THE IMPACT OF BERNE ON UNITED STATES COPYRIGHT LAW*

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I. INTRODUCTION

Nineteen eighty-eight was a milestone year for intellectual property legislation.[1] Congress enacted ten bills last year falling within the general subject matter of copyrights, patents, and trademarks. Five of these new laws exert an integral impact on United States copyright protection.[2] I will focus on the most important piece of new legislation—the Berne Convention Implementation Act of 1988 ("BCIA").[3]

The BCIA, as its name denotes, is an act whose purpose is to implement the Berne Convention for the Protection of Literary and Artistic Works, initially adopted in Berne, Switzerland, on September 9, 1886.[4] The Berne Convention is the world's oldest

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1 1988 was significant for the United States with regard to international copyright relations in other ways as well. The United States formally suggested that the General Agreement on Tariffs and Trade ("GATT") be supplemented to include an intellectual property code. *See* 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). Also, the United States pursued and quietly resolved a trade complaint filed against South Korea by the Motion Picture Export Association of America. Sobel, *U.S. Enters New Era in International Copyright Relations*, 10 ENT. L. REP. 3 (Nov. 1988).

2 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801 (1988)); Satellite Retransmission Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (1988) (codified as amended at 17 U.S.C. § 119 (1988)); the Record Rental Amendment of 1988, Pub. L. No. 100-617, 102 Stat. 3194 (1988) (amending 17 U.S.C. § 109 (1988)); the National Film Preservation Act of 1988, Pub. L. No. 100-446, 102 Stat. 1782 (1988) (codified at 2 U.S.C. § 178 (1988)); and the Intellectual Property Bankruptcy Protection Act, Pub. L. No. 100-506, 102 Stat. 2538 (1988) (codified at 11 U.S.C. § 101 (1988)).

3 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). The BCIA contains 13 sections, most of which amend United States copyright law. *See* Symposium Appendix at 73.

4 Since 1886, the Berne Convention has been revised approximately at 20-year intervals. *See* Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 49, 52 n.11 (1989) [hereinafter Jaszi]. The current text is adopted at 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. The text is reproduced in 4 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT Appendix 27 (1989) [hereinafter NIMMER ON COPYRIGHT]. The preceding text of the Berne Conven-

and most comprehensive copyright treaty.[5] Among the seventy-seven members of the Berne Union are virtually all of the principal nations of the world, with the notable exceptions of the Soviet Union and the People's Republic of China.[6] It has taken the United States a full century[7] to bring our laws into compliance with Berne.[8] The BCIA finally completes that process, started[9] by the Copyright Act of 1976.[10] As of the effective date of the BCIA, March 1, 1989, the United States has taken its place in the international copyright community as a full-fledged member of the Berne Union.

The underlying philosophy of the BCIA, which Congress has repeatedly emphasized, is minimalism.[11] This minimalist philosophy dictates that to the extent that United States copyright law was clearly incompatible with the strictures of the Berne Convention, Congress amended that portion of United States law, but only to the minimum extent required to bring it into conformity with Berne.[12] By way of illustration, if ten experts and industry representatives testified before Congress, seven stating that United States law needed to be changed and three opining that United States law was adequate, then Congress, in accordance with its minimalist approach, left the law unaltered.[13] Congress

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tion, the Brussels Act of June 26, 1948, is reproduced in 4 NIMMER ON COPYRIGHT Appendix 26.

5 *See generally* RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987).

6 The Soviet Union belongs to the other great multilateral copyright treaty, 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, Paris Text, 25 U.S.T. 1341, T.I.A.S. No. 7868. China, by contrast, belongs to no international copyright organization and has yet to enact a comprehensive copyright statute. *See* Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1 (1988).

7 Actually, the United States and Japan both participated as observers at the initial 1886 conference in Berne. The United States delegate indicated rather obliquely that American participation in Berne might be forthcoming: "The position and attitude of the United States is one of expectancy and reserve." *See* Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J. L. & ARTS 9, 29-30 (1986).

8 In a little-known historical sidelight, the United States Senate actually 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 modification United States copyright law would need to undergo in order to conform to Berne. 79 CONG. REC. 6099 (1935). *See* Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J. L. & ARTS 89, 103 (1986).

9 *See generally* Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

10 *See, e.g.*, 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 9.01[A][2].

11 *See* H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 20 (1988) [hereinafter H. R. Rep. No. 100-609].

12 *Id.*

13 For instance, a group of interested representatives from both industry and government comprised the Ad Hoc Working Group on United States Adherence to the Berne Convention. *See id.* at 7. *See also Final Report of Ad Hoc Working Group on U.S. Adherence to*

acted only if all ten agreed that there was a clear inconsistency.[14] Even then, Congress acted only to the minimum extent required to bring the United States into compliance with Berne Convention requirements by eliminating overt impediments to Berne adherence.[15]

