.[66]

At the conclusion of the meeting the Group of Consultants said that it was of "the general view . . . that the principal, if not the only, obstacle to the accession of the United States would seem to be certain provisions on formalities contained in the United States' law."[67]

During the post-war years, a basic foreign policy objective of the United States has been to ultimately adhere to the Berne Convention. In this connection, a reference is made to the legislative history of the 1976 Copyright Act, which clearly establishes the fact that one objective of the lengthy and painstaking copyright revision effort was to eliminate major obstacles to United States adherence to the Berne Convention.[68] In this context, the "term of protection" was singled out as the major obstacle.[69] Thus, the Report of the House Judiciary Committee on the new copyright law, stated:

> The need to conform the duration of U. S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community.

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[64] The Group of Consultants was convened by the Director General of WIPO and met from June 5 to 7, 1978 in Geneva. The members of this Group, acting in their personal capacities rather than as representatives of their countries included: Mr. S. Balakrishnan (Madras, India), Professor Antonio Chaves (Sao Paulo, Brazil), Mr. Ivor J.G. Davis (London, United Kingdom), Mr. Valerio de Sanctis (Rome, Italy), Mr. Mihaly Ficsor (Budapest, Hungary), Mr. Andre Kerever (Paris, France), Mr. Andrew A. Keyes (Ottawa, Canada), Mr. N'Dene N'Diaye (Dakar, Senegal), Ms. Barbara Ringer, accompanied by Mr. Jon Baumgarten (both from Washington, D.C., United States), and Professor Eugen Ulmer (Munich, Federal Republic of Germany). WIPO, REPORT OF THE GROUP OF CONSULTANTS (June 14, 1978).

[65] *See infra* text accompanying note 147.

[66] WIPO, REPORT OF THE GROUP OF CONSULTANTS (June 14, 1978).

[67] *Id.*

[68] H.R. REP. No. 1476, *supra* note 20, at 135.

[69] *Id.*

> Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.[70]

We are now at a crossroad of historical significance. Intellectual property experts, such as the late Stephen Ladas, developed a thesis that international copyright apparently was a response to the Industrial Revolution.[71] The expanding technology in communications in that period necessitated reciprocal protection of literary works between countries.[72]

Today, there is another revolution taking place—a technological revolution—involving communications satellites, computers, computer software, semi-conductor chips, and so on. As an example, I refer to the Brussels Satellite Convention.[73] As a footnote to that reference, the United States Senate at its closing session on October 12, 1984, gave advice and consent to ratification of that Convention.[74] Our instrument of ratification[75] was deposited with the United Nations in New York as of December 9, 1984, and the Brussels Satellite Convention took effect for the United States three months later.

The fundamental question that confronts all of us today, creators and users alike, is whether modernized international copyright regimes will be built upon the system of authors rights that have been developed over the past century; or, whether that system will be scrapped as national interests seek to define copyright in this new environment created by the technological revolution. The characteristics of copyright, as we know them today, are of fundamental policy importance to all groups in the United States, including users and consumers, as well as creators and producers. If copyright protection were to erode to the point where there was little or no protection, the creator's stimulus for creativity would wither away.

There is a significant body of opinion today that the modernization of copyright, the decisions taken in the process of development, will be determined more objectively in the WIPO/Berne Conven-

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70 *Id.*

71 S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938).

72 *Id.*

73 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, May 21, 1974, 13 I.L.M. 1447.

74 CONG. REC. 14,583 (daily ed. Oct. 12, 1984).

75 President's Instrument of Ratification of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (October 31, 1984).

tion forum than in that of the UNESCO/Universal Convention.[76] Furthermore, there is a view that the Berne Convention is a more secure and widely accepted basis for a resolution of copyright problems at the national level, because it spells out in more detail the subject matter and nature of protection.

The question of the identification of obstacles to United States adherence to the Berne Convention, arising out of possible inconsistencies between United States copyright law and obligations under the Berne Convention, is a top priority in our government. The question of United States adherence to the Berne Convention in its broadest context is actively being considered by the State Department's International Copyright Panel. Significantly, in a meeting of the Panel on September 12, 1984,[77] virtually all of the private sector groups favored in principle United States membership in the Berne Convention.

In conclusion, I would like to make some personal remarks. As the leading producer in the world of copyrighted works in the form of books, motion pictures, sound recordings, and other types of cultural expression, effective international copyright protection is a matter of paramount importance to the United States. The creation of these works has flourished in a favorable cultural and intellectual climate arising out of sound and balanced copyright laws in this country. If this is so, then it would seem to follow that the United States should become a party to the Berne Convention, the very keystone of the international copyright structure.

Undoubtedly, there will be questions raised about the material benefits derived from United States membership in the Berne Convention. There is one answer that can be given to any skeptic. The United States cannot afford *not* to become a member state of the more carefully structured Berne Convention. It must become an active participant, rather than an observer, in the next revision of that Convention, whether it takes place in 1990 or in the twenty-first century. Failure to do so would be a significant factor in the further deterioration and fragmentation of the international copyright system, which is crucial to the cultural and intellectual climate of our small planet.

