A GARLAND OF REFLECTIONS ON THREE INTERNATIONAL COPYRIGHT TOPICS*

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I. THE EFFECT OF UNITED STATES BERNE ADHERENCE

A. *Introduction*

The United States is a party to many copyright treaties, including a network of bilateral arrangements with other countries[1] and one regional agreement.[2] I will concentrate on the two major multilateral agreements to which the United States is a party, the Universal Copyright Convention ("UCC")[3] and the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[4]

The consequences of United States Berne adherence can be classified for purposes of discussion as the domestic short term effects, the international short term effects, and the long term effects. The question of the domestic short term effects of United States Berne adherence is mainly governed by the Berne Convention Implementation Act ("BCIA").[5] I will not comment on

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1 *See generally* United States Copyright Office, Circular 38a: International Copyright Relations of the United States (revised March 15, 1989). States with which the United States enjoys bilateral copyright relations include Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, El Salvador, Finland, France, Greece, Hungary, India, Ireland, Israel, Italy, Luxembourg, Mexico, Monaco, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Romania, South Africa, Spain, Sweden, Switzerland, Thailand, and the United Kingdom. All of these bilaterals predate the coming into force of the Universal Copyright Convention ("UCC"), Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, and entry of the United States into the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), Sept. 9, 1886, *revised* Paris, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. To the extent that any of the countries listed above is a party to the UCC or Berne Convention, the terms of the relations established under those multilateral treaties will supercede conflicting terms of the relevant bilateral.

2 Buenos Aires Convention, Aug. 10, 1910, 38 Stat. 1785, T.S. 593.

3 Universal Copyright Convention, Sept. 6, 1952, U.S.T., T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

4 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

5 Berne Convention Implementation Act of 1988 ("BCIA"), Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801

this issue,[6] but instead, on the two other sets of issues: the short term international effects and the long term effects.

The short term international effects of United States adherence to Berne include any change in the position of United States copyright owners abroad after March 1, 1989. One should ask how, if at all, the United States adherence to the Berne Convention affected the degree of recognition which American works will receive abroad. Another aspect of the topic of international short term effects is the question of how, as of March 1, 1989, the rights of foreign authors in the United States have changed.

With respect to both of these questions under the general heading of international short term effects, it is easy to overstate the significance of United States adherence to the Berne Convention. There have been important international short term effects, but these effects are limited. However, I want to suggest that the third category of consequences noted above, the long term effect of United States Berne adherence, may be significant. Although it is too early to predict with any certainty the long term effect of the United States participation in the Berne Union on the United States or the long term effect of that participation on the rest of the international copyright community, speculation may be both timely and useful.

The nature of the arrangement into which the United States entered when it adhered to the Berne Convention is important to stress. Its ratification of Berne requires the United States to undertake a particular set of legal obligations and secure a particular set of legal rights. But along with adherence to the Berne Convention comes membership in a club, the Berne Union. The Berne Union, a club organized more than a century ago, has some general objectives and goals. The countries of the Berne Union pledge not only to observe certain rights or obligations among themselves, but also to collectively promote the recognition of "authors' rights."[7] Membership in the Berne Union will

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(1988)). *See* Symposium Appendix at 73. The domestic short term effects refers to the effect on authors in the American legal system.

[6] *See generally* Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 29 (1989).

[7] This characteristic of the Berne Convention arrangement is apparent from the Preamble to the Berne Convention and from its first Article, which remain today in essentially the original form adopted by the 1886 Conference. The Preamble recites that the countries of the Berne Union, "being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary artistic works," have agreed to the following provisions. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised*, Paris, July 24, 1971, Preamble, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. Article 1 states that the signatory

affect the United States in that the United States will participate in the "culture" of the Berne Union. Similarly, our presence in the Berne Union will effect the Union and its outlook. It seems safe to predict that the Berne Union will not be the same in ten years as a result of United States participation, although it is more difficult to predict the exact nature of the changes in the outlook of the Union which United States participation will generate. A look forward at the long term effects of United States Berne adherence, like a look at immediate consequences for United States international copyright relations, necessarily entails a discussion of the history of the Berne Convention and its relationship to the other important multilateral arrangement, the Universal Copyright Convention.

B. *The Historical Relationship Between the Berne Convention and the Universal Copyright Convention*

The first Act of the Berne Convention, the Act of 1886,[8] was the outgrowth of an historical movement that had begun in continental Europe, specifically in pre-revolutionary France. The movement was spearheaded by politically important and popular authors to promote broad international and domestic recognition of the cause of authors' rights.[9] The protection of authors' rights was based on the principle of national treatment without the requirement of reciprocal international copyright arrangements as an essential element of this campaign.

Another goal of the movement was the elimination of formalities in national law. These campaigners felt strongly that enjoyment of copyright or authors' rights protection should not be burdened by requirements of compliance with formalities. Uniformity, not only with regard to the international recognition of authors' rights, but some uniform body of authors' rights that would be recognized in the laws of all countries, was another of

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countries have agreed to the formation of a "Union for the protection of the rights of authors in their literary and artistic works." *Id.* at art. 1. As Sam Ricketson has pointed out, the word "Union" has an important function in the Berne context as a symbol of the member countries' commitment to the active promotion of the cause of authors' rights. S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1896-1986 151 (1987) [hereinafter RICKETSON, THE BERNE CONVENTION].

[8] Berne Convention for the Protection of Literary and Artistic Works, Berne Act, Sept. 9, 1886, *revised* 1908, 1928, 1948, 1967, 1971.

[9] Figures like Victor Hugo were pivotal in the pre-Berne militation for the recognition of authors' rights. In 1878, Victor Hugo presided over the International Literary Congress. Also present were other authors and publishers of the era, such as Turgenev and Bancroft. RICKETSON, THE BERNE CONVENTION, *supra* note 7, at 46. The Congress was an instrumental pre-Berne force in initiating authors' rights. *Id.*

their goals. Those were the essential elements of that program as it was defined in the middle of the 19th century and continue to be the essential elements of the program that underlies the present Berne Convention and the Berne Union.

These goals were accomplished by promoting the international recognition of authors' rights and creating pressure for the upgrading of national laws. Berne was the outgrowth of all of this and when it was adopted it was not only the first true international, multilateral copyright treaty, as distinct from a bilateral or regional agreement, but it also gave the whole cause of international copyright a new prominence.

In addition, the 1886 Act introduced the concept of minima, the notion that signatory countries had to include in their domestic copyright laws certain features in order to adhere to the Berne Convention and join the Berne Union. In particular, the 1886 Act insisted as a minimum requirement that all signatory countries respect the translation rights of foreign authors.[10] Although it was a modest first step, it was significant because the translation right symbolized international copyright arrangements. From that source, the Berne Convention has grown through a series of successive revisions, and with each successive draft the level of protection has been upgraded.[11] For example, the 1886 Act said nothing about the term of copyright protection, but in the 1908 Act the notion of a basic term of copyright based on the life of the author was introduced.[12] The 1908 Act referred to a term of copyright protection as merely a desirable feature of national law, but by the 1948 Brussels Act, it had matured into one of the Berne minima.[13]

Moral rights, the right to be identified as the author of the work and prevent distortion or mutilation of the work, are another typical example of how the Berne Convention has worked over the years. Moral rights for authors were introduced in the

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[10] Berne Convention, Berne Act, Sept. 9, 1886, art. 5.