Given that the Senate has now ratified the Berne Convention and Congress, as a whole, has signaled its approval by amending United States copyright law to conform to the Berne Convention, the minimalist approach is disappointing. Assuming accession to the Berne Convention to be a positive development for our country, one would have imagined that after a century of effort, Berne proponents could secure greater changes to United States copyright law than the tepid provisions contained in the BCIA.[16] As an example, consider the juke box compulsory license,[17] about which widespread recognition of its incompatibility with the Berne Convention existed.[18] Congress acted in the BCIA by adding a very lengthy provision to the Copyright Act,[19] but upon careful examination, it is apparent that this lengthy provision will virtually maintain the *status quo ante*.[20] In essence, Congress has added some legislative twists and turns to the juke box provision which are designed to forestall almost any practical application.[21]

The irony here is that a primary motivation of the United States in joining the Berne Convention was to make an international statement about our moral posture in adhering to the world's foremost multilateral copyright treaty.[22] Given that desire, it is not only unfortunate, but self-defeating, for our govern-

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the Berne Convention, 10 COLUM.-VLA J.L. & ARTS 513 (1986) [hereinafter *Final Report of Ad Hoc Working Group*]. The Ad Hoc Working Group rendered the opinion that the cable compulsory license of 17 U.S.C. § 111(c) (1988) is Berne-compatible. *See Final Report of Ad Hoc Working Group* at 519. The BCIA leaves the cable compulsory license wholly unaffected.

14 The requirement of a notice for copyright subsistence is a primary example of a feature of United States law which, by consensus of congressional witnesses, is incompatible with the Berne Convention. *See infra* Part II(A).

15 Congress kept the notice formality largely intact, rather than merely eliminating copyright notices altogether. *See infra* notes 29-45 and accompanying text.

16 As noted by the House subcommittee, "[i]deal 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." H.R. Rep. No. 100-609, *supra* note 11, at 20 (emphasis added).

17 17 U.S.C. § 116 (1988).

18 H.R. Rep. No. 100-609, *supra* note 11, at 47.

19 *See* 17 U.S.C. § 116A (1988).

20 *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 8.17[A].

21 *See also* 1 NIMMER ON COPYRIGHT, *supra* note 4, § 2.08[D][2][a] n.163.4 (minimal adjustment of United States copyright law to Berne Convention requirement regarding architectural works).

22 *See generally* Jaszi, *supra* note 4.

ment to implement Berne only through the most stingy means available.

II. BREAD AND BUTTER ISSUES: PROVISIONS OF THE BCIA CONCERNING COPYRIGHT FORMALITIES

Representative Robert Kastenmeier, the chief congressional architect of the BCIA, stated that "the central feature of Berne is its prohibition of formalities."[23] Although the thrust of the Berne Convention is unquestionably anti-formal, Representative Kastenmeier's characterization is nonetheless a bit too broad. The Berne Convention does not prohibit formalities. While allowing formalities to exist *per se*, Berne forbids only those formalities that stand as a condition to the exercise and enjoyment of a copyright.[24]

For example, in the United States, those who register their works prior to infringement may, following a favorable judgment, obtain attorneys' fees and statutory damages.[25] Those two *remedies*—attorneys' fees and statutory damages—hinge on the *formality* of registration, which is perfectly compatible with the Berne Convention because they do not interfere with the exercise and enjoyment of a copyright. In other words, it does not contravene the Berne Convention to make *remedies* dependent upon formalities.[26] Alternatively, however, to make "the exercise or the enjoyment of a copyright" dependent upon a formality would be incompatible with the Berne Convention.[27] The primary example of hinging copyright *subsistence* on a formality is copyright notice, which has been a feature of every United States

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23 134 CONG. REC. H3082 (daily ed. May 10, 1988).

24 The Berne Convention states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality" in "countries of the Union other than the country of origin. . . ." Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 5(1)-(2), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

25 17 U.S.C. § 412 (1988).

26 Indeed, capitalizing on this feature, the BCIA doubled all statutory damages, meaning that, concurrent with Berne adherence, the formality of registration actually assumed heightened significance. *See* 3 NIMMER ON COPYRIGHT, *supra* note 4, at § 14.04[B][1][b].

27 The Berne Convention provides:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 5(2), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

copyright act since the original Copyright Act of 1791.[28]

A. *Copyright Notice*

Because of a near unanimity that our notice strictures violate Berne standards, the United States has finally abandoned its two century-old copyright notice requirement. Works first published two weeks ago, or today, or at any point in the future, need not bear any copyright notice to satisfy United States domestic law[29] or to receive protection under the Berne convention.[30] Nonetheless, affixing a copyright notice remains not only a good idea,[31] but a necessity for a copyright owner who wishes to command protection throughout the nations of the other major treaty, the Universal Copyright Convention ("UCC").[32] In addition to the above reasons, I would recommend continuing to affix a copyright notice because those who use copyright notices may preclude a defense of innocent infringement in mitigation of statutory or actual damages.[33] Conversely, those who do not use a copyright notice today may not invoke that remedy.[34]

Given that the nations of the Berne Union have eschewed any type of copyright notice for decades and that the United States now accedes to Berne membership, logic would indicate that our laws should now be in harmony with those of the rest of the world. Unfortunately, experience proves the opposite. In implementing the Berne Convention, Congress has left an extraordinarily complex system of formalities extant during this

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28 Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790). *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 7.01 n.1.

29 17 U.S.C. § 401 (1988).