I would now like to introduce my fellow bureaucrat in the Copyright Office, Lewis Flacks, Policy Planning Adviser for the Register

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[76] *See generally infra* text accompanying notes 147-65 (remarks of Michael Keplinger).

[77] Department of State, Advisory Committee on International Intellectual Property, Notice of Meeting (September 12, 1984).

of Copyrights, who will address the 1971 Paris text of the Berne Convention.

Mr. Flacks

My contribution to today's discussion on the Berne Convention and United States adherence to it will necessarily be brief; it is impossible to put one hundred years of successive revisions of the Berne Convention and the development of national jurisprudence under it in the eighty or so member states into fifteen minutes.

All I can attempt is to describe the character of the Berne Convention, in particular the 1971 Paris text to which the United States would adhere; and, to indicate the kinds of subjects that the Convention covers. I will try, when discussing the Berne Convention, to provide references to aspects of the more familiar Universal Convention, to which the United States adheres.

In general, multilateral copyright treaties are concerned with three things: first, determining conditions of eligibility for the protection of works among contracting states, so-called "points of attachment" for copyright protection; second, establishing the copyright law applicable to a particular work, that is, under whose law rights, remedies, and limitations are derived as to particular works; and third, establishing minimum norms of protection which all contracting states agree to extend to works protected under the particular treaty.

Both the Berne Convention and the Universal Convention deal with all three subjects. The provisions with respect to eligibility, *i.e.*, the conditions under which works are protected, are similar in both the Berne and the Universal Conventions.[78] These provisions are the familiar criteria of protection based on the nationality of the author or the place of first publication by an author of any nationality in a Convention country.[79]

The Berne and Universal Conventions define "publication" in somewhat different ways. Most importantly, the former[80] does

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[78] Berne Convention, *supra* note 8, at arts. 3(1),(2); Universal Convention, *supra* note 1, at arts. II(1),(2). Until 1967, the Berne Convention provided for eligibility based solely upon the first publication of a work in a Berne signatory. Since the coming into force of the 1971 Paris Act, Berne has had the same dual basis for eligibility as does the Universal Convention—nationality of the author at first publication or place of publication. WIPO, GUIDE TO THE BERNE CONVENTION 26 (1978).

[79] Berne Convention, *supra* note 8, at arts. 3(1),(2); Universal Convention, *supra* note 1, at arts. II(1),(2).

[80] The Berne Convention defines publication as follows:

> The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the cop-

not necessarily incorporate the rule of *White-Smith Music Publishing Co. v. Apollo*,[81] whereas the Universal Convention definition clearly does.[82] From the United States' current point of view, except for a few technical shards left in the 1976 Copyright Act,[83] the only place where the *Apollo* doctrine appears to retain vitality is in Article VI of the Universal Convention. This is an interesting demonstration of the extent to which the Universal Convention was drafted by the United States and for the United States, by states desperately anxious to get the United States into some form of simple, multilateral copyright relations. To achieve this, the Universal Convention was drafted with an eye toward maximum compatibility with *existing* United States copyright law.[84]

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ies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

Berne Convention, *supra* note 8, at art. 3(3).

[81] 209 U.S. 1 (1908). The *Apollo* Court defined a copy or publication as "a written or printed record . . . in intelligible notation." *Id.* at 17.

[82] The Universal Convention defines publication as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." Universal Convention, *supra* note 1, at art. VI.

[83] 17 U.S.C. § 101 (1982). Distinctions exist between "copies" and "phonorecords" in the 1976 Copyright Act, but their significance no longer will lie in questions of acquisition or loss of federal copyright, nor in whether a particular infringing reproduction is technically a "copy." The residual importance of White-Smith v. Apollo, 209 U.S. 1 (1908), under the 1976 Copyright Act is reflected in the different notice requirements applicable to works first published in visually perceptible form as opposed to phonorecords of sound recordings. 17 U.S.C. §§ 401(A), 402(A). As the House Report notes in connection with the notice requirement for published phonorecords of sound recordings, "[s]ince 'phonorecords' are not 'copies' there is no need to place a section 401 notice on 'phonorecords' to protect the literary or musical works embodied in the records." H.R. Rep. 1476, *supra* note 20, at 145.

[84] The United States delegation to the 1952 Intergovernmental Copyright Conference was unusually blunt in this respect: "[w]e are all very anxious, however, . . . that our burden of getting these legislative changes made shall not be so heavy that we fail in our attempt. Therefore, I appeal to you to understand that, when we in the United States delegation feel compelled to follow a cautious rather than an ambitious policy in regard to certain provisions, we are fighting out of a sense of loyalty to this great effort itself . . . ."

UNESCO, RECORDS OF THE INTERGOVERNMENTAL COPYRIGHT CONFERENCE 125 (1955) (hereinafter cited as RECORDS).

The French delegation was, characteristically, even more blunt:

> I am authorized by my government to say that the article concerning ratification of the Convention which we are going to sign will only become effective if the Convention bears the signature of 6 or 12 states, of which at least six are nonsignatories of the Berne Convention. Moreover, the French Government will not ask Parliament to ratify the Convention unless it already bears the valuable signature of the United States of America.

Id. at 127.

Most of these states were members of the Berne Convention who hoped they were building in the Universal Convention a bridge over which the United States would cross to become a member of Berne.