[11] There were revisions to the original Act of 1886 approximately every twenty years, in 1896, 1908, 1928, 1948, and an attempt at a new act in 1967, which failed for a lack of sufficient number of adherents. *See* The 1896 Paris Revision Conference (April 4 - May 4, 1896); The 1908 Berlin Revision Conference (Oct. 14 - Nov. 14, 1908); The 1928 Rome Conference (May 7, 1928); The 1948 Brussels Revision Conference; The 1967 Stockholm Revision Conference; The 1971 Paris Conference (July, 1971). *See also* RICKETSON, THE BERNE CONVENTION, *supra* note 7, at 81. Ultimately, a new act was passed in 1971. *Id.* at 81-128. For a concise description of the way in which these successive conferences improved the level of protection which the Convention affords to authors' rights, see S. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 92-101 (1983) [hereinafter STEWART, NEIGHBORING RIGHTS].

[12] Berne Convention, Berlin Act, Nov. 13, 1908, art. 7, 1 U.N.T.S. 217, 223-24.

[13] Berne Convention, Brussels Act, June 26, 1948, art. 7, 331 U.N.T.S. 217, 227-28.

Berne Convention in 1928 simply as rights subject to national treatment, the recognition of which was not mandatory for Berne members.[14] In other words, a Berne member country was required to recognize such a right in favor of the author of a work originating in another Union state, if, and only if, that country affords such protection to domestic authors. After the 1948 revisions, no country could adhere to the Berne Union without having laws in place which gave moral rights protection for at least the author's lifetime.[15] In the 1971 Paris Act of Berne, the mandatory minimum term for the protection of moral rights was made coextensive with the basic term of protection, the life of the author plus fifty years.[16]

These examples show the manner in which the Berne Convention has operated over the years as a force toward the general upgrading of domestic law protection for copyright or authors' rights, as well as a vehicle for securing the international recognition of such interests. In fact, the Berne Convention has provided an important impetus for the upgrading of authors' rights all over the world. This is all the more impressive because the Convention has no enforcement mechanisms, apart from a device for the reference of disputes to the International Court of Justice under Article 33 which, as a practical matter, has never been utilized.[17] Although the pressure which Berne has applied to Berne Union countries with respect to the upgrading of national law has been purely moral in character, it has nonetheless been powerful.

Over the last century, the greatest challenges to Berne have been the same problems that have challenged national copyright laws all over the world, for example, the development of new information technologies.[18] The next time the members of the

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[14] Berne Convention, Rome Act, June 2, 1928, art. 6*bis*(2), 123 U.N.T.S. 233, 251.

[15] Article 6*bis*(2)-(3) of the 1971 Paris Act provides that the country in which protection is claimed must provide protection until the death of the author against any action "which would be prejudicial to [the author's] honor or reputation." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 6*bis*(2)-(3), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

[16] Article 7 of the Paris Act provides that "[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death." *Id.* at art. 7.

[17] Article 33(1) of the Paris Act sets forth the procedure for dispute resolution. If two member countries cannot resolve their conflict through negotiations or other means, they have the right to bring their case before the International Court of Justice. *Id.* at art. 33(1). However, paragraph (2) of that Article states that at the time of ratification of the Convention any country may "declare that it does not consider itself bound by the provisions of . . . [the preceding] paragraph. . . . " *Id.* at art. 33(2).

[18] *See generally* CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 212-53 (1986) (describing conflicts in goals relating to transfer of information and information technology between developed and developing countries).

Berne Union revise the Convention,[19] technological issues like the protection of computer programs and data resources, the copyright treatment of photocopying and satellite transmissions as well as the question of technology transfers between the developed and developing worlds are likely to be discussed. Indeed, one important motive for United States adherence to the Berne Convention was the desire to participate more fully in the next major revision of the Convention.

Prior to 1988, one significant failure of the Berne Convention was the Berne Union's inability to attract the United States as a member. In 1886, the United States was still in some ways an outlaw nation where world copyright was concerned, and a variety of practical and political difficulties effectively barred its adherence prior to 1988.

The earliest international copyright relations of the United States were based on notions of reciprocity.[20] Later, the United States moved into a series of bilateral treaty relations with a variety of countries. In 1935, the Senate made an abortive attempt to ratify the Berne Convention.[21] By the 1950's, the absence of the United States from the Berne Union posed a worsening dilemma. As the Berne minima became more exacting, i.e. as the level of protection required of signatory states by the successive acts of the Berne Convention became higher, it became increasingly difficult for the United States to join. As the prospect for United States adherence grew dimmer, the future of the Berne arrangements became less clear.[22]

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[19] If past practices of the Berne Union were a guide, a Revision Conference should take place within the next few years, as the twentieth anniversary of the 1971 Act is approaching. In fact, there is some indication that the next reconsideration of the substance of the Berne Convention may take the form of the discussion of a new protocol, rather than a general revision. *See infra* note 38 and accompanying text.

[20] The "Chace Act" of 1891, 26 Stat. 1106-1110 (1891), empowered the President to determine whether the laws of a foreign country afforded adequate protection to the rights of American authors, and where such a determination had been made to proclaim the availability of protection for the citizens of that country under American law. Within months, this enactment was followed by the issuance of a proclamation with respect to Belgium, France, Great Britain and its possessions, and Switzerland; more followed soon thereafter. *See* Solberg, *Copyright Enactments of the United States, 1793-1906*, 87-105, Copyright Office Bulletin No. 3 (2d ed. 1906).

[21] The United States Senate ratified the Berne Convention on April 19, 1935. 79 CONG. REC. 6032 (1935). On April 22, 1935, however, Congress withdrew ratification after recognizing the significant modifications United States copyright law would have undergone to conform to the Berne Convention. *Id.* at 6099.

[22] The absence of the United States from the Berne Union was only one aspect of a larger dilemma. *See generally* STEWART, NEIGHBORING RIGHTS, *supra* note 11, at 134.

> [Berne's] weakness, as seen after the 1939-45 war, was twofold. First, the Union had always striven for quality of rights rather than quantity of membership and it therefore lacked universality. The two states which had emerged from the war as 'superpowers,' the United States and the Soviet

In the years from 1947 to 1952, a group of states convened by UNESCO, the newly-formed United Nations cultural agency, which included many Berne countries as well as the United States, designed a plan to attract nations that previously had avoided joining the Berne Union into a new multilateral copyright arrangement, the UCC. The UCC, to which the United States finally adhered in 1955, had been designed as a sort of junior Berne Convention, with the specific objective of bringing the United States and other recalcitrant nations into the fold.[23] It was, in part, as a result of our experience with the UCC and our discovery that international copyright was not as threatening as it had been advertised to be, that the United States ultimately was able to muster the political will to join Berne.