30 Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* July 24, 1971, art. 2(2), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

31 Even during the Berne era, copyright notice remains "in all probability, the cheapest deterrent to infringement which a copyright holder may take." H.R. Rep. No. 100-609, *supra* note 11, at 27.

32 *See* 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. III, para. 1, 25 U.S.T. 1341, T.I.A.S. No. 7868. Nations that are party to the UCC but not the Berne Convention may, like the United States prior to March 1, 1989, require a valid UCC copyright notice in order to excuse compliance with other copyright formalities.

33 17 U.S.C. §§ 401(d), 402(d) (1988).

34 17 U.S.C. § 401(d) (1988) provides:

> If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).

Id.

supposedly anti-formal Berne era. Congress did not sweep aside all of the jurisprudence of copyright notice. Instead, it reenacted the existing sections of the Copyright Act with respect to formerly published works and added a new level of analysis with respect to post-March 1, 1989 publications.

As an example, suppose that after today's lecture, a member of the audience walks down Fifth Avenue to a book shop and purchases a cassette book-on-tape, which bears the following notice: "Copyright XYZ Publisher." Because that notice includes no date, which is required by United States notice provisions,[35] that defective notice is tantamount to publishing the work without a copyright notice.[36] However, given that the customer purchased the item today, March 16, 1989, the absence of the copyright notice is largely insignificant—under the Copyright Act of 1976 as amended by the BCIA, notice is strictly voluntary. Therefore, a conclusion about the copyright status of the work cannot be drawn.

Suppose further research reveals that the subject book-on-tape has never been registered with the United States Copyright Office and that it was first published in 1980 with the same notice specified above. Since the law in 1980 required defective notices to be cured by registration within five years, it would appear that this work is now in the United States public domain because it was not registered by 1985.[37] Thus, one may go to the United States Copyright Office, commission a search, determine that the work has not been registered, and thereupon conclude that it is not protected by copyright today.[38]

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[35] 17 U.S.C. § 401(b) (1988) provides:

> If a notice appears on the copies, it shall consist of the following three elements:
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> (1) the symbol ©, or the word "Copyright", or the abbreviation "Copr."; and
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> (2) the year of first publication of the work;
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> . . . .
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> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

Id.

[36] *See* E. Mishan & Sons, Inc. v. Marycana, Inc., 662 F. Supp. 1339, 1344 (S.D.N.Y. 1987).

[37] Section 405 of The Copyright Act of 1976, 17 U.S.C. § 405 (1976) [hereinafter 1976 Act] states that "[t]he omission of the copyright notice . . . does not invalidate the copyright in a work" if "the registration for the work has been made before or is made within five years after the publication without notice . . . ." *Id.*

[38] *Id.* at § 401(a)(2). *See* Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426 (9th Cir. 1986); Donald Frederick Evans and Assoc. v. Continental Homes, Inc., 785 F.2d 897 (11th Cir. 1986); M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421 (4th Cir. 1986); Disenos Artisticos E Industriales, S.A. v. Work, 676 F. Supp. 1254 (E.D.N.Y. 1987).

But now, suppose that even more research reveals that the subject book-on-tape was first published in 1970. Under this scenario an entirely different set of rules applies, because the Copyright Act of 1909 governed at that time.[39] Section 19 of the 1909 Act required a copyright notice to consist of the word "copyright" and the proprietor's name.[40] No date was required except for certain categories of work, such as printed, literary, musical or dramatic works.[41] Because our cassette tape does not fit within any of the excepted categories, no date was required in the copyright notice for this work. Consequently, when this work was first issued in 1970, it did bear a proper copyright notice. But what about its further publication in 1980? When the work was reissued with an undated copyright notice in 1980, the 1976 Act, which required dates in the copyright notices for this category of works, as for all works, governed. Consequently, it would seem that the 1980 publication doomed the work absent curing registration. Nonetheless, the 1976 Act contains a saving provision, which states that any work republished with a copyright notice that was valid under the 1909 Act may still bear that same copyright notice, notwithstanding that such a notice is insufficient to meet the guidelines of the 1976 Act.[42] Accordingly, the work, when first published in 1970, had valid notice. When it was republished in 1980 without changing its notice, that notice was still effective, and hence, the work remains protected today even if never the subject of a copyright registration.

The foregoing illustrates the complexities of United States copyright law, despite the "abolition" of the copyright notice requirement. Three levels of analysis govern the placement and effect of copyright notice. First, the BCIA does not require copyright notice for works first published after March 1, 1989.[43] Second, Congress left the notice provisions intact "[w]ith respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date" of the BCIA.[44] Third, the 1976 Act preserved the 1909 Act's notice provisions.[45] Therefore, as in the foregoing example, one must refer to the

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[39] The Copyright Act of 1909, ch. 320, 35 Stat. 1075-88 (1909) (revised at 17 U.S.C. § 1 (1976)).

[40] 17 U.S.C. § 18 (1909).

[41] *Id.*

[42] 17 U.S.C., Trans. Supp. Prov., § 108 (1976). *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 7.04.

[43] *See supra* note 26.

[44] 17 U.S.C. §§ 404(b), 405(a)-(b), 406(a)-(c) (1989).

[45] *See supra* note 42.

