Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention

INTRODUCTION

The theme of cultural, political, and economic interdependence among nations touches many facets of our lives. A nation cannot hope to prosper if it remains parochial in its view of issues that are relevant to the world at large. A nation's retention of an isolationist perspective in the areas of trade policy, cultural and political philosophy, and artistic creativity can only result in a denial of maximum benefits for the nation's consumers and industries and for the world community.

Since World War II, many multilateral conventions and international organizations have been created in recognition of international interdependence in an effort to manage that interdependence. These mechanisms have not always been successful in attaining their stated objectives, largely because of problems created by cultural, political, and economic differences, issues of state sovereignty, and shortsighted self-interest. The value of the conventions and organizations should not be discounted, however, for they have established a focal point for negotiations which have often yielded beneficial results to the international community.

The Berne Convention for the Protection of Literary and Artistic Works (Berne or Berne Convention)\(^3\) is the primary international treaty providing

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1. Many of the comments from the copyright community cited throughout this note are taken from U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. 427 (1985-86) [hereinafter Hearings].


3. The Berne Convention was originally signed on Sept. 9, 1886, and was codified at 331 U.N.T.S. 217. Berne was most recently revised at the Conference for the Revision of Berne, held in Paris in 1971. That revision comprises the current version of the treaty and is reported in WORLD INTELLECTUAL PROPERTY ORGANIZATION, COPYRIGHT: A MONTHLY REVIEW OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 1971, at 135. Future references to the Berne Convention, or Berne, will be to its reprinting in that volume. The latest version of the treaty was never registered with the United Nations, a fact which has no impact upon its validity or force. Berne is administered by the World Intellectual Property Organization (WIPO). Headquartered in Geneva, the WIPO was created in the late 1800s and serves as the secretariat for Berne as well as for other multilateral treaties, including the Patents and Trademarks Treaty and the Paris Convention for the Protection of Industrial Property. Hearings supra note 1, at 236-66 (statement of Martin Goldberg,
international protection for copyrights.\footnote{Signed by seventy-six nations, including all major producers of copyrighted works except the United States, the Soviet Union, and the People's Republic of China, Berne establishes a comprehensive and detailed system of rights and obligations that protects and furthers the dissemination of intellectual works in the international arena.}

Because the United States is one of the leading producers and exporters of copyrighted works,\footnote{Its nonadherence to Berne is particularly visible. Although the United States is a signatory to various bilateral copyright agreements and is a member of the Universal Copyright Convention, many in the United States believe that these copyright arrangements do not sufficiently protect United States copyright interests abroad. The perceived inadequacy of current agreements, coupled with problems of piracy, limitations in the protection extended by non-Berne members, and threats of retaliatory action by Berne members, have recently prompted renewed congressional counsel to the Information Industry Ass'n). The WIPO administers Berne just as the United Nations administers the various treaties and charters concluded under its auspices.} its nonadherence to Berne is particularly visible. Although the United States is a signatory to various bilateral copyright agreements\footnote{The Universal Copyright Convention, Sept. 8, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 133, \textit{revised} July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178, administered by the United Nations Economic and Social Council (UNESCO), is the international copyright treaty to which the United States is a signatory. The Universal Copyright Convention is discussed \textit{infra} notes 28-31 and accompanying text (comparing Berne and the Universal Copyright Convention).} and is a member of the Universal Copyright Convention, many in the United States believe that these copyright arrangements do not sufficiently protect United States copyright interests abroad. The perceived inadequacy of current agreements, coupled with problems of piracy, limitations in the protection extended by non-Berne members, and threats of retaliatory action by Berne members, have recently prompted renewed congressional


The United States has concluded bilateral copyright agreements with several nations. See, e.g., Agreement Relating to Copyright Relations Between the United States and the Philippines, Exchange of Notes at Washington, Oct. 21, 1948, 62 Stat. 2996, T.I.A.S. No. 1840, 77 U.N.T.S. 197; Agreement Providing for Reciprocal Protection of Literary, Artistic, and Scientific Works, Exchange of Notes at Washington, April 2, 1957, United States-Brazil, 8 U.S.T. 418, T.I.A.S. No. 3793, 290 U.N.T.S. 119; Agreement Relating to Reciprocal Copyright Relations, Exchange of Notes at Washington, May 4, 1950, United States-Israel, 1 U.S.T. 645, T.I.A.S. No. 2121, 132 U.N.T.S. 189. These agreements are often more easily negotiated than multilateral conventions since only two negotiating parties are involved. Moreover, they tend to reflect particular national concerns more accurately. Such agreements do little, however, to resolve the complications that arise from the international (rather than bilateral) nature of modern copyright.

