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DEDICATION

TO THE MEMORY OF MY MOTHER

AND TO MY FATHER

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PART I

Highlights of the Berne Convention Implementation Act of 1988

By David Nimmer

Over a century after the world's first and foremost multilateral copyright convention was promulgated, the United States has finally become a full-fledged participant in the international copyright community. Congress has amended our law to conform to, and the Senate has given its advice and consent to join, the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886; the President has duly signed the bill into law. Thus, no longer need American copyright proprietors surreptitiously enter through Berne's oft-cited back door — the front door to Berne protection now stands open.

To join Berne, the United States has had to sacrifice (or, from the more enlightened perspective of the rest of the world, to relieve itself of) its talismanic reliance on copyright formalities; several other definitions and compulsory licenses have been adjusted to comport with Berne standards. Berne has brought us face-to-face with the burgeoning recognition of moral rights in this country, and has forced us at least to confront the future of that doctrine, even though Congress tailored its ultimate statement on the subject to be as non-substantive and non-predictive as possible. In addition, the legislative and executive branches have had to ponder the interplay between the supremacy clause

(Pubs.465,068,331,556)

and international law, determining whether it is the treaties to which the United States adheres or the laws passed by the Congress that constitute "the supreme Law of the Land." For all these reasons, Berne ratification signals a watershed event in the history of United States copyright law.

I. Introduction[1]

A. The Berne Convention and International Copyright Protection

In 1886, eight nations banded together to recognize copyright protection across their national boundaries. H. Rep., p.11.[2] Thus was born the Convention for the Protection of Literary and Artistic Works, at Berne, Switzerland. In the intervening century, the Berne Convention has undergone five revisions,[3] while the Berne Union has grown to 77 members.[4] The most current text is the Paris Act of July 24, 1971.[5] Today, all the important countries of the world belong to Berne, with the notable exceptions — besides the United States for several more months — of the Soviet Union and the People's Republic of China.

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[1] An outstanding treatment of the framework of copyright in the international community is contained in Professor Lionel Sobel's "Introduction to International Copyright: Its Treaties and National Laws, and an Explanation of the Way They Interact to Create an Integrated System," The Fundamentals of International Copyright (course material from November 4, 1988 presentation at American University).

[2] Both the Senate and the House considered predecessor bills to the new law. References to the legislative history herein are as follows:

"H. Rep." refers to H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988).

"S. Rep." refers to "S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988).

"H.J.E.S." refers to the House Joint Explanatory Statement on House-Senate Compromise Incorporated In Senate Amendment to H.R. 4262, contained in 134 Cong. Rec. H10095-97 (daily ed. Oct. 12, 1988).

"S.J.E.S." refers to the Senate Joint Explanatory Statement on Amendment to S. 1301, contained in 134 Cong. Rec. S14554-56 (daily ed. Oct. 5, 1988).

[3] See H. Rep., pp. 12-13.

[4] A list of Berne adherents appears in S. Rep., pp. 6-7.

[5] The text is reproduced in 4 *Nimmer on Copyright* Appendix 27. The preceding text of the Berne Convention, namely the Brussels Act of June 26, 1948, is reproduced in 4 *Nimmer on Copyright* Appendix 26.

1. The Ban on Certain Formalities

According to the chief Congressional architect of United States adherence to the Berne Convention, "The central feature of Berne is its prohibition of formalities." 134 Cong. Rec. H3082 (daily ed. May 10, 1988) (statement of Rep. Kastenmeier). In actuality, although the Berne Convention's enlightened approach to copyright protection is notable for its antipathy to formalities, it has never embodied a complete prohibition. Rather, the Convention states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality," Paris text, art. 5(2),[6] in "countries of the Union other than the country of origin," Paris text, art. 5(1). Thus, Berne imposes a condition that copyright subsistence for works emanating from other member states may not be premised on formal requirements. It does not, however, prohibit formalities as a condition to certain types of remedies, licenses, exemptions, etc.