1909 Act and the original 1976 Act, as well as the BCIA, when determining in 1990 whether, for example, a work first published in 1969 and republished in 1983 remains protected by United States copyright. So much for the elimination of the notice formality.

B. *Registration*

Registration is another formality which underwent change when the United States joined the Berne Convention.[46] To place the Berne Convention's registration requirements in perspective, one must first understand the operation within the American framework of two doctrines of international copyright law which Berne brings to the fore: *national treatment* and *minimum standards*.

The requirement of *national treatment* is based on the principle that each given country ought not disadvantage foreigners.[47] Under the Berne Convention, those copyright privileges that a country affords its own citizens must equally extend to Convention claimants seeking copyright protection within that country.[48] For example, if an American can obtain statutory damages in the United States merely by virtue of registering her song with the Copyright Office, then a Brazilian and an Italian must also be allowed to obtain statutory damages in the United States after having registered their songs with the United States Copyright Office.

In the United States, national treatment has never been an issue. Once a foreigner's works qualified for protection, such works have historically been afforded every right pertaining to American-authored works. Thus, returning to the foregoing example, Brazilians and Italians have been accorded statutory damages for decades on precisely the same terms and conditions as Americans.[49]

The Berne Convention also sets forth certain *minimum re-*

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[46] Berne Convention Implementation Act of 1988, § 9, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (amending 17 U.S.C. §§ 408 & 411 (1988)).

[47] *See* Sobel, *The Framework of International Copyright*, 8 CARDOZO ARTS & ENT. L.J. 1, 7 (1989).

[48] Art. 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 (emphasis added).

[49] *See* 17 U.S.C. § 504(c) (1988).

quirements that each adhering state must accord. For example, the United States Congress has created the right to have infringing goods impounded and destroyed.[50] This right is protected under the Berne Convention,[51] and any abrogation of it by the United States Congress would run afoul of its Berne Convention obligations. However, Congress is not barred from changing its copyright law to eliminate rights not set forth and established under Berne.[52]

A word of caution is in order here. The minimum standard requirement only applies to Berne Convention claimants; it does not reach a country's internal laws as applied to its own citizens.[53] Accordingly, a country could eliminate a Berne Convention protection affecting its own citizens by revising its domestic copyright law. Congress, for instance, could eliminate the minimum standard of impoundment vis-a-vis only American claimants. Such a course would not violate the Berne Convention because litigants entering United States courts as Berne Convention claimants would still be able to invoke the minimum standard of impoundment. In effect, United States courts would grant Berne Convention claimants rights superior to American claimants, who would only receive national treatment.

With that background in mind, we can appreciate the changes that Congress wrought in United States registration provisions. Congress eliminated the requirement of registration solely for Berne Convention claimants, leaving United States citizens obligated to register their works as a jurisdictional prerequisite before filing suit.[54] This curious situation arose because the House bill that led to the BCIA left registration unaffected.[55] All claimants coming into United States district court, whether American or foreign, under that bill would have continued to be

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50 One can go to court in this country and, after securing judgment in favor of plaintiff in a copyright infringement suit, have the court order the infringing goods impounded and destroyed. 17 U.S.C. § 503(b) (1988).

51 Berne Convention For the Protection of Literary and Artistic Works, Sept. 6, 1886, *revised* Paris, July 24, 1971, art. 16, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

52 *Id.* at Art. 5(1).

53 The Berne Convention applies to those authors cited in articles 3 and 4 of the Convention.

54 "[R]egistration is not a condition of copyright protection." Berne Convention Implementation Act of 1988, § 9(a)(1), Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. § 408(a) (1989)). This adds an exception to § 411(a) "for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States." *Id.* at § 9(b)(1)(B) (codified at 17 U.S.C. § 411(a) (1989)). *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 7.16[B][1][b].

55 *See* H. R. Rep. 100-609, *supra* note 11, at 41 n.93.

under the jurisdictional prerequisite of tendering the registration certificate for the work on which the suit was based. By contrast, the Senate bill, viewing the registration prerequisite as a barred formality under Berne, completely eliminated the statutory provision[56] requiring registration.[57] To resolve the tension between the House and the Senate bills, Congress compromised by invoking the doctrine of minimum standards, outlined above, and providing that American claimants who come to court to sue for violations of their copyrights must, as they always had to, produce a registration certificate bearing the seal of the United States Copyright Office.[58] However, plaintiffs who come into United States courts as Berne Convention claimants are excused from the jurisdictional requirement of offering a registration certificate. In that way, no one from another Berne nation can claim that the United States has breached its treaty obligations by imposing a prohibited formality on Berne Convention claimants.

Once again, an irony must be noted. In addition to the reasons noted above, registration has other significant consequences. Only those who register their works are entitled to statutory damages,[59] attorneys' fees within the discretion of the court,[60] and a *prima facie* presumption of copyright validity.[61] Therefore, to avail herself of these additional privileges, which go beyond Berne minima, a foreigner must register her copyright. This seeming leniency for Berne Convention claimants ought actually be viewed as a hidden trap that only a foolish foreign copyright owner would invoke. For instance, if a Belgian author wishes to sue for violation of his copyright in United States court, he must hire an American lawyer, pay approximately $120.00 as a filing fee to a United States district court, and complete all the other procedural and logistical requirements for filing suit. However, based on the BCIA, this author could say, "I want to save myself from spending $10 and from filling out a registration form. Therefore, I am going to take advantage of this loophole, even though it is going to cost me recovery of statutory damages, attorneys' fees, and the *prima facie* presumption of va-

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56 17 U.S.C. § 411(a) (1976).