The Berne Convention established a number of special points of attachment to deal with particular circumstances unaddressed in the Universal Convention but of contemporary importance in determining whether a work can be protected under the Berne Convention. Thus, there are special rules defining points of attachment for cinemagraphic[85] and for architectual works.[86] These rules recognize that traditional notions of nationality could not fairly be applied.

Second, what does the Berne Convention say about the law that is applicable with respect to the protectability of the work? The Universal Convention and Berne Convention have the same cornerstone in this respect: national treatment. Neither the Universal *nor the Berne Convention defines "national treatment."* Essentially, it means that a country pledges to treat foreign works the way its law treats national works.[87] "National treatment" refers both to the law applied to one's national nationality and to works first published on the national territory. So, when a country pledges to give national treatment, it will treat United States authors the same way it treats its own authors, and in the same way it treats works first published in its own territory.[88]

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[85] The Berne Convention provides that the Article 3 conditions requiring an author to be either a national of a Berne country, or for his or her work to be first or simultaneously published in a Berne country, shall not apply to "authors of cinemagraphic works the maker of which has his headquarters or habitual residence in one of the countries of the Union." Berne Convention, *supra* note 8, at art. 4(a).

[86] Protection under the Berne Convention applies to "authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union" even if Article 3 conditions are not met. *Id.* at art. 4(b).

[87] Berne Convention, *supra* note 8, at art. 5; Universal Convention, *supra* note 1, at arts. II(1),(2). THE WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS defines "national treatment" as:

> [a] basic principle of most of the international conventions relating to copyright and neighboring rights according to which the owners of such rights shall enjoy, under the relevant convention and within the scope thereof, in Contracting States other than the country of origin, the same rights as are enjoyed by nationals of the country where protection is claimed. National treatment, however, does not exclude enjoyment of and additional *rights granted by the convention itself.*

Id. at 165 [hereinafter cited as WIPO, GLOSSARY OF TERMS].

[88] The equation of nationality of the author with the place of first publication of his or her work as alternative bases for eligibility of a work for protection under a convention is not as odd as it may first seem. Most states, regardless of whether or not they participate in international copyright arrangements, tend to protect all works first published in their national territory without regard to the nationality of the author. Presum-

Both Conventions provide that the copyright law which is applicable to a work is that of the country where protection is sought. The existence of protection in countries of the Berne and Universal Conventions (with some minor exceptions having to do with the calculated term of protection[89]) are absolutely independent from one country to another.[90] This is a corollary of national treatment.

It is therefore quite possible under the Berne and the Universal Conventions for a work to be in the public domain in one country party to the Conventions while under protection in another.[91] And, of course, the rights and remedies which copyright holders may expect to enjoy under the law of their country of origin are largely irrelevant when their works go outside that country.

The third aspect of copyright treaties is the minimum level of protection generally assured among contracting states. It is here that we see the most significant differences between the Berne Convention and the Universal Convention. It is not so much a matter of the Berne Convention being a higher level convention or a more pro-proprietor protectionist convention, but rather a matter of how Berne has elevated the progressive consensus among states of the Union in their local law to international law.[92] The characters of the Berne and the Universal

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ably, this is done because a local publisher may have an economic interest of some significance in such circumstances. United States copyright law is not atypical in this respect. *See* 17 U.S.C. § 104(b)(2) (1982).

[89] Berne Convention, *supra* note 8, at art. 7; Universal Convention, *supra* note 1, at art. IV.

[90] For example, the Berne Convention expressly provides that the enjoyment of rights under Berne is "independent of the existence of protection in the country of origin." Berne Convention, *supra* note 8, at art. 5(2).

[91] Indeed, this may well represent the normal state of affairs, particularly with respect to the protection of American works in countries party to the Berne Convention. Up until 1978, works could fall into the United States' public domain by a variety of eccentric ways, long before the otherwise routine expiration of the maximum statutory terms for protection. Noncompliance with first publication formalities, deposit, or renewal formalities could terminate protection for otherwise protectible works at various points in the potential lifespan of a copyright. Yet, for example, while the first publication of a work in the United States without a copyright notice would throw the work into our public domain immediately, a simultaneous, notice-free publication in a Berne state would effectively secure protection in other countries of the Union. Further, the failure to renew a copyrighted work in the 28th year following its first publication would place a work into our public domain, whereas the same work would probably continue to be protected for the length of time prescribed in the various laws of Berne countries. This extremely favorable, formality-free treatment contrasts sharply with the reciprocity-based comparison of term provisions of the Universal Convention. Universal Convention, *supra* note 1, at art. IV(4).

[92] *See, e.g.*, Berne Convention, *supra* note 8, at art. 6*bis* (protection of the right to claim authorship of a work and object to distribution of the work or other derogatory action in relation to the work, which would be prejudicial to the author's honor). Other

Conventions are in this respect quite different.