Berne's non-formalistic approach stands in marked contrast to the formidable edifice of copyright formalities that United States copyright law has built throughout the past two centuries. For that reason, the United States, unwilling to discard the copyright notice that set it apart among all the world's principal nations, has always refused to join Berne.[7] Instead, to accommodate this peculiarity of American law within the world copyright community, a separate treaty organization was formed in 1952 — the Universal Copyright Convention.[8] H. Rep., p.14. Although the U.C.C., like Berne, prohibits member states from requiring

[6] Citations to the Berne Convention herein, unless otherwise noted, will be to the Paris text of July 24, 1971, and will be in the format set forth in the text.

[7] In a little-known historical sidelight, the United States Senate actually ratified the Berne Convention on April 19, 1935, but then withdrew ratification two days later upon realizing that U.S. law would have to be modified to bring us into compliance with Berne, an issue that the Congressional committee had neglected to consider.

[8] The current text of the U.C.C. is the Paris text of July 24, 1971, reproduced in 4 *Nimmer on Copyright* Appendix 25. This text is dated the same date as the most recent version of the Berne Convention because the two bodies deliberated in Paris jointly to revise the two treaties. See H. Rep., p.17. The preceding text of the U.C.C. was the Geneva Act of September 6, 1952, reproduced in 4 *Nimmer on Copyright* Appendix 24.

formalities as a condition to copyright protections, the U.C.C., unlike Berne, dispenses with those formalities only upon use of a prescribed copyright notice. U.C.C. Paris text, art. III(1). That U.C.C. notice is itself patterned after the American model; thus, the U.C.C., in effect, allowed the United States to continue to require the very formality that multilateral copyright treaties are designed to avert.

A word is required here on the scope of formalities of which the copyright treaties require waiver. First, neither the U.C.C. nor Berne regulate formalities in general — they govern only formalities that stand as a condition to copyright protection. Thus, each nation may premise certain remedies (e.g., statutory damages and attorney's fees)[9] on compliance with stated formalities. Second, neither treaty purports to govern the scope of formalities that a country may place on its own national to secure copyright protection.[10] *See* Berne Paris text, art. 5(1) ("Authors shall enjoy . . . in countries of the Union other than the country of origin . . . ."); U.C.C. Paris text, art. III(1). If France, for instance, wished to do so, it could require each of its citizens to pay 1000 francs and to obtain Ministerial permission to obtain a copyright; those requirements would not fall afoul of any treaty. However, to belong to the Berne Union, France must accord copyright protection to works by German and Brazilian authors, for instance, without any formalities at all; by like measure, the U.C.C. requires France to accord copyright protection to American and Nigerian authors, for instance, without any formalities, so long as the requisite U.C.C. copyright notice (© 1966 by ABC) appears on the work. Thus, were it willing to adopt the politically

[9] See 17 U.S.C. § 412 (1987), which so provides and is not affected by the new law. Indeed, the new law strengthens the remedial impact of the formality of registration by doubling statutory damages! See § III(B)(2)(b) *infra*.

[10] S.J.E.S. at S14554 ("Berne does not restrict member nations from imposing formalities on works of domestic origin.") The operative principle in Berne (as well as the U.C.C.) is "national treatment," i.e. that "authors should enjoy in *other* countries the same protection for their works as those countries accord their own authors." H. Rep., p.12 (emphasis added); S. Rep. p.2. Understandably, there has been little concern historically that member states would attempt to disadvantage their own nationals, rather than foreigners.

inexpedient course of advantaging foreigners at the expense of Frenchmen, the French parliament could require whatever formalities it desired of French citizens[11] without falling afoul of Berne.