\textit{infra} notes 34-40 and accompanying text. Essentially, produ-
consideration of Berne ratification. 8

In October 1986, former Senator Charles Mathias of Maryland, then
Chairman of the Senate Judiciary Committee’s Subcommittee on Patents,
Copyrights and Trademarks (the Subcommittee), introduced legislation 9
to amend the United States Copyright Code to allow for United States
compliance with Berne. 10 Although the Mathias bill expired at the close of the 99th
Congress, strong congressional interest in Berne continues. At the beginning of
the 100th Congress, Representative Robert Kastenmeier of Wisconsin in-

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ners of copyrighted works are concerned that Berne members will use a mechanism provided in
article 6 of Berne, which permits a signatory to retaliate against non-signatories that do not ade-
quately and effectively protect the interests of its citizens. 11 Berne, supra note 3, at 136-37. Although
this particular mechanism has not yet been used against works of United States origin, it is an
option which is permissible under international law and which appears increasingly probable in an era of
fierce trade competition.

8. Congress has addressed the issue of Berne adherence on many occasions over the course of the
past century. Hearings, supra note 1, at 286 (statement of the United States Council for
International Business). However, serious consideration of adherence has been blocked by apparently
irreconcilable conflicts between fundamental provisions of the United States Copyright Code, 17

The Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909), repealed by Copyright Revision Act of
particularly difficult to reconcile with Berne. For an example of the conflict between the 1909 Act
and Berne, see 17 U.S.C. § 24 (1976), which provided a complicated formula for determination of
duration of copyright. This section was impossible to reconcile with the simple “life plus 50”
formula of Berne article 7. Berne, supra note 3, at 137. The 1976 Code revisions eliminated this
particular difficulty by creating a “life plus 50” duration requirement that conforms to the Berne
1976, several of its significant provisions continue to be troublesome in terms of adherence to Berne.
See generally Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne
Convention [hereinafter Ad Hoc Report], reprinted in Hearings, supra note 1, at 427 (discussing features of
Code which appear to conflict with Berne).

For examples of articles discussing adherence to Berne, see Bodenhausen, U.S. Copyright Protec-
tion and the Berne Convention, 15 BULL. COPYRIGHT SOC’Y 215 (1966); Gebay, The U.S. System
and the Berne Convention, 26 BULL. COPYRIGHT SOC’Y 202 (1979); Kinges, The Role of the U.S. in
International Copyright, 56 GEO. L.J. 1050 (1968); Note, Abandon Restrictions All Ye Who Enter: The

9. The bill was entitled the Berne Convention Implementation Act of 1986, S. 2904, 99th Cong.,
2d Sess., 132 CONG. REC. S14,508, S14,510-12 (daily ed. Oct. 7, 1986), and was drafted based on
reports by the Ad Hoc Working Group, the United States Copyright Office, and testimony of the
copyright community before the Subcommittee. Id. at 14,509 (introductory statement of Sen.
Mathias). Although the bill expired at the close of the 99th Congress, its provisions will be discussed as
an alternative proposal to the two bills currently under consideration by the 100th Congress.

10. The Mathias legislation, unlike similar attempts in the past, was significant because it had the
backing of the current Administration. President Reagan submitted Berne for Senate ratification on
June 18, 1986. The President’s message was reprinted when S.2904 was introduced, 132 CONG.
House urging the Senate to join the Berne Convention). Recognizing the importance of membership
in an effective international organization, the Administration “stated its intention to ‘vigor-
ously pursue United States accession to the Convention.’” Hearings, supra note 1, at 287
(statement of the United States Council for International Business) (citing Administration State-
ment on the Protection of United States Intellectual Property Rights Abroad, at 4 (Apr. 3, 1986)).
roduced similar legislation in the House of Representatives, and in May 1987 Patrick Leahy of Vermont introduced an alternate proposal in the Senate.