C. *The Effect of the Berne Convention on the International Copyright Relations of the United States*

The Berne Convention is only the most recent of a series of international copyright treaties to which the United States has become a signatory over the years. This explains one reason United States adherence to the Berne Convention may be less important with respect to the recognition of protection for American works abroad than has generally been supposed. In fact, rights in American works already have gained broad recognition under bilaterals and, in particular, under the UCC before United States adherence to the Berne Convention. At present, most countries are members of either the UCC, or of both Berne and the UCC. While the Berne Convention is a more powerful source of protection for works of foreign origin than the UCC, UCC protection had already yielded significant benefits for American authors abroad before March 1, 1989.[24] Where a country had copyright relations with the United States under the

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> Union, were not members, neither were many Asian, and African states who were members of the United Nations. . . . The copyright systems not only of the United States but also of many Latin American countries differed from that of the Berne Union . . . .

Id.

[23] The United States was an early signatory to the UCC. The United States became a party to the Text of 1952 on September 16, 1955, and became party to the Text of 1971 on July 10, 1974. The Soviet Union, a later signatory, joined the UCC on May 27, 1973 by signing the 1952 text. COPYRIGHT, Monthly Review of the World Intellectual Property Organization 13 (June 1989).

[24] *See* United States Copyright Office, Circular 38a: International Coypright Relations of the United States (revised May 1989) (listing countries with which the United States had relations under the UCC prior to United States adherence to the Berne Convention, and the smaller number with which the UCC still forms the only basis for copyright relations, such as Malawi and Zambia).

UCC on that date, the additional benefits yielded by United States adherence to the Berne Convention may not, in the ordinary case, be great.

However, the UCC makes fewer requirements of signatory nations with respect to the term of copyright protection and protects fewer kinds of works.[25] Where the nature of the rights protected is concerned, the UCC is relatively vague and indefinite in its language, while the Berne Convention is relatively specific and, as such, far more powerful.[26] Thus, at the margin, there may be some advantages to Berne Convention adherence by United States copyright owners, in terms of the recognition of their rights abroad, even in countries which are contracting states of the UCC.

Moreover, the United States now has relations by way of the Berne Convention with some countries which are not members of the UCC, and with which the United States has no bilateral treaty relations.[27] This group of countries represents a large part of the African continent, as well as four countries which have been identified as significant sites for piracy of United States works.[28]

Thailand, one of these four, is an interesting case. Thailand has denied that it has effective copyright relations with the United States by way of bilateral agreements between the two

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[25] *Compare* Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 7, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221 *with* Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, art. IV(2), 25 U.S.T. 1341, T.I.A.S. No. 7868 (terms of protection); and Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 1, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221 *with* Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, art. I, 25 U.S.T. 1341, T.I.A.S. No. 7868 (works protected).

[26] The principal commitment undertaken by signatories of the UCC is to provide "adequate and effective" protection for the rights of authors and other proprietors of copyright in the works originating in other contracting states. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, *revised* July 24, 1971, Paris Text, art. I, 25 U.S.T. 1341, T.I.A.S. No. 7868, further specified in arts. IV*bis* and V. By contrast, the Berne Convention spells out a variety of specific minima, in terms of the recognition of authors' economic and moral interests, which Berne Union states must observe with respect to works originating in other Union countries. *See generally* Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, arts. 6, 6*bis*, 11-14, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. One effect of these differences is to make the recognition of the rights against the unauthorized retransmission of broadcast signals optional under the UCC, while it is mandatory by virtue of the Berne Convention.

[27] Benin, Central African Republic, Chad, Congo, Cyprus, Egypt, Gabon, The Ivory Coast, Libya, Madagascar, Mali, Niger, South Africa, Sri Lanka, Surinam, Thailand, Togo, Turkey, Upper Volta, Zaire, and Zimbabwe.

[28] Cyprus, Egypt, Thailand, and Turkey.

states on the ground that those bilaterals were never properly ratified in Thailand. However, Thailand will find it harder to deny that it has relations with the United States by way of the Berne Convention because Thailand is a member of the Berne Union. Although Thailand is only a member at the 1908 Berlin level, some degree of relationship under Berne attaches despite the fact that the United States joined at the 1971 Paris level. The mere fact of United States Berne membership does not necessarily provide automatic protection for United States works in Thailand or in any other Berne Union country, but it provides a basis for litigation with respect to unauthorized uses of American works in those countries. Therefore, the United States decision to join Berne is not an insignificant development from the standpoint of American copyright owners with interests abroad.

Nonetheless, the importance of United States Berne adherence is easily overstated. As a practical matter, the United States had access to protection by way of the Berne Convention in the past without membership in the Berne Convention by means of the "back door to Berne." The "back door to Berne" is a feature of the Berne Convention which results from the manner in which the Convention defines the term "country-of-origin." The point is crucial because the Berne Convention requires a work which claims one Berne country as its country-of-origin to be protected on the basis of national treatment in all other countries of the Berne Union.[29]

Country-of-origin is defined in terms of a variety of criteria, the most important of which is the place of the work's publication. The Berne Convention identifies various factors to be consulted in determining the country-of-origin of a work. If the work is first published in a country of the Berne Union, that country is the country-of-origin. Moreover, if the work is published simultaneously in several countries of the Berne Union and the term of protection is longer in one country than an-

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[29] Article 5(1) of the Berne Convention provides:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 5(1), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

In Berne Convention terms, the "country-of-origin" of a work can be the state where that work is published, if this represents "first" publication or occurs "simultaneously" with (i.e. within 30 days of) the first publication. This is true even when the author is not a national of the country in question. *Id.* at art. 5(4)(a).

other,[30] then the country that grants the shorter term of protection is the country-of-origin. Perhaps most significantly, if the work is published simultaneously in a Berne country and a country outside of the Berne Union, then the Berne country is the country-of-origin. Nowadays, if a work by an American author is published on the same day or within a few days in the United States and Canada, both would be the countries-of-origin, since the United States, like Canada, is a member of the Berne Union. But note that if one assumes the same circumstances of publication, the author could have claimed protection throughout the Berne Union even before March 1, 1989, on the grounds that Canada, a Berne country, was the country-of-origin of the work.[31]

Many American works were protected under the Berne Convention before the United States adhered to Berne. However, such protection never approached comprehensiveness. The "back door to Berne" was not an effective technique by which to obtain Berne protection for works of art published in limited editions and other works addressed to a limited public.[32] Therefore, American copyright owners of such works will benefit from United States adherence to Berne, at least in respect to Berne countries with which the United States has no other copyright relations.