The rub arises, for American purposes, in that the formalities required under United States copyright law are extraterritorial[12] under the 1976 Act.[13] Thus, to cite an extreme example, in order to enjoy United States copyright protection, a toy published by a Japanese company in Japan must bear a copyright notice complying with Title 17, United States Code, notwithstanding that Japan requires no copyright notice to secure protection for its works and that, in any event, toys are not copyrightable works in Japan.[14] Another example is the requirement of renewal of a pre-1978 work in the U.S. Copyright Office twenty-eight years following its publication. Failure properly to do so injected the classic Italian movie *The Bicycle Thief* into the U.S. public domain.[15]

Given that the Berne Convention requires the United States to recognize copyright protection for works authored by nationals of signatory nations without any formalities, in order to join Berne the United States must carve an exception to its formal requirements, at least for Berne claimants. And once it does so, unless it wishes to create an apartheid system of copyrights in which its own constituents (i.e. American-authored works) will be disadvantaged, Congress must demolish the whole system of formalities insofar as they stand as a condition to copyright protection. As will be seen below, the new law largely eliminates proscribed

[11] However, to the extent that a Frenchmen first published a work in a different Berne country, such as Italy, the Convention could require its copyright protection without any formalities.

[12] Copyright laws are not extraterritorial, i.e. they accord no protection beyond their national boundaries. However, they sometimes require activities to be undertaken abroad to accord "intraterritorial" protection. *See generally* 3 *Nimmer on Copyright* chap. 17.

[13] 2 *Nimmer on Copyright* § 7.12[D][1]. Under the 1909 Act, this proposition was more debatable. *Id.* § 7.12[D][2].

[14] Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189 (2d Cir. 1985).

[15] International Film Exchange, Ltd. v. Corinth Films, Inc., 621 F. Supp. 631 (S.D.N.Y. 1985). Note that renewal registration is a formality allowed under the U.C.C. See U.C.C. Paris text, art. III(5).

formalities from American copyright law for all claimants; in one respect, however, Congress has freed Berne claimants from a hurdle that it still places on Americans.[16]

2. Benefits of Membership

For the last three decades, United States membership in the U.C.C. alone has safeguarded the rights of American authors reasonably well. The U.C.C.'s eighty members overlap to a large extent with Berne members and include most principle U.S. trading partners. H. Rep., pp.14-15 (26 U.C.C. members do not belong to Berne). Since 1973, the Soviet Union has belonged to the U.C.C. as well. (China still does not belong to any copyright treaty organization; it is expected to enact its first comprehensive copyright statute in the next several years.)[17] Further, to the extent that broader protection was desired, U.S. copyright owners could publish their works simultaneously[18] in the United States and in Canada or another Berne country, thereby protecting the work both under the U.C.C. and in Berne as well, via the "back door" of such simultaneous publication.

In recent years, however, as the losses to United States copyright proprietors from piracy abroad mounted into the billions of dollars,[19] American participation in the U.C.C. has proven inadequate.[20] First, the dozens of Berne members that had

[16] See § III(B)(2)(a) *infra*.

[17] China has, of late, sent "strong signals that it is considering adherence to Berne." S. Rep., p.3. Its absence from the world copyright community is ironic, given that China not only originated the first printing technology, but also enacted the world's first copyright law. *See* Simone, "Copyright in the People's Republic of China: Now and When?" at 5 (unpublished 1988).

[18] For countries adhering either to the 1971 Paris Act or the previous 1948 Brussels Act of the Berne Convention, "simultaneous" means within thirty days of first publication. Paris text, art. 3(4); Brussels text, art. 4(3). For countries adhering to prior Berne Acts, such as Canada, the meaning of the term is left undefined.

[19] S. Rep., p.2.

[20] As noted above, the U.C.C. and Berne texts were revised jointly in Paris in 1971; thus, lack of U.S. membership in Berne did not deprive this country of its voice vis-a-vis Berne revision. More recently, however, the United States has withdrawn from UNESCO, the U.C.C.'s parent body. The extent of the United States' disenfranchisement in international copyright from that move is debatable; concern on that score served as an impetus for the current legislation, S. Rep., p.4, albeit only weakly, H. Rep., p.15.