In light of these developments, this note will address the desirability of United States adherence to Berne and the legislation required to implement it. Part I discusses the principal advantages of ratifying Berne. Part II discusses issues that complicate adherence and examines the legislative proposals of Senator Mathias, Senator Leahy, and Representative Kastenmeier. Part III concludes that Berne should be ratified and that the Copyright Code should be amended to ensure full United States compliance. This note challenges the suggestion that legislation aimed at minimal compliance be enacted and endorses the enactment of legislation that will clearly reflect the policies and provisions of Berne, as well as the collective interests of the international intellectual property community.

I. WHY RATIFY BERNE?

Although different sectors of the United States copyright community have particular reasons for promoting Berne adherence, four reasons are shared by the industry as a whole: (1) concerns over the lack of effectiveness of domestic and international trade laws; (2) concern over the creation of more comprehensive international copyright protections; (3) the absence of a voice for the United States in an effective international copyright organization; and (4) the avoidance of “back door” protections. Berne ratification would be a major step in alleviating each of these concerns.

A. INTERNATIONAL TRADE ISSUES

The first concern shared by the copyright industry recognizes that the market for intellectual property is truly international and that, as a result, “copyright must be treated as an international system of law.” Intellectual property is no longer defined solely with reference to traditional works such as literary, dramatic, and musical creations. New technologies have introduced entirely new forms of intellectual property, such as computer software and databases, into the international market. The copyright industries, in-

13. Hearings, supra note 1, at 408 (statement of Garson Kanin, President, Authors League of America, Inc.).
cluding these new technologies, have become important contributors to the United States gross national product\textsuperscript{14} and have helped to lessen the United States trade deficit.\textsuperscript{15} At a time when the trade deficit continues to increase, such contributions are invaluable. Thus, there is renewed interest in developing ways to protect the copyright industries and ensuring their continued prosperity in the international marketplace. In fact, this issue has become such an urgent concern that the new omnibus trade legislation currently being considered by Congress includes significant provisions regarding intellectual property.\textsuperscript{16}

Protecting the economically valuable intellectual labors of Americans abroad is by no means a theoretical problem. International piracy is cited by many representatives of the copyright community as placing a significant burden upon their industries.\textsuperscript{17} In a statement before the Subcommittee, the United States Council for International Business provided an illustration of the magnitude of the problem, reporting that “estimated annual losses to the United States copyright industries from piracy in ten representative countries are over $1.3 billion.”\textsuperscript{18}

Different measures have been considered and undertaken to remedy this situation. Individual industries, acting in concert with the United States gov-

\textsuperscript{14} In 1982, the copyright industries were reported to have contributed $140.9 billion to the GNP (a five percent share). \textit{Id.} at 282 (statement of the United States Council for International Business) (citing M. Rubin, \textit{The Copyright Industries in the U.S.: An Economic Report Prepared for the American Copyright Council.} 9 (1985)).

\textsuperscript{15} In 1982, the copyright industries reported a $1.2 billion trade surplus. \textit{Hearings, supra} note 1, at 282 (statement of United States Council for International Business) (citing \textit{International Intellectual Property Alliance, U.S. Government Trade Policy: Views of the Copyright Industries} 2 (1985). In this regard, Sen. Mathias noted that “[t]he trade in books, sound recordings, motion pictures, computer software, and other copyrighted works is one of the few bright spots in a trade picture that is overshadowed by trade deficits.” 132 CONG. REC. S14,508 (daily ed. Oct. 1, 1986) (introductory statement).


\textsuperscript{17} \textit{See Hearings, supra} note 1, at 292 (representative of the United States Council for International Business stating that “international piracy of copyrighted works has reached devastating proportions”); Dam, \textit{The Growing Importance of International Protection of Intellectual Property}, 21 INT’L LAW. 627, 627 (1987) (Vice-President of IBM discussing inadequate international protection of key trade component—intellectual property).