The Universal Convention was intended to be an agreement among sovereign states to provide "adequate and effective" copyright protection.[93] The key problems that the Universal Convention deals with are the relief from domestic formalities through a simplified procedure,[94] and the essential rule of national treatment.[95] The basic evil that the Universal Convention tries to minimize is discrimination against foreign authors,[96] a characteristic form of economic mistreatment of authors in all societies. While national treatment is of major importance in the Berne Convention, it is not the goal of that Convention; the goal is the creation of a real, vital, international "Union."[97] Berne adherence evidences a conscious decision by a state to seek harmonization of its national copyright laws with those of other Unionist states.[98] Whenever a consensus exists among the practices of the states party to the Convention, that consensus is raised to the level of international legislation. In many countries their system of constitutional law can make such legislation self-executing.

The Berne Convention contains three different types of regulations: those which obligate states to accept a particular rule; those which set express limitations upon the discretion of Unionist states; and those which expressly leave states completely free to do what they want.[99] The Berne Convention is really quite a substantial treaty as compared to the short and almost "model bilateral" Universal Convention. Because Berne seeks maximum

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minimum laws of protection mandated by the Berne convention include those relating to: (1) translation, *id.* at art. 8; (2) reproduction, *id.* at art. 9; (3) quotations, *id.* at art. 10; (4) public performance, *id.* at art. 11; and (5) adaptations and arrangements, *id.* at art. 12.

93 Universal Convention, *supra* note 1, at art. I: "[e]ach Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors . . . ." The RECORDS OF THE 1952 INTERGOVERNMENTAL COPYRIGHT CONFERENCE note only that "adequate and effective" protection requires recognition of those rights which are "given to authors by civilized societies." REPORT OF THE RAPPORTEUR-GENERAL, *reprinted in* RECORDS, *supra* note 84, at 74. Bogsch notes dryly that this interpretation "seems to be logical though not overly helpful." A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION 5 (3d ed. 1970).

94 Universal Convention, *supra* note 1, at art. III.

95 *Id.*

96 *Id.* at art. II.

97 Berne Convention, *supra* note 8, at art. 1.

98 Thus, while the Preamble of the Universal Convention speaks of the "desire to assure in all countries copyright protection of literary, scientific and artistic works," the Preamble to the Berne Convention emphasizes that "[t]he countries of the Union, being equally animated by the desire to protect, *in as effective and uniform a manner as possible*, the rights of authors in literary and artistic works . . . ." (emphasis added).

99 S. LADAS, *supra* note 71, at 180-81; S. STEWART, *supra* note 17, at 48.

realistic uniformity, it must contain many more detailed regulations that shape copyright laws among members of the Union.[100]

The Universal Convention in contrast, seeks the widest number of adherents, which necessarily implies maximizing the discretion of the participating states. So, the Universal Convention has a certain minimum term protection,[101] as well as a means to simplify satisfaction of local formalities.[102] In the original text of the Universal Convention, the right of translation is the only explicit right mentioned.[103] Frankly, the only reason it was mentioned was so that there would be something for an exception to the exclusive right of translation to hang onto.[104]

In 1971, both Conventions were simultaneously revised[105] to address the needs of developing countries for access to works in education, and similar compulsory licensing provisions were added to both Conventions.[106] In exchange for concessions with respect to the reprinting and translation of protected works under compulsory licensing, several new minimum rights were

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100 For example, Article 9(1) of the Berne Convention provides for the exclusive right to authorize reproduction of Berne protected works. Article 9(2), however, leaves as "a matter for legislation in the countries of the Union" whether to permit exceptions, provided the exceptions do not conflict with the "normal exploitation of the work and [do] not unreasonably prejudice the legitimate interests of the author." Similarly, Article 10*bis*(1), governing reproduction by the press, leaves to each member country to legislatively determine the extent to which to regulate reproduction of written works concerning economic, political, or religious topics, with the exception that credit must always be given to the source. Berne Convention, *supra* note 8.

101 Universal Convention, *supra* note 1, at art. IV.

102 *Id.* at art. III.

103 *Id.* at art. V(1) (Geneva text, 1952).

104 *Id.* at art. V(2).

105 The texts of both Conventions were revised in Paris on July 24, 1971 and entered into force on July 10, 1974. The joint revision of the Berne and Universal Conventions marks a watershed in the development of international copyright law; and in certain respects, a significant exercise of constructive copyright diplomacy by the United States. The revision conference of the Berne Convention held in 1967 at Stockholm produced as an integral part of the substantive revision of the Convention, a Protocol Regarding Developing Countries, the effect of which would have been materially to reduce the levels of protection available to works in many parts of the Third World. The failure of the Stockholm Act to gain acceptance produced a genuine crisis in international copyright law, with developing countries threatening to withdraw from the Berne Convention and to amend the Universal Convention to their liking. With the danger of international copyright treaties becoming completely unraveled, cooler heads prevailed on all sides and, following recommendations adopted in Washington in 1970, a joint Universal Convention-Berne revision conference was held in Paris in 1971. *See* Schrader, *Armageddon in International Copyright: Review of the Berne Convention, the Universal Convention and the Present Crisis in International Copyright*, 2 ADVANCES IN LIBRARIANSHIP 305 (1971); Schrader, *Analysis of the Protocol Regarding Developing Countries*, 17 BULL. COPYR. SOC'Y 160 (Feb., 1970); *see also* Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 J. COPYR. SOC'Y 402 (April, 1982).