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not ratified the U.C.C. and which had no bilateral copyright relationships with the United States had no obligation to protect the copyrights of American authors. Even in cases where the U.S. proprietor had attempted to secure back-door Berne protection, problems of proof and other difficulties often forestalled relief.[21] Second, American efforts to bring copyright piracy havens into the international fold often foundered on the U.S.'s own reluctance to participate in the pre-eminent world copyright treaty.[22] The United States Trade Representative expressed great dissatisfaction at his anomalous position in urging other countries to do what his own had refused. H. Rep., pp.17-18. Cf. S. Rep., pp.4-5.

Proponents of the Berne Convention have pointed to two prime benefits that the U.S. secures from membership. First, effective upon accession, the United States obtains immediate bilateral copyright relations for the first time with 24 nations of the world. S. Rep., p.3. Most notable among such countries are Egypt, Thailand, and Turkey.[23] No longer need American authors seek to use the back door to Berne for entering the courts of those nations.[24] Second, Berne membership constitutes a moral state-

[21] S. Rep., p.3 ("simultaneous publication is expensive and uncertain"). For example, Peter Nolan of the Motion Picture Association of America, who is cited frequently in the legislative history, testified before the House Subcommittee that a motion picture studio brought suit in Thailand based on the concurrent release of a movie in Canada (a Berne country) and the United States, thus invoking Berne's back door. Statement to House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, September 16, 1987. At a subsequent address to the Los Angeles Copyright Society, Mr. Nolan provided the later information that the court in Thailand refused to recognize the validity of the Canadian publication of that movie, *The Sting*, based on a purported failure to comply with Canadian (albeit not Berne) publication standards. See S. Rep., p.3 (adverting to this case).

[22] The U.C.C. itself provides that among states party both to it and to Berne, the latter's provisions govern. See H. Rep., pp. 14-15. Further, Berne is expected to provide the standards for the General Agreement on Tariffs and Trade (GATT). See S. Rep., p.5.

[23] A list of all Berne adherents is contained in 4 *Nimmer on Copyright* Appendix 22. A list of all U.C.C. adherents is contained in 4 *Nimmer on Copyright* Appendix 21. Further information on the international copyright relations of the United States is set forth in 4 *Nimmer on Copyright* Appendix 20.

[24] See S. Rep., pp.3-4 (recounting perils of Berne's back door.) Note, however, that actual results must await experience. Thus, the Thai court that

ment of the importance of protecting intellectual property through adherence to the foremost copyright treaty, embodying the highest standards of protection.

B. The Berne Convention Implementation Act of 1988

The Berne Convention Implementation Act of 1988[25] ("BCIA") contains thirteen sections, most of which amend Title 17, United States Code, dealing with copyrights.[26] The law, as passed, is referred to in the text as the BCIA, the new law, or the Senate Amendment. See § I(B)(1) *infra*. For ease of reference herein, section numbers of the new law are referred to as follows: BCIA, § 1. Where necessary, the bills that led to the BCIA are referred to as follows: H.R. 4262, § 1 and S. 1301, § 1. Reference to the Copyright Act of 1976, prior to its 1988 amendment, are as follows: 17 U.S.C. § 101 (1987). Finally, the Copyright Act of 1976, as amended by the BCIA, is referred to as follows: 17 U.S.C. § 101 (1989). Unchanged provisions of that Act are set forth without a date.

1. Passage of the Law

After some early Congressional interest in the subject, a group on interested citizens, both industry representatives and governmental, constituted themselves the Ad Hoc Working Group on U.S. Adherence to the Berne Convention.[27] That group's 1986 report laid much of the groundwork for legislative consideration of this issue. In the 100th Congress, several bills were introduced in both chambers to bring U.S. law into compliance with Berne standards.

The primary bill in the House of Representatives was H.R. 4262, introduced by Rep. Kastenmeier of Wisconsin, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary. Although Chairman Kastenmeier's subcommittee devoted much time to

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invalidated Universal Studio's copyright in *The Sting* based on back-door problems could perhaps erect other roadblocks to protection even after U.S. accession to Berne. See n. 21 *supra*.