57 Section 7(c)(1) of S1301 provided that "[r]egistration is not a prerequisite to the institution of a civil action for infringement of copyright." S. Rep. 352, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 3706, 3710, 3735.

58 The Berne Convention allows members to apply their domestic copyright laws to their citizens. *See supra* note 47 and accompanying text.

59 17 U.S.C. § 412(2) (1988).

60 *Id.*

61 *Id.* at § 410(c) (1988).

lidity." It is difficult to foresee that this new provision will be commonly invoked. Accordingly, the change is more illusory than real.

C. *Recordation*

Another aspect of the United States copyright law that the BCIA has changed is the law governing the recordation of transfers. Moreover, unlike the registration change discussed above, this change will be more real than illusory.

In addition to registering copyright for a work, the 1976 Act provided that a transferee from the author had to file a recordation of transfer with the United States Copyright Office.[62] Such recordation, like a registration, served as a jurisdictional prerequisite to filing suit. The BCIA has now abolished that jurisdictional requirement. Moreover, this change applies to Berne Convention and American claimants alike.[63]

III. Ethereal and Constitutional Issues

A. *Public Domain Recapture*

Article 18 of the Berne Convention provides that upon accession to the treaty, an adhering state must accord protection to works that are still protected in their countries of origin.[64] This rule differs dramatically from the standard applicable under the UCC.[65] Thus, last year's Berne ratification posed a dilemma for the United States that we did not face upon joining the UCC in 1955. More specifically, the United States has never recognized copyright protection for Egyptian-authored works published in Egypt in 1970, for example. Yet those works are probably protected in Egypt today. The question therefore arises: Upon joining the Berne Union, of which Egypt is also a member, must the United States recapture the copyright of such Egyptian works out of the public domain?

Regardless of the answer to that question as a matter of in-

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62 *See* 17 U.S.C. § 205(d) (1987).

63 Berne Convention Implementation Act of 1988, § 109(a), Pub. L. No. 100-568, 102 Stat. 2853 (1988) (amending 17 U.S.C. § 501(b) (1989)).

64 Article 18(1) provides: "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin . . . ." Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 18(1), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

65 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. II, 25 U.S.T. 1341, T.I.A.S. No. 7868.

ternational treaty law, Congress has provided the answer as a matter of internal legislation. The BCIA provides that works in the United States public domain remain in the public domain.[66] As a practical matter,[67] therefore, the Egyptian works under consideration will not benefit from United States accession to the Berne Convention.[68]

B. *Moral Rights*

Almost a third of the new law's thirteen sections are designed, in whole or in part, to forestall any claim that the Berne Convention is self-executing under United States law.[69] In addition, this issue played a key role in the bill's deliberation in both houses.[70] The issue of self-execution merited such close attention not because of its intrinsic jurisprudential significance, but rather because of its intimate relationship to the controversial issue of moral rights. To appreciate the significance of this issue, Article 6*bis* of the Berne Convention must first be understood:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[71]

Many advanced nations, such as France and Japan, for example, incorporate Article 6*bis* of the Berne Convention into their domestic

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66 Section 12 of the BCIA explicitly states that it "does not provide copyright protection for any work that is in the public domain in the United States." Berne Convention Implementation Act of 1988, § 12, Pub. L. No. 100-568, 102 Stat. 2853 (1988). 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. No. 100-352, 100th Cong., 2d Sess. 48 (1988) [hereinafter S. Rep. 100-352]; H.R. Rep. No. 100-609, *supra* note 11, at 51-52.

67 Even as a treaty matter, there appears to be some justification for the United States' position. Some long-standing Berne members, evidently also do not recapture public domain works.

68 The contrary conclusion could arise if the United States courts applied the Berne Convention as governing law, rather than the BCIA. This issue raises the question of treaty self-execution. *See infra* notes 82-106 and accompanying text.

69 *See* Berne Convention Implementation Act, §§ 2-3, 4(a)(3), 6, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

70 *See* H.R. Rep. No. 100-609, *supra* note 11, at 28-38; 134 CONG. REC. S14553 (daily ed. Oct. 5, 1988) (statement of Senator DeConcini).

71 Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 6*bis*(1), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

copyright laws, either *in haec verba* or in substance. In the United States, by contrast, moral rights are in their infancy.[72] The issue therefore arose as to whether the United States would adopt the moral rights envisioned by Article 6*bis* in the course of joining the Berne Convention.