106 Universal Convention, *supra* note 1, at arts. V*bis*, V*ter*, V*quarter*; *see also* Berne Convention, *supra* note 8, at app.

added to the Universal Convention.[107] These rights are mentioned, but are not well defined, and do not necessarily relate to a particular jurisprudence or a well established history outside the history which resides within the Berne community. The new rights which are established in the Universal Convention are reproduction, public performance, broadcasting, and of course, translation.[108]

Contrast this general structure with Berne. Oversimplifying somewhat, there is, first, the Berne Convention's longstanding principle of automatic copyright protection.[109] Formalities as conditions for the exercise or enjoyment of copyright are prohibited.[110]

Second, there is a clear statement of the obligation to protect the author's moral rights in addition to well-established economic rights.[111] This derives from the French and German experience that recognition of the moral rights of the author is necessary to protect what is essentially an expression of personality rather than solely a commercial commodity which authors happen to create. The extent to which moral rights have to be recognized, and the variety of forms by which they could be recognized, is still a subject of debate. Indeed there are a number of countries which have long been members of the Berne Convention, yet provide non-statutory forms of protection for the moral rights of the author.[112] This protection may take the form of the right to be credited as an author, the right to object to mutilation or distortion of the work, and, in some cases, the right to object to unfair and excessive criticism of the work.[113]

Third, the Berne Convention, quite unlike the Universal

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[107] Universal Convention, *supra* note 1, at art. IV*bis*, which provides that "the rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting." Indirect recognition of the right to prepare derivative works may be recognized in the second sentence of the Article IV*bis*, which states that "[t]he provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original." Exceptions to exclusive rights are allowed so long as they "do not conflict with the spirit and provisions of this Convention" leaving the author with "a reasonable degree of effective protection to each of the rights to which exception has been made." Universal Convention, *supra* note 1, at art. IV*bis*(2).

[108] *Id.*

[109] *See* Berne Convention, *supra* note 8, at art. 5(2).

[110] *Id.*

[111] Berne Convention, *supra* note 8, at art. 6*bis*; *see also supra* note 92.

[112] *E.g.*, France, Germany, and Italy. 2 M. NIMMER, *supra* note 1, at § 8.21[A].

[113] "Moral rights" is a flexible concept which, in a number of states, goes quite far beyond the minimum contained in the Berne Convention. For an exhaustive and interesting enumeration of the rights which are viewed, in one place or another, as "moral" rather than "economic," see WIPO, GLOSSARY OF TERMS, *supra* note 87, at 161. The

Convention, has very detailed provisions on the terms of protection for works in general and for particular types of works.[114] These provisions represent compromises made over a fifty year period, principally among the industrialized states of Europe. For a long time, the Berne Convention has had a general rule of protection for the life of the author plus fifty years.[115] There is also a laundry list of special terms: fifty years from the making of a film or from its public distribution;[116] fifty years from the time an anonymous or pseudonymous work is made available to the public;[117] and limited terms for photographs and works of applied art.[118] The term is always determined by the mandatory nature of the Convention, which unequivocally states that "[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death."[119] But in these other categories there is always some area of flexibility and the term provisions provide the floor.[120] In the final analysis, the term is calculated in the same manner as rights by the country where protection is sought.[121]

Fourth, the Berne Convention, in recognizing exclusive rights for copyrights,[122] clearly grants exclusive rights for translation in the work.[123] This right is no longer subject to any major qualifications, though the limitation of exclusive translation rights has long been characteristic of the Berne Convention, and persists in a number of the states that are party to it.

Fifth, there is the exclusive right of reproduction. The Berne Convention provides for reproduction in any manner and in any form.[124] There are certain exceptions, and the Universal Convention, after listing the new rights in the 1971 revision,[125] provided generally that certain exceptions could be made, as long as they did not unduly prejudice the economic rights of the author and were consistent with the letter and spirit of that Con-

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significance of the difference may lie in the theoretical inalienability of moral rights as opposed to economic ones.

114 Berne Convention, *supra* note 8, at art. 7.

115 *Id.* at art. 7(1).

116 *Id.* at art. 7(2).

117 *Id.* at art. 7(3).

118 *Id.* at art. 7(4).

119 *See, e.g., id.* at art. 7(1).

120 The Berne Convention permits member countries to grant wider protection. *Id.* at art. 19.

121 *Id.* at art. 7(8).

122 *See, e.g., id.* at arts. 8-14*ter*.

123 *Id.* at art. 8.

124 *Id.* at art. 9(1); *see also supra* note 99.

125 Universal Convention, *supra* note 1, at art. IV*bis*(1).

vention.[126] However, there have long been uncertainties about the spirit of the Universal Convention, due to its brevity and since it does not point in any clear judicial direction.

The Berne Convention does, however, specifically provide for exceptions. It first says generally that states have the discretion to provide for exceptions to the reproduction right so long as the exceptions do not conflict with the normal exploitation of the work, or unreasonably prejudice the legitimate interests of the author.[127] There are a great number of detailed articles and sub-articles which deal with freedom to use works under particular circumstances.[128] There is a basis for fair use[129] in the Berne Convention, although it is called "fair practice" and is mainly applicable to quotations.[130] There are provisions applying to the use of copyrighted works, including their reproduction and distribution in the context of teaching; also covering uses that touch on broadcasting, publications, and the making of visual recordings.[131] There are also provisions which expressly recognize the right of the press to reproduce copyrighted works in certain limited circumstances.[132] The theory of these exceptions is that states may choose to make them available to specific users, always limited by the notion that the use must be justified by the purpose, and the extent of the use should not exceed that purpose. That is a flexible formulation, but the real answer to how it applies in fact requires us to look at the practices of the states that have long been parties to the Berne Convention. In particular, one must look at those states that are at the same level of development at the United States. The Berne Convention regulates in

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126 *Id.* at art. IV*bis*(2).