Another way in which United States adherence to the Berne Convention may affect the rights of United States copyright owners abroad involves the retroactivity of Berne. Although in joining the Berne Union the United States failed to provide retroactive protection to works originating in other Berne countries and which were in the public domain in the United States as of March 1, 1989, retroactivity of protection is a feature of the 1971 Act of the Berne Convention.[33]

Despite the rather stingy behavior of the United States with

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[30] Art. 3 of the Berne Convention provides that "[a] work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication." *Id.* at art. 3, para. 4.

[31] Article 5 of the Berne Convention also articulates rules for determining the country-of-origin of works first published outside the Berne Union, without simultaneous publication in a Berne Union country, and for unpublished works. I will not address these here since they are not germane to the protection of United States works by the "back door" to the Berne Convention.

[32] Where such works are concerned, initial publication in more than one country usually is ruled out, either by definition or by virtue of the economics of demand. The Berne Convention makes it clear that to qualify as a publication in a given country, sufficient copies of the work must be made available there to satisfy the local demand. Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 4(4), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

[33] *Id.* at art. 18.

respect to extending retroactive protection to works originating in other Berne countries, one effect of United States Berne adherence may be to bring back into protection, in some Berne countries, United States works which as of March 1, 1989, were in the public domain there. This matter will be resolved under the domestic laws of the Berne countries in question.

As I have suggested, short-term benefits from United States Berne adherence, in the form of enhanced legal protection for United States works abroad, are real but limited. Interestingly, expanded legal protection for foreign works in the United States actually may be a more notable short term effect. As a practical matter, copyright owners in the Berne Union countries which had no copyright relations with the United States before March 1, 1989 had no good means equivalent to the "back door to Berne" available to American copyright proprietors through which to achieve indirect protection in the United States. Thus, although many United States works probably enjoyed protection in Egypt before March 1, 1989, few, if any, Egyptian works were protected here.

D. *Long Term Effects of United States Berne Adherence*

From the point of view of United States interests, the most important consequences of Berne adherence will be of a different kind. They will not be realized immediately, but will appear gradually over time.

First, United States adherence to the Berne Convention will serve the United States as an important talking point in its ongoing diplomatic efforts to promote greater recognition of the rights of American intellectual property owners abroad. Prior to 1989, American delegations representing the State Department, the Office of the United States Trade Representative, and private industry argued in favor of greater protection for American sound recordings, movies, and computer software. The governments of Pacific Rim countries responded by challenging the moral foundations of the American arguments. They pointed out repeatedly that the United States has never seen fit to join the Berne Union. This argument is no longer available.

Second, there is a close relationship between United States adherence to the Berne Convention and the potential for the development of an intellectual property code in the General Agree-

ments for Tariff and Trade ("GATT").[34] Because the copyright component of any set of intellectual property provisions in GATT will be based largely on Berne Convention principles, it would have been difficult or impossible for the United States to function effectively as an advocate for the inclusion of an intellectual property code in GATT without being a member of the Berne Convention.

There is another long term effect of the United States joining the Berne Convention which may or may not qualify as a benefit. Now that the United States has become a member of the Berne Union, it will be exposed over time to what I call the "culture" of the Union. Those influences will affect United States domestic law in a variety of ways. For example, the promotion of protection for authors' "moral rights" is, and has been since 1928, a basic feature of the Berne agreement. Despite Congress' decision to ratify the Berne Convention without making corresponding modifications in United States domestic law relating to moral rights, United States participation in Berne inevitably will tend to promote the cause of moral rights at home. That influence, in turn, will increase the likelihood of passage of moral rights legislation in the United States in the years to come.[35] Thus, United States participation in the Berne Convention will change the future shape of domestic American law.[36]

How much the United States will change the Berne Convention remains an open question. The United States brings to the Berne Union an orientation fundamentally different from that characteristic of most Berne Union countries. American participation may in time change the attitudes and the assumptions of

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[34] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948).

[35] Senator Kennedy's bill would confer a greater degree of moral rights protection on vocal artists. The bill has better prospects for passage in the aftermath of United States adherence to the Berne Convention than it did beforehand. Visual Artists Rights Act of 1989, S.1198, 101st Cong., 1st Sess., 135 CONG. REC. 81, 6811-13 (1989). A report issued March 15, 1989 in Washington by the Copyright Office, discusses, among other things, the possibility of new moral rights legislation to regulate such activities as film colorization. The authors of that report argue that the prospects for moral rights legislation in the motion picture field are also tied to United States Berne adherence. *See generally* TECHNOLOGICAL ALTERATIONS TO MOTION PICTURES AND OTHER AUDIOVISUAL WORKS: IMPLICATIONS FOR CREATORS, COPYRIGHT OWNERS AND CONSUMERS 77-96 (Report of the Register of Copyrights, United States Copyright Office, Mar. 1989).

[36] Another domestic law issue likely to feel the influence of the "culture" of Berne is the question of the appropriate definition of the scope of "fair use" under 17 U.S.C. § 107 (1976). Many Berne Union countries recognize no such broadly-defined exception to the exclusive rights of the copyright owners. United States Berne adherence is likely, over time, to encourage narrowing judicial interpretations of the "fair use" defense.

the Berne Union, just as participation in the activities of the Berne Union are bound to change the United States.

II. The Relationship Between National Law and International Copyright

The general scheme of international copyright law under which the Berne Convention and the UCC exist is based on the principle of national treatment. The extent of the rights of an American copyright owner in a foreign country where protection may only be claimed through the UCC or the Berne Convention depends upon the national law of the country where the protection is claimed. There are two cautions I should suggest about the process of ascertaining the content of national laws of other countries in determining the scope of rights available to American copyright owners abroad. One caution concerns the fact that several countries have undertaken major reforms in their domestic copyright laws within the last two years.[37] Thus, one must be sure to consult the most recent sources available.

The second and more fundamental caution involves the necessity for understanding more than the superficial language of the statutes in English translation. To understand another country's national law of copyright or authors' rights, one must focus on the underlying philosophy, premises, and assumptions on which that law is based. Otherwise, predicting the manner in which the law actually will operate in a client's case will be difficult. A comparison between French copyright law and Anglo-American copyright law illustrates this second caution.

The Anglo-American law of copyright is a law designed to promote economic objectives, created on behalf of and shaped to the interests of publishers and other distributors of intellectual property. In contrast, French law is the result of a process of militation in which individual authors were themselves active.[38] Consequently, French copyright law and other European laws based on it have always been remarkably single-minded in their focus on the author as the bearer of rights and on the promotion of the author's interest as the ultimate objective. This orienta-

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[37] The list includes Malaysia, Singapore, Indonesia, South Korea, Taiwan, the United Kingdom, Canada, Spain, Australia, and Belgium. Other countries, such as France, undertook major reforms earlier in the 1980's.

[38] French authors' rights law has its roots in the petitions of pre-revolutionary authors for royal recognition of their legal rights. It was reinvented after 1789, again at the insistence of individual authors. *See generally* M. Dock, Etude Sur Le Droit D'Auteur 113-57 (1963).

tion toward the author is the key to understanding many of the present features of French case law. Unless one refers to it, it is difficult to apply the black letter law.