Before discussing Congress' resolution of this issue, I will elaborate on the foregoing moral minima of the Berne Convention. Berne contains two moral rights, *attribution* (paternity) and *integrity*. The *attribution* right is a right to claim credit, such that each time an artistic work is utilized the author's name must be listed. The right arises in all sorts of contexts. For instance, when a song is broadcast over the air on a radio station, the attribution right, if applied literally, would require that the singer's name be credited on the air. If applied even more broadly, it would mean that the instrumentalist's name, back-up vocalists' names, and the sound engineer's name must all be stated on the air. Consider an actual case, filed in Brazil, in which a Brazilian newspaper published a photograph of Joseph Mengele. The photograph had been taken from a British documentary, which had obtained the photograph from a Czech film crew, which, in turn, had received the photograph from an unknown provenance. Ponder the complexities of attribution under that scenario![73]

The *integrity* right is a right to prevent distortion or mutilation of an artistic work itself. In another actual case from foreign jurisprudence, the son of the producer of an Italian movie sued RAI, the Italian television network, for breach of the subject film's integrity right. RAI had put the film on television and interrupted the continuity of the film with commercials. The filmmaker's son claimed the showing of commercials constituted unconscionable mutilation of his father's work and thus should be barred as a violation of the integrity right.[74]

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72 *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 8.21 (cited in H.R. Rep. No. 100-609, *supra* note 11, at 33 n.63). The Ad Hoc Working Group concluded that United States law is in compliance with the Berne Convention's moral rights requirements, citing at length from Professor Nimmer's report prepared for the predecessor organization to the World Intellectual Property Organization ("WIPO"). *See Final Report of Ad Hoc Working Group, supra* note 13, at 548-57 (citing Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967)). The House Report draws the same conclusion. H. R. Rep. No. 100-609, *supra* note 11, at 34 & n.67.

73 "[T]he recognition of the right to claim authorship in each such potential 'author' would require an index of unmanageable size." *Hearing on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 100th Cong., 2d Sess. 398 (1988) (statement of David Ladd on behalf of The Coalition to Preserve the American Copyright Tradition).

74 "Preparation of works for commercial television necessarily entails cutting for in-

A useful contrast in understanding the integrity right stems from juxtaposing treatment of the same case in this country and in a jurisdiction with a highly developed *droit moral*, i.e. France. Dmitri Shostakovich, the celebrated Soviet composer, instituted suit in New York state court in 1941,[75] well before the U.S.S.R. first undertook international copyright relations in 1973.[76] Shostakovich acknowledged that he lacked copyright protection in the United States.[77] He nonetheless claimed that the defendant's exhibition of an anti-Soviet film entitled *The Iron Curtain* violated his moral rights by synchronizing his music in a manner offensive to his sensibilities.[78] The New York court rejected Shostakovich's contention that use of his music in an offensive context contravened his rights.[79] Nonetheless, the almost identical case was brought in France, which ruled *au contraire*.[80]

During the Congressional debate over the Berne bill, an avalanche of opposition to moral rights was registered, including by some of the bill's most vociferous advocates.[81] If the bill had any hope of passage, the task was presented of fashioning a method for the United States to join the Berne Union without incorporating its moral rights provisions into the fabric of American law. The law as passed purports to satisfy that goal.

C. *Self-Execution*

Against the background of the foregoing "parade of horribles," one can understand Congress' fear that moral rights, as contained in the Berne Convention, could be argued to have been imported into United States law by virtue of Berne adher-

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sertion of commercials, time limitations or indecency concerns. The [filmmaker's son is delaying] presentation by objecting to such cut or the inclusion of commercials." *Id.* at 399.

75 Shostakovich v. Twentieth Century Fox Film Corp., 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (1st Dep't 1949).

76 *See* 4 NIMMER ON COPYRIGHT, *supra* note 4, at Appendix 21.

77 *Id.* at 577.

78 The film depicted KGB infiltration of Canada. *Id.* at 576. The composers were given credit lines and their works were "reproduced . . . for a total of approximately 45 minutes. The entire running time of the film [was] 87 minutes." *Id.* Additionally, one of the plaintiff's names was shown when a character in the movie "plac[ed] a recording of th[e] particular plaintiff's music on a phonograph." *Id.* at 577.

79 *Id.*

80 Societe Le Chant du Monde v. Societé Fox Europe et Societé Fox Americaine Twentieth Century, Cour d'appel, Paris, Jan. 13, 1973 (discussed in Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 534-35 n.56 (1955)).

81 Representatives of the magazine publishing industry opposed the Berne bill precisely out of a fear that it would lead to increasing recognition of moral rights in this country. S. Rep. 100-352, *supra* note 66, at 6. Representatives of the Writers' and Directors' Guilds of America supported the bill, but also believed that it had to be supplemented by additional legislation protecting moral rights to satisfy their concerns. *Id.*

ence. Congress stated its position on this subject without ambiguity:

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law — (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.[82]

The unambiguous intent of Congress is that no litigant can come into a United States court and prevail on an argument that the Berne Convention is self-executing. The President of the United States and members of the Executive branch have gone on record with essentially the same declaration.[83]

The question remains how courts will construe United States ratification of the Berne Convention with regard to whether, in fact, the treaty is self-executing. On the one hand, moral right opponents need go no further than to cite the fact that the legislative and executive branches have stated that moral rights are not self-executing in the United States. But on the other hand, Article 6, clause 2 of the United States Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, *under the Authority of the United States*, shall be the supreme Law of the Land. . . . "[84]

A recent case involving the sculpture "Tilted Arc" is helpful in resolving the dilemma.[85] This work by sculptor Richard Serra was placed on display some blocks from here in Federal Plaza in lower Manhattan. After determining that the sculpture's location was inappropriate, the General Services Administration, which owned the sculpture, decided to move it. Serra attempted to invoke a moral right to have the sculpture remain where it was designed to be displayed.[86] He lost his case last year, based on constitutional

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82 Berne Convention Implementation Act, § 3(b), Pub. L. No. 100-568, 102 Stat. 2853 (1988). *See also id.* at § 2 (Berne Convention is "not self-executing under the Constitution and laws of the United States").