127 Berne Convention, *supra* note 8, at art. 9(2).

128 *See, e.g., infra* notes 130-32.

129 Under United States copyright law, the doctrine of fair use is codified in 17 U.S.C. § 107 (1982).

130 Berne Convention, *supra note 8, at art. 10(1) provides that:*

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

131 For example, the Berne Convention provides that:

> It shall be a matter for legislation in the countries of the Union and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

Id. at art. 10(2).

132 *Id.* at art. 10*bis*(1).

some detail the exclusive right of public performance.[133] It is broadly stated to include public performance by any means or process including broadcasting.[134] Yet, there are special provisions on broadcasting, applicable to cable origination and retransmission.[135] These provide for the possibility of compulsory licensing with respect to certain kinds of performance rights in broadcasting under limited circumstances.[136] There are detailed provisions for ephemeral recording,[137] a matter which was first treated in our law in 1976.[138] Unlike the Universal Convention, the Berne Convention expressly recognizes the right of adaptation[139]—that tremendously valuable right to create derivative works from which authors often receive far more renumeration than from the first publication of their original works. There are provisions which deal with the mechanical reproduction of music,[140] including the opportunity for compulsory licensing not dissimilar to that which existed in the Copyright Act of 1909 in the United States,[141] and which were maintained with technical modifications in the 1976 Copyright Act.[142] In fact, our compulsory license for mechanical reproductions in music was the first,[143] but it was the consideration of the issue in 1908, during the Berlin Revision Conference of the Berne Convention, which really provided on enormous amount of focused research for the United States Congress when it revised the law in 1909. Thus, there were and are substantial similarities.

There are special provisions in the Berne Convention that deal with rights in cinemagraphic works.[144] These provisions are intended to account for the differences between the Anglo-Saxon and civil legal traditions concerning who is the author of a cinemagraphic work. They also state how different systems of law can, in effect, provide equivalent kinds of protection, where

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133 *See id.* at arts. 11-11*bis*.

134 *Id.*

135 *Id.* at art. 11*bis*(1).

136 *Id.* at art. 11*bis*(2).

137 *Id.* at art. 11*bis*(3).

138 17 U.S.C. § 112.

139 Berne Convention, *supra* note 8, at art. 12.

140 *Id.* at art. 13(1).

141 Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (1909) (subsequent history omitted).

142 17 U.S.C. § 115 (1976) (subsequent history omitted).

143 For instance, under § 1(e) of the 1909 Copyright Act, compulsory licensing was triggered by use of the copyrighted work. In contrast, section 115(a)(1) of the 1976 Copyright Act requires distribution of the recording to the public before compulsory licensing is triggered. *See* 2 M. NIMMER, *supra* note 1, at § 8.04.

144 Berne Convention, *supra* note 8, at arts. 14(1)(i), 14*bis*(2).

one relies mostly on the notion of entrepreneurial authorship and the other on actual creator authorship. Furthermore, there are also provisions that deal with folklore,[145] and a long and complex provision that concerns developing country privileges.[146]

I would now like to turn the podium over to Michael Keplinger from the Patent and Trademarks Office, who is closely involved with this issue.

Mr. Keplinger

It is a pleasure, and a bit of a threatening experience to follow Lewis Flacks on a topic like the Berne Convention. I think it might be said that there are five people in this country who know a lot about the Berne Convention and its application, and Lewis is three of them.

Before starting with a brief discussion about the Berne Convention, some of its advantages, and arguments in favor of and against adherence that will identify some of the areas that require further analysis and study, I would like to add some remarks about the technological revolution and its impact on the Berne Convention, as well as the protection of intellectual property generally. The impact of technology, the world-wide dimensions of the information revolution, and the growing information industry, force us to think ever more seriously about the international order for the protection and regulation of intellectual property. But, I think it also points out the importance of, and the vital need for, international standards and an international system of law to regulate transactions in this area.

Certainly, any system of property law is always supported by technological safeguards. We lock our houses, we lock file cabinets, and we put money in safes; it is only reasonable that those concerned with the protection of high technology intellectual properties incorporate the best technological means that they can to aid in safeguarding their properties. Unless the law provides for redress against those who violate the safeguards that are employed, I question the efficacy of both the law and the technological safeguards.

Turning to the international regime and international law, I wish to mention several developments with respect to the Berne Convention and its consideration within the government. The copyright proprietors present at the September 12, 1984 meeting

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[145] *Id.* at art. 15(4)(a).

