how to industry often fall through the cracks of the classical bipolar structure enshrined in existing international conventions, including the TRIPS Agreement.[198] Policymakers charged with the task of restructuring 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 Ptolemaic 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,[199] an increasingly discredited intellectual property system risks collapsing of its own protectionist weight.

198 *See supra* text accompanying notes 6-10, 18-44.

199 *See Legal Hybrids*, *supra* note 11, at 2535 ("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 pertain immutably to 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.[1] For more than a century, the United States had refused to join the Berne Convention.[2] Instead, the U.S. chose to maintain copyright laws that, by Berne standards, did not adequately protect works of foreign authors.[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.[4]

Formalities such as the notice requirement,[5] manufacturing clause,[6] copyright renewal,[7] and registration requirements[8]—as a

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1 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, *revised* Paris, July 24, 1971, art. 5(2), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221; *see* Jonathan D. Reichman & Joshua R. Bressler, *After NAFTA, U.S. Copyright in Public Domain Works*, N.Y. L.J., Oct. 28, 1994, at 5.

2 Fred H. Cate, *The Future of Communications Policymaking*, 3 WM. & MARY BILL OF RTS. J. 1, 20 (1994); *Copyrights, Senate Passes Legislation Paving Way to U.S. Membership in Berne Convention*, DAILY REP. FOR EXECUTIVES, Oct. 12, 1988; Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

3 Senator Patrick Leahy, Endnote, *Time for the United States to Join the Berne Copyright Convention*, 3 J.L. & TECH. 177, 182 (1988). The Berne Convention provides greater recognition of author's rights. Lana C. Fleishman, Note, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189, 213 (1993).

4 Cate, *supra* note 2, at 21.

5 17 U.S.C. §§ 401-404 (1988 & Supp. V 1993).

6 Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106; 17 U.S.C. § 16 (1909); 17 U.S.C. §§ 601-603 (1988). The manufacturing clause, with certain exceptions prohibits the importation of non-dramatic, English-language literary works of U.S. authors unless manufactured in the U.S. or Canada. *See id.*; *GATT Round Seen Ineffective Way of Reaching Accord on Intellectual Property*, DAILY REP. FOR EXECUTIVES, Mar. 19, 1987, at L-5.

condition for suit[9] and for the collection of statutory damages and attorneys fees[10]—distinguished U.S. copyright law from the myriad of copyright laws under which American texts are protected around the world.[11] 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.[12] American intellectual property owners who suffered substantial monetary losses abroad from the lack of multinational protection[13] were the primary impetus for U.S. accession to the Berne Convention. Adherence to Berne will ensure that U.S. authors receive needed protection in foreign nations.[14] This article will address the issue of copyright formalities in the future.

Formalities make it extremely difficult for authors to preserve their rights.[15] 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.[16] Thus, the U.S.'s admission to Berne required elimination of the formalities present in U.S. copyright law.[17] 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.[18]

7 17 U.S.C. § 304 (1988); 17 U.S.C. § 24 (1909).

8 17 U.S.C. § 409 (1988).

9 17 U.S.C. § 411 (1988).

10 17 U.S.C. § 412 (1988).

11 *See* Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 76, 82 (1988); Reichman & Bressler, *supra* note 1; Marian Nash Leich, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 83 AM. J. INT'L LAW 63, 65 (1989).

12 *See* Berne Convention Implementation Act of 1988; Copyright Amendments Act of 1992, Pub. L. 102-307, 106 Stat. 264 (1992); *see also* Oman, *supra* note 11; Leahy, *supra* note 3, at 184.

13 The U.S. International Trade Commission estimated 1986 losses at $6.2 billion, compared to only $1.5 billion in 1982. Cate, *supra* note 2, at 21.

14 *Copyrights, Senate Passes Legislation Paving 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 & Bressler, *supra* note 1.

16 Reichman & Bressler, *supra* note 1; *see* Arthur Wineburg, *Leveling the Intellectual Property Playing Field*, THE RECORDER, Nov. 3, 1992, at 8; *Copyrights, Senate Passes Legislation Paving Way to U.S. Membership in Berne Convention*, *supra* note 2.

17 Reichman & Bressler, *supra* note 1; *see* Wineburg, *supra* note 16, at 8; *Copyrights, Senate Passes Legislation Paving Way to U.S. Membership in Berne Convention.*, *supra* note 2.

18 *See* Reichman & Bressler, *supra* note 1.

By subjecting foreign authors to frustrating formalities and requiring registration in the domestic language, the U.S. violated the "golden rule" by doing unto all countries what no country had done unto it.[19] Had the U.S. been obliged over the last one hundred years to comply with similar requirements of registration, notice, renewal, and a manufacturing clause in every major country to which American works and rights were exported, American authors, publishers, motion picture companies, and other entities would have suffered an astronomical loss. If every country applied America's unreasonable standard, U.S. authors would have to register in about seventy different languages using seventy different foreign attorneys.

II. FORMALITIES: CASE LAW

Various courts have recognized that formalities often deny copyright protection to authors for no legitimate social purpose.[20] In *Goodis v. United Artists Television*,[21] the estate of author David Goodis sought copyright protection for a novel entitled *Dark Passage*. Goodis had sold the rights to serialize the novel in *The Saturday Evening Post*. While each edition contained a copyright notice in the magazine's name, Goodis placed no notice in his own name.[22] The defendant argued that the single copyright notice was insufficient to preserve Goodis' rights and that each weekly publication threw the work into the public domain.[23] Fortunately, the Court of Appeals for the Second Circuit held that the Goodis work was not released into the public domain, since the rights associated with the novel were divisible.[24] Prior to this case, however, the common law rule of indivisibility of copyright[25] deprived many

19 *See Hearings on S. 373 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Comm. on the Judiciary*, 103d Cong., 2d Sess. (1993) (statement of Irwin Karp on behalf of Committee for Literary Property Studies) [hereinafter Karp, *Hearings*] (on file with the *Cardozo Arts & Entertainment Law Journal*).