For example, the decision of the highest French court in a case involving an artist's moral rights in a monumental sculpture designed for the premises of the Renault automobile company's headquarters in Paris is incomprehensible unless one understands the fundamental author orientation of French law.[39] That the court compelled Renault to expend funds to complete the construction of the work, against the company's wishes, makes no sense except in terms of the underlying philosophical orientation of French law.

More recently, a French television network's proposal to air a colorized version of an American black and white motion picture, "The Asphalt Jungle," brought a lawsuit by the heirs of John Huston, the film's director, by one of the film's screen writers, and by various representatives of the French equivalent of the Screen Directors' Guild, who joined as plaintiffs in the litigation.[40] The litigation initially led to an injunction against the broadcast of the film in its colorized version. Although the decision has been reversed on choice of laws grounds on initial appeal, it is widely expected that the Cour de Cassation, France's highest court, will reexamine the grounds of that reversal.

The injunction was issued in light of the fact that in connection with the production of the film, John Huston and the screen writer, as well as other participants in its creation, signed contracts waiving any possible moral rights in the work which they may have otherwise possessed. The trial court applied a choice of laws rule which rendered those American contractual undertakings irrelevant, holding that because of the intensity and importance of the authors' rights interests involved, ordinary conflicts principles should not apply. The trial court's decision is difficult to understand, both in its authors' rights aspect and in its choice of laws aspect, without appreciating the extent to which French law is author-centered. Once one appreciates this, how-

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[39] Dubuffet v. Regie Renault, Trib. Gr. Inst. Paris, Mar. 23, 1977, July 1977 RIDA 191, *aff'd*, Paris, June 2, 1978, 1979 D. Jur. 14, *rev'd*, Civ. 1re, Jan. 8, 1980, 1980 D. Jur. 89, *on remand*, Versailles, July 8, 1981, Oct. 1981 RIDA 201, 1982 D.I.R. 45, *aff'd*, Civ. 1re, Mar. 16, 1983, July 1983 RIDA 80, 1983 D.I.R. 432. The case is fully discussed in Francon & Ginsberg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM. J.L. & ARTS 381 (1985).

[40] Mme. Huston et autres v. C. Soc. d'exploitations de la 5th Chaine et autres, Trib. de Gr. Inst. Paris, Nov. 22, 1988; June 1989 *Recueil Sirey Dalloz* 342; *rev'd* Cour d'appel de Paris, 4eme chambre, section b, July 6, 1989.

ever, it is easy to see how the trial court's approach ultimately may be vindicated.[41]

Other features of French law which may be explained, at least in part, in terms of its underlying "author-centrism" include resale royalty provisions, provisions designed to regulate contractual relations between authors and publishers (forbidding particular contract terms so as to equalize the bargaining power of authors and publishers), provisions controlling the duration of copyright, the traditional opposition of the French to the concept of "works made for hire," and the French approach to the scope of copyright protection. A 1987 case called *Le Monde v. Microfor* from the French Cour de Cassation illustrates some interesting implications of the French approach to copyright protection.[42] In that case, the defendant company had incorporated into its informational database the titles of certain quotations from news stories that had appeared in *Le Monde*, the plaintiff newspaper. *Le Monde* brought suit on the ground that this use of quotations and titles constituted an infringement of its rights in the periodical issues from which the titles and quotations were drawn. Facing a similar case, an American court would have had to determine whether or not the material copied by the defendant was protected by copyright. If the court found that substantial amounts of protected material had been taken, American law would frame the remaining question in terms of fair use and would look to the quantity and quality of the takings for an answer.[43]

By contrast, the French courts focused on whether the defendant's use constitutes the making of a new work. The Cour de Cassation found that the defendant's database constituted a new work in itself, and that finding led to its holding that the defendant was permitted to make fairly extensive use of *Le Monde's* protected material. Had the Cour de Cassation determined that the defendant's index was not a new work, the defendant would have been entitled to make much less use of *Le Monde's* original material. Concentrating on whether or not the use constitutes the making of a new work in itself is alien to American law, but in keeping with the fundamental author-centered approach characteristic of the law of France.

To further complicate matters, it should be noted that re-

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[41] For a further discussion of the issues posed by this case, see generally, Ginsberg, *Colors in Conflict: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures*, 36 J. COPYRIGHT SOC'Y 81 (1988).

[42] Judgment of Oct. 30, 1987, Cass. ass. plen., Fr., 1987 Bull. Civ. I.

[43] *See, e.g.*, Telerate Systems, Inc. v. Caro, 689 F. Supp. 221 (S.D.N.Y. 1988).

cently France has approached certain specific problems, such as computer software protection, in ways which appear to be at odds with its traditional author-centered approach. As background to a description of the French solution to the problem of software protection, it is important to note that the United States and many other countries advocate assimilation of computer software to literary works, leading to full protection for computer software under copyright law. Alternatively, computer software may be excluded from copyright protection and protected instead under a separate, analogous scheme of law. This has been referred to as a "neighboring rights" or *sui generis* scheme of protection for computer software.[44]

As of 1985, France enacted new supplementary authors' rights legislation to deal with a variety of problems, most of which involve issues relating to new technology.[45] These 1985 rules, which are to be implemented within the scheme of the French law of copyright or authors' rights, provide a kind of hybrid form of protection for computer software. For example, the application of moral or authors' rights, a fundamental tenet of French copyright, is limited, if not eliminated, with regard to computer software. Moreover, the 1985 amendments introduce the work for hire doctrine, which is generally inimical to the French law of authors' rights, where computer software is concerned. Thus, although one may understand the basic philosophical premises and thrust of French copyright law, one must be aware that France, like many other countries, is coping with new problems arising from technological developments in ways which are not always consistent with the theoretical assumptions underlying its law in general. Obviously, one cannot necessarily predict how a country will move to provide protection to works involving new technologies by understanding that nation's traditional approach to thinking about copyright or authors' rights.

III. The Impingement of Trade Law on International Copyright

Over the last century, the Berne Union and the UCC have slowly but effectively raised international consciousness about authors' rights issues and have brought about a gradual but cu-

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[44] *See, e.g.*, Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs*, 70 Minn. L. Rev. 471 (1985).

[45] Law No. 85-660 of July 3, 1985, *Journal Officiel* of July 4 and Nov. 23, 1985. The law became effective January 1, 1986.

mulatively dramatic increase in the protection of authors' rights around the world. Although this is important, an increasing number of American copyright owners realize the significance of foreign markets, or at least their potential profitability, while simultaneously experiencing the loss of such potential profits by virtue of a phenomenon generally referred to as "piracy."