[146] *See* Berne Convention, *supra* note 8, at app.

of the State Department's International Copyright Advisory Panel universally and unanimously supported adherence to the Berne Convention. Certain representatives of industries who had long questioned some of the features of the Berne Convention, particularly the author's moral rights, strongly endorsed adherence to the Berne Convention. They did so because of their concern with growing and developing international trade of their products: motion pictures, broadcast programming, and other works transmitted by electronic means around the world. Copyright users, represented by educators, also supported the concept of adherence to the Berne Convention. It is going to be vitally important for those of us in the private sector, as well as those of us in the public sector who are concerned with Berne Convention adherence, to work carefully to consolidate this support and identify some of the benefits that adherence would bring to the United States. It is hard to quantify these benefits in precise terms, that is, in dollars and cents. You cannot say for example, that it is going to be fourteen billion dollars in 1985. However, it is possible to cite advantages of a political or quasi-political nature that would accrue to the United States from membership in the Berne Convention. One of those certainly is a more favorable forum for the representation of the United States' interests in the world of International copyright. WIPO, which administers the Berne Convention,[147] is a specialized United Nations agency that deals only with intellectual property matters. UNESCO, the Secretariat of the Universal Convention is not as well equipped to deal with modern intellectual property matters, in part because of its politicization and the disproportionate influence of the developing nations. In general, WIPO is not as politicized as UNESCO and the influence of the developing nations is not as great as in UNESCO. In addition, the present Director General of WIPO, Arpad Bogsch, is an American national who strongly supports United States adherence to the Berne Convention. Another important feature of the Berne Convention, can be called, as Mr. Flacks said, either higher levels of protection, or simply more detailed specifications of the requirements for protection. These are the very characteristics of the Berne Convention which are vitally important to the United States' interests. As the importance of trade in products based

[147] Berne Convention, *supra* note 8, arts. at 22-24; *see also* Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3.

on intellectual property continues to increase, the importance of maintaining effective levels of international protection for United States producers and creators will continue to increase.

Adherence is important to the United States' international trade. For example, according to United States Department of Commerce statistics, the computer software industry, a relative newcomer to copyright, had worldwide revenues of eighteen billion dollars in 1983.[148] Nearly ten billion dollars of that sum accrued to United States firms. High levels of copyright protection are vitally important to these and other United States and foreign industries.

Another important feature of United States membership in the Berne Convention would be to place the United States in a better political or negotiating posture. United States trade and intellectual property officials and representatives would be able to negotiate from a stronger base when seeking to address trade problems involving intellectual property, or when representing the United States in international copyright fora. This point will be especially important, as Mr. Winter and Mr. Flacks have mentioned, in any coming revisions of the Berne Convention which certainly may occur in this decade. It will also put private sector business personnel on an equal footing with their equivalents from our major trading partners, who by and large, are members of the Berne Convention.

An additional item to take note of is that there are only three major powers in the world that do not belong to the Berne Convention: the United States, the Soviet Union, and the People's Republic of China. All of our major trading partners are, and generally have been members of the Berne Convention for many years.

United States membership in the Berne Convention will also strengthen the international copyright system. The international intellectual property system is under pressure from the demands of the developing countries. These pressures have been particularly acute in copyright, especially in the areas affected by new technology. Photocopiers, cable TV, satellites, and computers have raised important issues that have been addressed by United States copyright law for a number of years and internationally by WIPO and UNESCO. Our full participation in the governing body of the Berne Convention, the Berne Executive Committee,

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148 U.S. DEPARTMENT OF COMMERCE, A COMPETITIVE ASSESSMENT OF THE U.S. SOFTWARE INDUSTRY V (1984).

will put us in a better position to deal effectively with these issues as they arise internationally. Additionally, our membership in the Berne Convention would serve to encourage newly industrialized countries and developing nations to adhere to Berne, and to conform their laws to the standards of the Berne Convention.

Membership in the Berne Convention will exert some influence on the domestic United States copyright law as well. Certainly, some of the formalities will have to be relaxed in our law,[149] and some adjustments may be required in its compulsory licenses. Beyond these immediate effects, one of the most important consequences will be that it will force the United States to realize that we cannot "go it alone" with respect to international copyright policy. It will make us realize and consider copyright policy in the context of a worldwide market for these important intellectual properties.

There are some possible negative effects that may arise. Some copyright user groups, such as educators, librarians, cable television groups, or some broadcast organizations could consider that certain features of the Berne Convention might require raising the domestic levels of protection. They could consider that the Berne Convention might exert some adverse influence on the development of the doctrine of fair use[150] or library photocopying embodied in section 108 of the current Copyright Act.[151] If that perception arises, it could raise serious concerns in those groups about possible Berne membership.

Some of the features that will require serious consideration and modification in our law are important to some groups. There are certain features of our law that will require serious consideration before we move towards Berne membership. These include the formalities of copyright notice[152] and registration.[153] Some groups see things such as copyright notice as an important indication of the copyright status of a work, showing whether or not it is in the public domain.

Copyright notice is one of the features of our law that will require serious consideration with respect to Berne membership.

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[149] The Berne Convention provides that the "enjoyment and the exercise of [author's] rights shall not be subject to any formality." Berne Convention, *supra* note 8, at art. 5(2); *see also* Gabay, *supra* note 38, at 207-10.