83 *Hearings on H.R. 1623 before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 100th Cong., 2d Sess. 1229 (1986) (letter from Ronald Reagan to Senate dated June 18, 1986). *See also* House Joint Explanatory Statement on House-Senate Compromise Incorporated In Senate Amendment to H.R. 4262, 134 CONG. REC. H10095 (daily ed. Oct. 12, 1988).

84 U.S. CONST. art. VI, cl. 2 (emphasis added).

85 Serra v. United States General Serv. Admin., 847 F.2d 1045 (2d Cir. 1988).

86 *Id.* at 1048.

grounds.[87] But as of March 1, 1989, the United States entered a new era, raising the possibility that Serra could go back to court. In response to a claim of *res judicata*, Serra could argue that his prior case was decided on the basis of ancient law, i.e. the copyright statute applicable in 1988, and that he would be entitled to justice based on current law, i.e. the BCIA.

Before addressing the merits of this hypothetical, I will examine an analogous case from France, where moral rights are taken quite seriously. In this case, Renault contracted with a sculptor to construct a statue for the road leading up to the Renault corporate headquarters.[88] The contract contained a liquidated damages clause, providing that if Renault did not perform completely, it would pay the sculptor x francs. Renault began to construct the statue, but in the middle of the project decided to stop. One could have merely looked to the contract to pay the liquidated damages. Instead, the French courts held that having undertaken construction of the statue, Renault was obligated to finish the statue and the statue would remain for an indefinite period in the location for which it was designed.[89]

Thus, I will assume for the sake of discussion that the issue is live. A Berne Convention view of moral rights, assuming it to be congruent with the French approach,[90] would mean that Serra should prevail. By contrast, a reaffirmation of pre-Berne United States law would mean that Serra would continue to be without a remedy. Thus, depending on whether or not the Berne Convention is viewed as self-executing, different results could emerge.

The jurisprudence in this country on treaty self-execution is complex. One can go back as far as 1833 to find a United States Supreme Court opinion stating that the Florida Cession treaty is self-executing and creating a private cause of action based on the treaty.[91] By the same token, the Ninth Circuit in 1974 recognized a private cause of action under a treaty with respect to Former Japa-

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87 *Id.* at 1048-52.

88 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.

89 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).

90 The assumption does not necessarily pertain. France implements moral rights to a much greater extent than the minimum standards of the Berne Convention. *See* Plaisant, *France*, M. NIMMER & P. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7 (1989) [hereinafter INTERNATIONAL COPYRIGHT LAW]. The issue is simplified here for the sake of clarifying the issues.

91 United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (Marshall, Ch. J.).

nese Mandated Islands.[92]

One can also find authority to the contrary. In 1979, the Third Circuit decided that the 1883 Paris Convention for Intellectual Property was not self-executing.[93] The Berne Convention is in some respects similar to, but in others dissimilar to, the Paris Convention.[94] Without exhaustive analysis on the subject at this juncture, suffice it to say that it is unclear whether Mr. Serra's interests should be vindicated.

However, a vital difference exists between United States ratification of the Berne Convention, on the one hand, and our ratification of the Florida Cession treaty and the treaty with respect to Former Japanese Mandated Islands, on the other. The Senate ratified the latter two without any statement by Congress that such treaties are not self-executing. By contrast, as already noted, Congress implemented the Berne Convention with an explicit declaration that the treaty is not self-executing.[95] What role does this difference play? There is no authority on how to construe such a legislative determination. In fact, Congress has made a determination of non-self-execution in only one other instance in the United States Code: implementation of the Convention on Psychotropic Substances.[96] Given that that treaty has never been ruled self-executing or non-self-executing, a judge would have to forge new law in order to upset the explicit Congressional declaration and the explicit Presidential declaration that the Berne Convention is not to be deemed self-executing.

But assuming that the foregoing objections are brushed away by a court eager to rule in Serra's favor and that the Berne Convention as a whole is deemed self-executing within United States law, the more limited question remains as to whether Article 6*bis* of the Berne Convention is self-executing. The answer to this limited

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92 People of Saipan v. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

93 Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299 (3d Cir. 1979) ("Both [Article 17 of the Paris Convention, 13 U.S.T. 1, 41, T.I.A.S. No. 4931 and Article IX of the Pan-American Convention, Aug. 20, 1910, 38 Stat. 1811, 1815] are at odds with a contention that they are self-executing").

94 *Final Report of Ad Hoc Working Group*, *supra* note 15, at 600-01.