\textsuperscript{18} \textit{Hearings, supra} note 1, at 292 (citing \textit{United States Trade Rep., Piracy of U.S. Copyrighted Works in Ten Selected Countries: A Report by the International Intellectual Property Alliance to the United States Trade Representative} at 1 (1985). The ten countries analyzed in the report were Singapore, Taiwan, Indonesia, Korea, the Philippines, Malaysia, Thailand, Brazil, Egypt, and Nigeria. \textit{Id.} Singapore recently enacted a copyright code designed to enable it to conclude a copyright agreement with the United States. Proclamation No. 5657, 52 Fed. Reg. 19,122 (1987) (describing Singapore Copyright Act of 1987, Republic of Singapore Government Gazette, Acts Supp. no. 3 (1987).
government, have negotiated directly with countries where piracy is a problem.\textsuperscript{19} Termination of beneficial tariff rates under the Generalized System of Preferences (GSP) for countries that do not adequately protect United States intellectual property has also been recommended.\textsuperscript{20} Finally, the most significant measure is the proposal to create an intellectual property code to be incorporated into the General Agreement on Tariffs and Trade (GATT).\textsuperscript{21} As proposed, the Berne Convention would be established as the GATT Code on Intellectual Property.\textsuperscript{22} Thus, Berne adherence is essential for the protection of United States interests. As Senator Mathias noted, "GATT requires a mature standard of copyright principles as a yardstick for evaluating trade barriers. The [Berne] Convention provides that yardstick."\textsuperscript{23}

Because the protection of United States intellectual property is a critical trade issue that has a significant impact upon the economy, an effective inter-

\textsuperscript{19} See Hearings, supra note 1, at 249 (statement of Vico Henriques, President, Council for Business Manufacturers of America) ("I have personally gone to Taiwan and Singapore as part of a government delegation to try to negotiate an end to piracy.").

\textsuperscript{20} See id. at 248-49 (recommendations to this effect were made by the Computer Business Equipment Manufacturers Association (CBEMA) and other members of the International Intellectual Property Alliance). The Generalized System of Preferences (GSP) was created to promote industrial development in Third World countries. The GSP directs that developing countries adopt a deliberate policy of export-oriented industrialization and that developed countries lower the customs duties assessed on goods imported from those participating developing countries. The GSP was adopted in 1968, and its legal basis was laid in June of 1971 when the contracting parties to the GATT agreed to a waiver of the "most favored nation" provisions of article I (in order to implement the GSP). Individual nations may implement the GSP in different ways. J. Jackson & W. Davey, Legal Problems of International Economic Relations 1154-56 (1986).

\textsuperscript{21} The GATT is the treaty-organization that governs international trade. Drafted after World War II, it seeks to promote free trade among nations through the elimination of national trade barriers. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. (pt. 5) A3, A11, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 196 (as amended). The United States, together with many other nations engaged in international trade, is a signatory to GATT. The treaty has two principal provisions. Article I provides for most favored nation status, which requires each nation to extend to fellow signatories the same treatment it extends to its own most favored trading partners. Id. at A3, A12-A13, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 196, 198, 200. Article III provides for a national treatment obligation, under which a signatory must afford foreigners at least the same protections and rights under national law as it grants to its own nationals. Id. at A3, A18-A19, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 204, 206, 208. Pursuant to these general GATT obligations, GATT signatories have adopted codes that address more specific trade concerns such as import duties and subsidies. The proposal for a GATT Code on Intellectual Property demonstrates the recognition by GATT signatories that protection of intellectual property from piracy and other nontariff trade barriers is now a major trade issue. Dam, supra note 17, at 627 (government ministers recognized international protection of intellectual property as a trade issue to be negotiated as GATT agenda item).

\textsuperscript{22} See supra note 3 (describing Berne minima).