[25] BCIA, § 1(a) (Short Title).

[26] BCIA, § 1(b).

[27] The Group's report is reprinted in 10 Colum.-VLA J. L. & Arts 513 (1986).

taking testimony from various parties in the United States, France, and Switzerland,[28] and although support for the bill in the affected industries was overwhelming by the time deliberation ceased (*vide* the unanimous vote in favor of the bill in both houses), the House adopted a philosophy toward the Act that it termed "minimalist" — amending U.S. law only where absolutely necessary to bring the United States into compliance with Berne strictures, and then limiting the amendment's scope to the extent possible. H. Rep., p.20.

> Ideal solutions to issues take much congressional time, require careful examination of often conflicting interest, and generally lead to the legislative processing of a bill designed to solve a carefully defined question. That methodology is *not* used for the [Berne Convention Implementation] Act.

Id. (emphasis added). On May 10, 1988, the House passed H.R. 4262 by a vote of 420 to 0.

In the Senate, Senator Leahy introduced S. 1301, similar in import and broad outline to H.R. 4262, yet differing in the particulars of implementation.[29] Although also decidedly minimalist, the Senate bill actively eliminated one formality that the House version had not touched: copyright registration as a prerequisite to an infringement action. See § III(B)(2) *infra*. Conferees from the House and Senate worked together on an informal basis from May through October to harmonize the two bills, in particular compromising on the registration formality by creating one standard for United States works and a separate standard for works from other Berne countries. *Id.* From their efforts developed a revised version of S. 1301, which the Senate passed on October 5, 1988, by a vote of 90 to 0. The House passed the Senate Amendment on October 12, and the President signed it into law on Halloween.

2. Passage of the Treaty

On October 20, the Senate ratified the Berne Convention; for that historic occasion, five members of the Senate were present.[30]

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[28] H. Rep., p.9.

[29] As pertinent, the details of H.R. 4262 are contrasted with those of S. 1301 in the text *infra*.

[30] New York Times, October 21, 1988, p. 1 col. 1. Because five members falls somewhat shy of the 67 senators required to approve a treaty, presiding

The Department of State then prepared an instrument of accession for the President to transmit to the World Intellectual Property Organization, the body that administers the Berne Convention in Geneva, Switzerland. The Director General of the W.I.P.O. is required to circulate the United States's instrument of accession to all Berne members for three months before membership becomes effective. Paris text, art. 29(2). Thus, the U.S. should become a Berne member in good standing on March 1, 1989.

II. Mechanics of Implementation

A. Effective Date

The new law takes effect on the date on which the Berne Convention "enters into force with respect to the United States." BCIA, § 13(a). Thus, it is anticipated that the various changes canvassed below will become effective on March 1, 1989.[31]

With respect to causes of action arising before that effective date, the new law is inapplicable. BCIA, § 13(b). This provision should be interpreted in the same manner as Section 112 of the Transitional and Supplementary Provisions of the Copyright Act

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Senator Paul Simon resourcefully called for a division of the house, whereby senators note their votes by standing. Because Berne adherents stood in greater numbers than Berne opponents, the treaty passed. See Los Angeles Daily Journal, October 24, 1983, p. 3.

[31] The House bill had specified that the BCIA would become effective on the day following Berne accession. H.R. 4252, § 14(a). The purpose of such a time lag was "to assure that no possibility exists for invalidating the provisions of the Copyright Act on the basis of arguably contrary stipulation in the Berne Convention." H. Rep., p.52. See § II(C) *infra*. The problem with that approach is that the United States would be out of compliance with the treaty for one day; the State Department's preference was to have both law and treaty take effect on the same day. S. Rep., p.49. The Senate Amendment adopted the Senate approach, so that both law and treaty will enter into force simultaneously. H.J.E.S. at H10097.