95 *See* Berne Convention Implementation Act of 1988, §§ 2 & 3(a), Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. § 101 (1988)). The legislative history also indicated Congress' intention that the treaty not be self-executing in nature. The Senate committee included declarations of this intent "to make it absolutely clear to courts that any claim that Berne is self-executing be rejected." S. Rep. No. 100-352, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 3735. The Senate Report also explains that although the question of whether a treaty is self-executing is one for the United States courts to decide, the courts should look to these declarations of legislative intent for guidance. *Id.*

96 Pub. L. No. 95-633, 92 Stat. 3768 (codified at 21 U.S.C. § 801(a) (1988)).

question appears to be negative, meaning that Serra's hypothetical initial victory would be Pyrrhic. Article 6*bis* of the Berne Convention itself provides that "[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."[97] Thus, even if the Berne Convention as a whole is construed to be self-executing, Article 6*bis* intrinsically is not self-executing. Finally, even if all these problems were avoided, the fact remains that Berne Convention minimum standards, as already noted, apply only to Convention claimants. In other words, if he is an American, Serra cannot claim protection under the Berne Convention within the United States.

Thus, our lengthy speculation about Serra's renewal of his case shows that the BCIA is extremely unlikely, in the short run, to vindicate moral rights. Nonetheless, in the long term, although we have seen that moral rights have not been *ipso facto* legislated, they are arguably becoming implemented within United States law. This has been seen not only in the Kennedy Bill,[98] but in other laws as well. For example, the National Film Integrity Act of 1988[99] was enacted into law at around the same time as the BCIA. Its preamble includes a declaration by Congress of the cultural importance of motion pictures to the United States. Such recognition falls under the broad rubric of protecting the integrity right, even though the teeth in this new law are undeniably blunt. A few days after the BCIA was enacted, a New York court upheld a moral right in a book, despite the terms of the book contract.[100] Moral rights have arisen at the state level and are included by statute in the laws of six states.[101]

Bearing in mind the perils of prediction, the experience of the United Kingdom offers a worthwhile benchmark. Although that country joined the Berne Convention at its inception in 1887, moral rights were not then part of the fabric of British law. Even as recently as 1952, a special committee advising Parliament emphasized the foreignness of the idea of moral protection.[102] A generation

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97 Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, art. 6*bis*(3), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221.

98 Visual Artists Rights Act of 1987, S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. 11502 (daily ed. Aug. 6, 1987).

99 2 U.S.C. § 178 (1988).

100 Soc'y of Survivors of the Riga Ghetto, Inc. v. Huttenbach, 141 Misc. 2d 921, 535 N.Y.S.2d 670 (Sup. Ct. 1988). The court held that, although the publisher was the copyright owner, it did not have the right to drastically alter or revise the manuscript and publish it with the author's name. Additionally, the court did not prevent the plaintiff from seeking to enforce his contractual and common-law rights. *Id.* at 674.

101 *See* 2 NIMMER ON COPYRIGHT, *supra* note 4, at § 8.21[G][2]-[7].

102 Cornish, *United Kingdom*, INTERNATIONAL COPYRIGHT LAW, *supra* note 90, at § 7[1].

later, however, the Copyright, Designs and Patent Act of 1988[103] contains strong moral rights provisions.[104] With the increased tempo of internationalization, the recognition of moral rights within American law may occur much sooner than a generation hence. Moreover, the very "culture" of the Berne Union[105] to which the United States now adheres may also affect the American way of copyright protection, including judicial decisions regarding moral rights.[106]

IV. CONCLUSION

As stated at the outset, 1988 was a banner year for American copyright protection. We have now seen that a number of changes of a formal nature have entered our law as of March 1, 1989. In addition, a number of areas of a more theoretical or constitutional nature have also been implicated. As to those ethereal matters, by and large, no overt change was abruptly instituted upon United States accession to the Berne Convention. However, in the months and years ahead, I believe that we will see an evolution of United States copyright law directly affected by our adherence to the Berne Convention. I hope that my reflections today have offered a framework for viewing that evolution in context.

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[103] S.I. 1988, No. 48, *reprinted in* 11 HALSBURY'S STATUTES 5 (Current Statutes Service 1988). Coincidentally, this British act received the royal assent on November 15, 1988, only two weeks after the President signed the BCIA into law in the United States.

[104] Chapter 4 of the 1988 United Kingdom law is entirely devoted to moral rights. It includes the attribution right to be identified as the author and not to be falsely attributed with authorship, and the integrity right to object to derogatory treatment of a work, as well as provisions concerning divulgence, duration, and waiver. Copyright, Designs, and Patent Act of 1988, ch. 4.

[105] One of the primary accomplishments of the Berne Convention in 1886, which persists until this day, was the formation of all the constituent states into the Berne Union, an undertaking as political as it was legal. H.R. Rep. No. 100-609, *supra* note 11, at 12. This political unit is constituted at the very outset of the Convention. *See* 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.

[106] *See generally* Jaszi, *supra* note 4. *Cf.* Geller, *International Copyright: An Introduction*, INTERNATIONAL COPYRIGHT LAW, *supra* note 90, at § 3[4] n.334 (possibility of "porous" seepage of treaty principles into United States law).