"Piracy" is not a legal concept because under the domestic laws and existing treaty commitments of many of the "pirate nations,"[46] the activities of their domestic citizens are legal. In practice, the problem of "legal piracy" is compounded by the reluctance of some countries to honor obligations, under domestic law or international treaties, to protect United States works in a serious and practically effective manner. At the same time, most developing countries, including but not limited to "pirate nations," favor legal regimes which afford their nationals special opportunities to use free of charge or at reduced cost works of intellectual property originating in the developed world. One might say that one nation's "piracy," is another man's "technology transfer."[47]

This phenonenon of "piracy" cannot be combatted through primary reliance on existing multilateral copyright agreements, to which many "pirate nations" do not even subscribe and which do not have enforcement mechanisms. For example, if it is discovered that nationals of another Berne country are engaged in duplicating works originating in the United States, the only potentially effective remedies are those which may be available in that country's own courts. If those courts fail to respond, the United States has no real remedy available that it would not have if it were aggrieved by the acts of nationals of a non-Berne country.[48] Although some degree of extraterritorial reach may be

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[46] *See China Called Top Copyright Pirate*, N.Y. Times, Apr. 20, 1989, at D7, col. 4 (summarizing report by industry group to United States Trade Representative). Other offenders include Korea, India, the Philippines, Taiwan, Indonesia, Brazil, Egypt, Thailand, Nigeria, and Malaysia.

[47] This dilemma of characterization is not unlike that reported by James Boswell in his description of a conversation between his uncle, Dr. Boswell, and Samuel Johnson, concerning the character of the controversial eighteenth century bookseller James Donaldson, who specialized in cheap reprints of public domain books. Johnson called Donaldson a "rogue who took advantage of the law to cheat his brethren," and drew what was intended an unflattering comparison between the publisher and Robin Hood, "who robbed the rich in order to give it to the poor." BOSWELL'S LONDON JOURNAL 1762-1763 312-13 (F. Pottle ed. 1950). Here, however, Dr. Boswell intervened: "Come, . . . here is a health to bold Robin Hood." *Id.*

[48] The only arguable exception to this generalization is the theoretical availability of an action before the International Court of Justice under Article 33 of the Berne Convention. Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 33, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828

achieved for United States copyright, as a practical matter our law does not stretch far beyond our borders.[49]

Trade law is one means available to deal with unauthorized uses of American works in foreign markets when United States law does not reach, existing multilateral treaties are limited in their efficacy, and the domestic laws of the countries in question cannot be depended upon. For example, the United States has sought bilateral agreements with various Pacific Rim countries, under which those states would agree to protect American works against unauthorized taking by their own nationals.[50] The United States attracts such countries to these negotiations either by offering to continue certain privileges which those countries enjoy under American trade law or by threatening to impose various sanctions available under American trade law to the United States where American industries are aggrieved by the trade practices of some foreign country. But despite the promise of this bilateral approach, there are many countries over which the United States may have little economic or moral leverage.[51] Moreover, the piracy problem tends to move around because the investment and equipment necessary to produce pirate sound recordings or videotapes is small. Consequently, when one country concludes a bilateral agreement with the United States and begins to take serious steps to control the piracy of American

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U.N.T.S. 221. However, it should be noted that this article is subject to reservation, and that a number of Berne Union countries have taken such reservations. As a practical matter, Article 33 never has been invoked.

49 United States federal courts do not have subject matter jurisdiction over copyright infringements that take place entirely outside of the United States. Peter Starr Production Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1442 (1986). *See also* Robert Stigwood Group, Ltd. v. O'Reilly, 530 F.2d 1096, 1101 (2d. Cir.), *cert. denied*, 429 U.S. 848 (1976). United States courts may have subject matter jurisdiction over a copyright infringement if it can be shown that the agreement or authorization to infringe the copyright was signed or occurred in the United States. *Peter Starr*, 783 F.2d at 1443.

50 Such negotiations have taken place between the United States and Thailand, Indonesia, Singapore, Malaysia, and Taiwan. For example, under a new agreement with Taiwan, the Taiwanese must recognize a limited degree of retroactivity of protection of American works back to 1965 and give a degree of recognition, subject to some compulsory licensing, to the translation rights of American copyright owners. AGREEMENT FOR THE PROTECTION OF COPYRIGHT BETWEEN THE AMERICAN INSTITUTE IN TAIWAN AND THE COORDINATION COUNCIL FOR NORTH AMERICAN AFFAIRS (July 13, 1989).

51 Thus, for example, as countries attain higher levels of development, the threat of denying them benefits under the Generalized System of Preferences becomes less meaningful. This approach has been attempted, without notable success, in the case of Thailand. *See Thailand Denied Certain GSP Benefits for Weak Intellectual Property Laws*, 37 PATENT, TRADEMARK & COPYRIGHT J. 279 (1988). Whether the retaliatory sanctions possible under the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 19 U.S.C. § 2901 (1988)), with which a number of "pirate" nations now are threatened, will produce significantly more leverage remains unclear.

works, the individuals involved may easily move to another country. Thus, bilateralism has severe limitations.

United States copyright industries and government agencies suggest an approach which places pressure on developing countries as a group. The proposed mechanism for putting such collective pressure on developing countries is the creation of a set of intellectual property provisions, including standards for copyright protection, within the framework of the GATT.[52] Although the GATT began as a system concerned mostly with elimination of tariff barriers, it has become concerned with non-tariff barriers as well. For example, many nations subscribing to the basic GATT agreement also are parties to the Code on Subsidies and Countervailing Duties,[53] an agreement which limits the ability of governments to provide unfair economic advantages to local industries exporting in international commerce. Advocates of the development of intellectual property provisions within the GATT framework argue that, by analogy, lax enforcement of the intellectual property rights of foreign proprietors also could be considered a means by which states shelter local companies from international competition.

Notably, Articles XXII and XXIII of the GATT provide for procedures to resolve disputes concerning the application of its terms, and similar procedures also apply to such offshoots of the GATT as the Subsidies Code.[54] Taking the procedures under that Code as an example, dispute resolution begins when one signatory country suspects another of illegally or inappropriately subsidizing local industry. The procedure begins with informal consultation, followed by formal conciliation. If these fail, there is dispute settlement by an appointed panel of experts which reports to the Committee on Subsidies and Countervailing Tariffs. This Committee, in turn, may issue recommendations and authorize counter-measures to be taken by aggrieved nations against the offending one.

As I have already noted, the possibility of sanctions arising out of particular disputes relating to authors' rights is one element that is missing from the traditional multilateral arrange-

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[52] The GATT has existed since 1947 and constitutes the major international system for regular commerce and the elimination of trade barriers and distortions between nations.

[53] Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 530, T.I.A.S. No. 9619 (effective Jan. 1, 1980).

[54] *See generally* O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 71-80 (1987) [hereinafter LONG, GATT MULTILATERAL TRADE SYSTEM].

ments, the Berne Convention and the UCC. Although GATT sanctioning mechanisms have not always worked well, they do function. In the perception of many, the threat of their invocation has been effective in many cases where the actual need to apply them never arose.