[150] Some concern has been expressed informally that the general tenor of the Berne Convention, particularly the moral rights provisions, might influence a court, when confronted with a particular fact situation, to interpret "fair use" in a less expansive fashion than under the present United States jurisprudence.

[151] 17 U.S.C. § 108 (1982).

[152] *Id.* at §§ 401-404.

[153] *Id.* at §§ 408-410.

It is a formality in the meaning of that term within the Berne Convention.[154] The exercise of formalities under the Berne Convention is simply not permitted.[155] How copyright notice might be maintained, the effect of its total elimination, or making its use completely voluntary, are certainly issues that have to be considered. Good, solid scholarly research will be required for extended analysis of these questions.

Certain groups, such as librarians, educators, reprint publishers, and motion picture producers, believe that our registration system is important because it creates a national system of records that can help track ownership in copyrighted property, identify where licenses must be sought, specify the conditions under which they might be sought, and identify who owns what rights to what works. The importance of this registration system is a topic of serious consideration. How might it be maintained with Berne membership? Would it remain a viable institution if made totally voluntary, or would other changes have to be made in our law? The registration system is rather voluntary now,[156] yet certain features of the law, such as the requirement to register to cure the omission of the copyright notice from a published work,[157] might require some adjustment.

Another feature of our law that raises concerns, among both proprietors and users, is the compulsory license provisions of our law. As Lewis Flacks indicated, the Berne Convention, in a detailed fashion, regulates what are the rights of proprietors[158] and carves out certain exceptions for the users.[159] We do have compulsory licensing in our law.[160] What is the extent and the scope

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154 *See* Gabay, *supra* note 38, at 208.

155 *See supra* note 149.

156 17 U.S.C. § 408(a).

157 *Id.* at § 405(a)(2).

158 *See generally* Berne Convention, *supra* note 8.

159 *Id.* at arts. 17-18.

160 The current United States Copyright Act contains four compulsory licenses:

(1) The right to make and distribute phonorecords of nondramatic musical compositions. Essentially, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced and distributed if the copyright owner is notified and a royalty is paid. 17 U.S.C. § 115.

(2) Public performance of a nondramatic musical work "by means of a coin-operated phonorecord player" (jukebox). *Id.* at § 116(a). If the machine meets the statutory definition, *id.* at § 116(e)(1), then jukebox owners are required to pay a fee each year per jukebox.

(3) Cable television and cable radio. *Id.* at § 111. Basically, the cable system will be permitted to retransmit distant signals under a compulsory license if such retransmission is permitted by the Federal Communication Commission.

(4) Public broadcasting. This relates to "nondramatic musical works and published pictorial, graphic and sculptural works" displayed by noncommercial broadcasters. *Id.* at § 118.

of our compulsory licensing systems relating to retransmission via cable of broadcast programming?[161] Is this compatible with the Berne Convention?[162] What is the status of the jukebox compulsory license for the performance of music on jukeboxes?[163] How does it relate to the Berne Convention? This may be one of the more significant points at which our compulsory licensing system remains at variance with Berne Convention standards.

And what about some of the other provisions of our law; for example, our lack of statutory moral rights? Lewis Flacks indicated that the Berne Convention certainly does require recognition of moral rights.[164] But what about our law and moral rights? Our copyright law, *per se*, does not recognize moral rights, but other countries, such as Great Britain, have adhered to the Berne Convention for years, relying on the theory that the common law, that is, the law of defamation, privacy, and other personal rights, provides rights equivalent to moral rights. Certain scholars have suggested that under United States law the same result might obtain.

There are other technical provisions of the Berne Convention dealing with retroactivity[165] that have raised concern with regard to the application of the Berne Convention to the United States' law and its compatibility with the Berne Convention.

But, in general, I think it is fair to say that at the recent Copyright Advisory Panel, one of the observers characterized what needs to be done to our law, as adjustments, rather than major and fundamental changes, to permit the United States to adhere to the Berne Convention. There are certainly valid questions that will have to be studied. As was indicated earlier, in the Executive Branch of the government, the Cabinet Council on Commerce and Trade and its Working Group of Intellectual Property, has considered, in a preliminary fashion, adherence to

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161 *See supra* note 160.

162 The Berne Convention contains two compulsory license provisions: article 11*bis*(2) relating to the broadcasting right and article 13(1) relating to the recording right. *See* S. STEWART, *supra* note 17, at 73.

163 *See supra* note 160.

164 *See supra* notes 15, 111-13 and accompanying text.

165 Under the Berne Convention, a country which newly accedes to it must extend protection to "all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection." Berne Convention, *supra* note 8 at art. 18(1). Additionally, works which may still be protected in their countries of origin but are in the public domain in the United States will be protected but are subject to restrictions imposed by the acceding country. *Id.* at art. 18(3).

the Berne Convention, and further consideration of United States adherence to it is in progress in the Cabinet Council.

I have enjoyed participating in this session. Based on my long experience in the copyright community, I think, to echo the words of Mr. Winter, our adherence to the Berne Convention is something vitally important to our national interest, especially with respect to the emerging world order and the importance of intellectual property in international trade. I certainly hope that the discussion that we have had here this morning and the points that we have raised may inspire you to encourage your students to pursue some of these topics and help develop some good background papers on the compatibility of United States law with the Berne Convention.