To avoid all ambiguity with respect to the effective timing of the BCIA and U.S. accession to Berne, the House-Senate conferees recommended to the executive branch that it choose "a precise hour for the coming into force of the Convention for the United States in accordance with Article 29(b)(2) of the Convention." *Id*; S.J.E.S. at S14556.

of 1976, which contained similar language.[32] Thus, as to works infringed before March 1, 1989, even though suit is not filed until thereafter, the governing law should continue to be Title 17 prior to its amendment by the BCIA. Conversely, as to infringements occurring after March 1, 1989, even if with respect to a work published and/or registered for copyright before 1989 (as well as before January 1, 1978, the effective date of the Copyright Act of 1976), the governing law should be Title 17 as amended by the BCIA. See 1 *Nimmer on Copyright* § 1.01[B][3].

B. Retroactivity

Section 12 of the new law explicitly provides that it "does not provide copyright protection for any work that is in the public domain in the United States." BCIA, § 12. Taken literally and minimally, this provision merely expresses the truism that works in the public domain are *ipso facto* not protected by copyright. Its intent, nonetheless, is clearly not merely to legislate a tautology, but to avoid according retroactive protection by virtue of Berne adherence. S. Rep., p.48; H. Rep., pp.51-52. Thus, works that have already lost United States copyright protection as of March 1, 1989, cannot be resurrected by virtue of the new law. This conclusion applies equally to works that have already been adjudicated in the public domain within the United States[33] and to works that have not yet been ruled upon, but as to which a fatal flaw exists as of March 1, 1989 — even if such flaw (e.g., absence of copyright notice) would not be fatal after March 1, 1989.

The Berne Convention itself would seem to require newly adhering states to accord retroactive protection to works that are still protected in their countries of origin. Paris text, arts. 18(1), 18(4). See H. Rep., p.51. Indeed, the converse proposition abroad — namely, resurrection of United States copyrights in Berne nations that do not currently recognize them — was cited by the bill's proponents as a primary reason for United States accession to the treaty. Statement of Peter Nolan of the Motion Picture Association of America to House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, September 16, 1987.

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[32] See 17 U.S.C. § 112, Trans. Supp. Prov. (1976).

[33] E.g., International Film Exchange, Ltd. v. Corinth Films, Inc., 621 F. Supp. 631 (S.D.N.Y. 1985).

Thus, there is seemingly a disparity between the Berne Convention and its implementing legislation.[34] However, this disparity is of practical import to litigants in United States courts only if they may place reliance directly upon a treaty provision. That question in turn raises the issue as to whether the Berne Convention is self-executing under United States law, which is addressed in the following subsection.

A different question exists as to whether the United States must continue to protect works of foreign provenance once their own country of origin terminates copyright protection. The Berne Convention itself provides that the term of protection for copyright is "governed by the legislation of the country where protection is claimed; however, unless the legislature of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work." Paris text, art. 7(8). Under this provision, called Comparison of Terms or the Rule of the Shorter Term, most nations provide, consonant with Berne, that a work that has lost protection in its home country is ineligible for copyright protection, even if it falls within the specified term of the country wherein protection is sought. E.g., Plaisant, *France,* in "International Copyright Law and Practice," § 3[3] (Nimmer & Geller, eds. 1988). Nonetheless, the United States remains a country whose "legislature . . . otherwise provides;" no distinction is drawn for copyright duration purposes[35] under United States law between United States and foreign works. Therefore, once qualified for protection, a foreign work continues to enjoy U.S. copyright, even if the copyright lapses in its country of origin.

C. Self-execution

Almost a third of the new law's thirteen sections are designed,

[34] Although the House "Committee takes these points seriously," it determined nonetheless to address the question of the retroactivity required by Berne at a later date, "when a more thorough examination of Constitutional, commercial and consumer considerations is possible." H. Rep., p.52.

[35] For other purposes — namely, whether or not registration is a prerequisite to an infringement action — the new law does draw a distinction between United States works and works of foreign origin. BCIA, § 4(a)(1)(C)(1)(B). See Paris text, art. 5(3). See § III(B)(2)(a) *infra*.

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