As part of the Uruguay Round of GATT negotiations, the United States and others, such as Japan and the European Economic Community ("EEC"), are promoting the development of a set of intellectual property provisions similar to the Subsidies Code within the GATT. The rationale for such provisions is that when widespread piracy of intellectual property receives official sanction or tolerance it becomes a potentially serious distortion of international trade.

At the same time, along with many other GATT parties, the United States, Japan, and the EEC are advocating a general rationalizaton and upgrading of overall GATT dispute resolution procedures, including greater use of mediation and arbitration, tighter deadline structures, and more use of non-governmental experts on dispute resolution panels.[55] Such improvements in dispute resolution would apply, of course, to disputes arising under any set of GATT intellectual property provisions.

At the present moment, prospects for some kind of agreement on intellectual provisions as part of the GATT Uruguay Round negotiations seem fairly bright.[56] But this was not always the case. The notion of dealing with intellectual property issues

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[55] The range of United States objectives on the issue of dispute settlement is suggested in the Office of the United States Trade Representative, General Agreement on Tariffs and Trade (GATT), Uruguay Round Progess Report 17-18 (mimeograph, Dec. 14, 1988). These objectives were substantially achieved in the course of the mid-term meetings held in Montreal and Geneva in 1988 and 1989, respectively, and the improved dispute settlement mechanisms went into effect, on a trial basis, on May 1, 1989. *See* Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee, Mid-Term Meeting, MTN.TNC.11, 24-31 (mimeograph Apr. 21, 1989) [hereinafter Mid-Term Meeting].

[56] *See* Mid-Term Meeting at 21-22 (setting forth Ministerial Declaration agreed upon at the Geneva meeting of the Trade Negotiating Committee). It provides a framework for further negotiations on this issue, portions of which follow:

> Ministers agree that negotiations on this subject shall continue in the Uruguay Round and shall encompass the following issues:
> (a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;
> (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
> (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
> (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures;

in the GATT framework first arose in 1982, when the so-called "anti-counterfeiting code" was proposed. As its name suggests, this code would have addressed a fairly limited range of trademark issues and an even more limited set of copyright concerns. At the time, the notion of an "anti-counterfeiting code" did not attract much support and with the beginning of the Uruguay Round of GATT negotiations, the main advocates of such a code, including the United States, more or less abandoned that proposal in favor of a more comprehensive set of intellectual property provisions.[57] In some ways, the scheme which these proposals for an intellectual property code in the GATT and, in particular, the copyright provisions of these proposals, envision is much like the Berne Convention and the UCC. Much of the language of the proposed intellectual property code is taken directly from the text of the Berne Convention and at times even refers to the Berne Convention text explicitly.[58] The paramount objective of the intellectual property code proposed by the United States also is the objective of the multilateral copyright arrangements: national treatment subject to minimum standards.

But the Berne Convention and UCC models take one only so far in understanding the new proposals for GATT intellectual property provisions. The United States "Suggestion" proposal goes well beyond the Berne Convention. It would require a copyright protection for software, which the Berne Convention does not, and an issue about which there is significant debate among the countries of the Berne Union. It would also require copyright protection for sound recordings, which Berne does not

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(e) transition arrangements aiming at the fullest participation in the results of the negotiations.

The participants of the GATT Uruguay Round envisaged more than an "anti-counterfeiting code" as indicated by another provision of the same statement, which asserts that "[t]he negotiations shall also comprise the development of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods." *Id.* at 22. What motivated the ministerial representatives of the developing countries to abandon their objections in principle to the negotiation of a broadly conceived set of GATT intellectual property provisions may be suggested, in part, by another paragraph:

> Ministers agree that in the negotiations consideration will be given to concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including developmental and technological objectives.

Id. at 21.

57 MTN.GNG/NG11/W/14/Rev.1 (Office of the Secretariat, Oct. 17, 1988). The United States position was encapsulated in a document entitled "Suggestion by the United States for Achieving the Negotiating Objective," filed with the GATT Secretariat by the Office of the United States Trade Representative in October, 1988.

58 *See, e.g.*, the items on "Term of Protection" (following the Berne Convention) and "Limitations and Exemptions" (referring to the Berne Convention). *Id.* at 8.

impose on members of the Union. Moreover, the proposed intellectual property code in the GATT would go further than the Berne Convention in limiting the extent to which signatory nations may apply the principle of compulsory licensing to the rights of copyright owners.[59]

Although the proposed intellectual property provisions are close to the Berne Convention in many ways, the World Intellectual Property Organization ("WIPO"), the Berne Secretariat organization, has met these provisions with considerable hostility. WIPO feels challenged by the proposals to include broadly conceived intellectual property provisions in the GATT. While WIPO has not formally opposed the negotiation of such provisions, it feels that the intellectual property code in the GATT poses a potential threat to its survival or at least the continuing preeminence of the Berne arrangements. Recently, however, WIPO has announced plans which suggest that it is considering how to respond constructively to the challenge of the GATT.[60]

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[59] The *Suggestion* states, in pertinent part, as follows:

> Copyright protection shall extend to all forms of original expression regardless of the medium in which the work is created, expressed, or embodied or the method by which it is communicated or utilized. Such works include literary works (including all types of computer programs expressed in any language, whether application programs or operating systems, and whether in source or object code); . . . sound recordings; . . . compilations (whether of protected or unprotected materials and whether in print, in a machine-readable database or other medium); and . . . works created with the use of computers, as well as works in forms yet to be developed.

Id. at 7. Berne mandates protection for none of these, with the exception of certain compilations and perhaps some computer-generated works.

In addition, the United States *Suggestion* would impose a significant new limit on the practice of "compulsory licensing," a familiar *bête noire* of the copyright industries in the developed countries, beyond the limitations expressed in the Berne Convention itself. "Compulsory licenses shall not be adopted where legitimate local needs can be meet [sic] by voluntary actions of copyright owners. Implementation, where necessary, . . . shall be strictly limited to those works and those uses permitted in the Berne Convention (1971) . . . . " *Suggestion*, at 8.

The Berne Convention, by contrast, articulates no "necessity" standard in connection with compulsory licensing. In other words, the United States *Suggestion* represents an "improved" version of the Berne Convention minimum requirements, which have been adapted to the specific needs of developed copyright-exporting nations.

[60] Since the Uruguay Round discussions of intellectual property entered their most recent and serious phase to date, WIPO has responded with a number of proposals of its own, which are featured as parts of the WIPO draft program from 1990-91. A summary of the draft program may be found in INT'L PUBLISHERS' ASS'N, NO. 3, RIGHTS: COPYRIGHT AND RELATED RIGHTS IN THE SERVICE OF CREATIVITY 7 (1989). It should be noted that the program also incorporates features relating trademark and patent, including the development of WIPO sponsored "harmonization treaties." The present discussion, however, will concentrate on the features which relate specifically in whole or in part to copyright. Each of these proposals represents, in some sense, a response on the part of WIPO, the international organization with the greatest institutional investment in the traditional "model" of international intellectual property agreements, to the challenge posed by the Uruguay Round of GATT negotiations.