20 *See, e.g.*, Goodis v. United Artists Television, 425 F.2d 397 (2d Cir. 1970); Brecht v. Bentley, 185 F. Supp. 890 (S.D.N.Y. 1960).

21 425 F.2d 397.

22 *Id.* at 399.

23 *Id.*

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 base 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 "rejects partial assignments of copyrights and requires a

authors of their copyright interests in circumstances similar to that in *Goodis*.[26]

Another case[27] 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*.[28] 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 renewal accrues at the expiration of the original term . . . ."[29] They reasoned that the old copyright law did not mention intestacy, but only permitted the transfer of a copyright by will or contract.[30] 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.[31]

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.[32] Congress enacted the clause primarily as a tariff measure to protect domestic printers,[33] but it cost thousands of American and foreign authors their

proprietor or assignee of a copyright to hold nothing less than all the rights in a copyrighted work." *Id.* at 400.

26 The court limited application of the indivisibility doctrine to determining standing in multiple infringement suits brought by various holders of partial rights in a work. The rule did not determine the interest of a party like Goodis who seeks to obtain a copyright. *Id.*

27 *Brecht*, 185 F. Supp. 890.

28 The original German title to the play was *Mutter Courage und ihre Kinder, eine Chronik aus dem dreissegharhegen Krieg. Id.* at 891.

29 *Id.* at 892 n.1.

30 Counsel for the Brecht estate searched for a case to rebut the argument; none existed. The issue was one of first impression.

31 185 F. Supp. at 892 n.1 (stating that the defendant's extraordinary theory would lead to an absurd result which could not have been intended by Congress).

32 17 U.S.C. §§ 601-603. *See GATT Round Seen Ineffective Way of Reaching Accord on Intellectual Property*, *supra* note 6; Alexandra Duran, Comment, Community for Creative Non-Violence v. Reid: *The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work For Hire Doctrine of the 1976 Copyright Act*, 56 Brooklyn L. Rev. 1081, 1083 n.5 (1990).

33 *See* Al J. Daniel, Jr., *Agricultural Reform: The European Community, the Uruguay Round, and International Dispute Resolution*, 46 Ark. L. Rev. 873, 915 (1994) (noting that the manufacturing clause existed because of the fear "that the then infant United States printing and publishing industries would be overwhelmed by foreign competition") (citation omitted); Roger P. Alford, *Why a Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U. L. Rev. 696, 723 (1991); *Manufacturing Clause Extension Would Undercut U.S. Goals, Reduce Credibility, Panel Told*, Daily Rep. for Executives, June 13, 1986, at A-5.

copyrights. Finally, the clause was eliminated prospectively in the 1976 Act.[34] 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.[35] The resulting bill, enacted in 1982, extended the manufacturing clause for four years.[36] Moreover, in 1986, Congress introduced and prepared to pass a bill to reinstate the clause permanently in the U.S. copyright law.[37]

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.[38] Potential damage ranged from $300 to $500 million.[39] 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.[40] If section 412 is not eliminated, the same type of pressure through reciprocity may again be used against us.[41] If the U.S. is not violating the Berne Convention by

34 Daniel, *supra* note 33, at 916.

35 *See Senate Finance Committee Votes to Repeal Manufacturing Clause*, Daily Rep. for Executives, June 13, 1986, at A-5.

36 Copyright Law Amendment, Pub. L. No. 97-215, 96 Stat. 178 (1982).

37 S. 1822, 99th Cong., 2d Sess. (1986); S. 1938, 99th Cong., 2d Sess. (1986); *see* Daniel, *supra* note 33, at 916.

38 Daniel, *supra* note 33, at 916.

39 *Id.*

40 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 1993).

41 *See* Karp, *Hearings*, *supra* note 19.

imposing section 412,[42] 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.[43] 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.[44] 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, even-

[42] 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 rights. 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).

[43] *See* Memorandum from Irwin Karp submitted to the Subcomm. on Patents, Copyrights, and Trademarks of the Comm. on the Judiciary 1-3 (Nov. 1, 1993) (on file with the *Cardozo Arts & Entertainment Law Journal*).

[44] The work for hire doctrine deems an employer the author of any work prepared by an employee within the scope of employment. Duran, *supra* note 32, at 1085. For a general discussion of the work for hire doctrine, see *id.*; Kenneth L. Port, Foreward, *Symposium on Intellectual Property Law Theory*, 68 Chi.-Kent L. Rev. 585, 587 n.10 (1993). *See also* Nicholas E. Sciorra, *Self-Help & Contributory Infringement: The Law and Legal Thought Behind a Little "Black Box,"* 11 Cardozo Arts & Ent. L. J. 905 (1993).

tually 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 more 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.[45] 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.[46] 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

[45] 17 U.S.C. § 302(a) (1988) (stating that copyrights are protected for the life of the author plus fifty years). *See* Sciorra, *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 Obviousness: Invention Protection in the Twenty-First Century*, 38 Am. U. L. Rev. 1097, 1138 (1989); Leich, *supra* note 11, at 65. One example is the late Mr. Herbert Tenzer, who served on the copyright subcommittee of the House of Representatives at the beginning of the copyright revision process. Mr. Tenzer expressed doubts about the effectiveness of the "life and fifty" rule, since difficulties might arise when discerning the date of death.

[46] For example, when Mr. Tenzer 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.[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.

[47] Television and cable were among the earlier technologies that copyright law accomodated.