One feature of the WIPO program is the development of a "Protocol" to the Berne

At least until recently, the other and more important source of resistance to the development of intellectual property provisions within the GATT framework was the developing world. At one level, it has been claimed that the mandate of the Puenta Del Este Conference which opened the Uruguay Round of GATT discussions does not extend to the development of a broadly conceived set of intellectual property provisions, but instead was limited to the further exploration for the 1982 proposal for an "anti-counterfeiting code." This objection probably never counted for much in the larger scheme of things, at least standing alone.

But on another level, developing countries have articulated a different and more profound argument. They initially resisted discussions leading to the negotiation of intellectual provisions in the GATT on the ground that such provisions would operate to the advantage of the developed world, while actually impeding cultural, scientific and technological progress in the developing world. This objection posed the greatest challenge to the efforts of the United States and other developed countries to bring about the development of GATT intellectual property provisions. The problem was one of what incentives to offer develop-

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Convention, which would address the fact that Berne Union countries interpret their obligations under the Convention differently. A Berne Protocol would clarify existing norms, or establish new ones, with respect to the protection of computer programs, databases, and sound recordings, as well as addressing a variety of more technical issues on which countries of the Berne Union differ in practice. Although the procedure by which such a Protocol would be developed is uncertain, since there is no specific precedent, one point is sufficiently clear and important to be mentioned here: Whereas a full revision of the Berne Convention text would require the unanimous consent of all states in attendance at a regularly convened Diplomatic Conference, a Protocol would require something less than full unanimity. In other words, the Berne Protocol would be a device for accelerating the traditionally slow pace at which the Berne Convention has taken account of changes in information technology and in the configuration of the national interests of Berne Union members. Necessarily, the terms of the Berne Protocol would be the outcome of a conventional international political process, rather than the fruits of the consensus-building process which has characterized the activities of the Berne Union in the past.

Another feature of the proposed WIPO program is the development of dispute settlement mechanisms, within WIPO, for use in resolving international intellectual property disputes. These procedures would apply to disputes among states, which could submit their grievances to an independent panel, convened by WIPO, which would in turn report its findings to the General Assembly of WIPO. In addition, an arbitration center would be created to resolve international disputes among private parties.

In both form and substance, this proposal represents an obvious response to the likely intrusion of the GATT into the field of intellectual property. The WIPO mechanisms for the resolution of disputes among states obviously are modelled on those of the GATT. Indeed, the WIPO program states that "WIPO will invite GATT to cooperate, if GATT so desires, with this WIPO undertaking," suggesting the possibility the GATT might delegate dispute resolution under any new intellectual property provisions to the WIPO. *Id.* at 8. The provisions for the resolution of private disputes are an attempt to go GATT one better.

ing countries to enter into these discussions, as well as to accept the binding nature of provisions that would emerge from them.

A set of intellectual property provisions in the GATT would be like other treaties in that it would not bind non-signatories. Moreover, its dispute resolution mechanisms would not apply with respect to such countries. Thus, the United States and other developed countries advocating such provisions would have to use their own individual economic clout to bring developing countries to the negotiating table and, ultimately, to convince them to sign. Recently United States legislation was designed to increase that clout by mandating a review of developing countries' General System of Preferences status with special reference to their responsiveness on intellectual property issues.[61] A willingness on the part of developing countries to participate in discussions to install an intellectual property code in the GATT is one factor which may be taken into account as part of this review. Developing countries failing to cooperate may find their tariff benefits at risk.

On the other hand, there are a range of positive incentives for participation built into the concept of GATT intellectual property provisions. Preferential trade treatment by other intellectual property members, including major developed countries, is one such incentive which may be offered to developing countries to secure their participation first in the negotiations and then in the code itself. Access to the dispute resolution mechanism which would go with the intellectual property provisions may be another incentive in itself. Under GATT principles, one signatory to a set of intellectual property provisions might be permitted to respond to violations of intellectual property rights in non-signatory nations by using reprisals under domestic law. But alleged violations by other signatory countries could be pursued only through the dispute resolution mechanisms of the GATT itself.[62] In other words, by signing on to a GATT intellectual property code, countries of the developing world would safe-

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61 *See* the Trade Act of 1974, 19 U.S.C. § 2411 (1976) (amended 1984). The Trade Act was further amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 19 U.S.C. § 2901 (1988)).

62 The term "retaliation" does not appear in the text of the GATT, and the concept likewise has no place in the GATT arrangements. LONG, GATT MULTILATERAL TRADE SYSTEM, *supra* note 54, at 66. Even so-called "retaliatory" measures authorized under the GATT as the result of dispute settlement procedures are in fact designed to do no more than reestablish the balance of concessions and advantage between the states involved. For the application of these general principles to the field of intellectual property, see Intellectual Property Committee (USA), Keidanren (Japan), and UNICE (Europe), *Basic Framework of GATT Provisions on Intellectual Property* (Statement of Views of

guard themselves against a variety of miscellaneous trade sanctions which countries such as the United States might otherwise take against them in connection with instances of alleged piracy. Moreover, there would be special arrangements built into the intellectual property code for technical assistance in the promotion of technology transfer among and between intellectual property code member nations, especially from the developed to the developing world.[63]

Finally, although hard to gauge, another argument in favor of participation by the developing countries in the formation of intellectual property provisions in the GATT is that upgrading intellectual protection for domestic and for foreign works may be in the best interests of the developing countries themselves. According to this argument, developing countries which have not taken measures to protect intellectual property rights lack the preconditions for the development of healthy national intellectual property industries. Thus, the software marketplace in a country without domestic copyright protection for computer programs will likely be dominated by pirated copies of foreign works, rather than domestically produced competing alternatives. By the same token, in a country that protects domestic and foreign software, the price of copies of foreign software will rise, thus providing a protected space for the development of the domestic software industry. Whether applied to software, sound recordings, or textbooks, these are largely hypothetical arguments, their viability needs to be tested. But they cannot be dismissed out of hand.

Although I once viewed the proposals for intellectual property protection in the GATT as a threat to traditional and historically successful multilateral approaches to the international promotion of copyright and authors' rights, it may be that, notwithstanding WIPO's concerns, a GATT-based approach will prove consistent and complimentary with traditional multilateral approaches. Together they may form an overall strategy for the enhancement of authors' rights. Recognition of copyright issues in the GATT framework might not displace the Berne arrangements so much as it would revitalize them.

These are the questions about the relationships between dif-

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the European, Japanese, and United States Business Community, June, 1988) at 97-98 [hereinafter *Basic Framework*].

63 *See Basic Framework*, *supra* note 62, at 28 (discussing options involving "enhanced access by the non-party countries to technology once they have acceded to the GATT [intellectual property provisions]).

ferent bodies of law relating to international copyright protection which we will watch during the months, years, and decades to come.