\textsuperscript{23} 132 CONG. REC. S14,508-09 (daily ed. Oct. 1, 1986). It is possible that an eventual GATT intellectual property code would not be modeled after Berne if the negotiating parties chose otherwise. Moreover, should such a code be adopted, it would not necessarily bind all GATT members; it would instead bind only those members who chose to adhere to it. Despite this possibility, it is unlikely that nations seeking the creation of a GATT intellectual property code, many of which are Berne signatories, would refuse to incorporate Berne into the proposed code.
national system to protect intellectual property rights is essential. The GATT can provide that system. Currently, Berne establishes minimum standards for the protection of intellectual property. It does not, however, provide an enforcement mechanism for ensuring effective compliance by signatory states;\(^{24}\) compliance is entirely voluntary. Consequently, many signatories enjoy the benefits of membership, but for various domestic reasons do not conform to all of the standards set by Berne.\(^{25}\) If the Berne minima were incorporated into a GATT code, the latter's enforcement mechanism would help to enhance compliance.\(^{26}\)

The United States is a major proponent of a GATT Code on Intellectual Property.\(^{27}\) Any and all efforts by the United States to negotiate an intellectual property code based upon Berne at the next round of GATT negotiations will not, however, be credible unless the United States becomes a signatory to Berne.

B. COMPREHENSIVE INTERNATIONAL PROTECTION

While the United States is a member of the Universal Copyright Convention, this organization has not been very effective in protecting intellectual property rights because it imposes little more than a national treatment obligation on its members.\(^{28}\) The Universal Copyright Convention thus requires that foreign works not be discriminated against under a nation's domestic laws. The result is that international unity of rights and obligations are sacrificed in favor of nondiscrimination. If a member country provides few copyright protections to its own authors, it will not be required to provide more for foreign authors.

Berne provides superior, more comprehensive protections, moving beyond the national treatment obligation and requiring signatories to enforce prescribed minima for the protection of works of foreign authorship.\(^{29}\) A Berne

\(^{24}\) Article 33(1) of Berne does provide that disputes between members are to be brought before the International Court of Justice. However, article 33(2) specifically allows members to indicate upon accession that they will not be bound by article 33(1). Berne, supra note 3, at 145. This, in addition to the reality that the International Court of Justice hears very few cases each year, renders the enforcement mechanism provided by article 33(1) ineffective.

\(^{25}\) Australia, Ireland, Liechtenstein, and South Africa, for example, do not afford moral rights protections. Ad Hoc Report, reprinted in Hearings, supra note 1, at 461.

\(^{26}\) General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, art. XXIII, 61 Stat. (pt. 5) A3, A12-A13, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 266-68 (as amended). GATT enforcement actions are not consistently successful because a sovereign nation must agree to comply with such an action. In practice, however, countries do tend to adhere to GATT panel conclusions for political reasons.

\(^{27}\) Dam, supra note 17, at 627, 633 (discussing enthusiasm of U.S. industry and Congress regarding GATT intellectual property code).


\(^{29}\) The force of this argument is somewhat weakened when a Berne signatory also belongs to the
signatory that provides few intellectual property protections for its own citizens must nevertheless provide the Berne minima for foreign authors.\textsuperscript{30} Moreover, the level of protection that the Berne minima do establish often surpasses that of the United States Copyright Code.\textsuperscript{31}

The effectiveness of the Universal Copyright Convention in protecting United States interests has been further impaired by the withdrawal of the United States from UNESCO, the body within the United Nations that administers the Convention. As one commentator recently remarked, "[a]s a result of our resignation from UNESCO we have lost our only direct influence in international copyright matters since we no longer participate in the UNESCO General Conference which passes on the [Universal Copyright Convention] program and budget."\textsuperscript{32}

In contrast, the World Intellectual Property Organization (WIPO), which administers Berne, is highly regarded by the United States copyright industry as a body with particular expertise in the area of intellectual property. Such expertise and specialization are invaluable in the quest for the perfection of an effective system of international intellectual property law and relations.

C. VOICE IN AN EFFECTIVE INTERNATIONAL ORGANIZATION

As one of the world's largest producers and exporters of intellectual property, the United States should have a voice in the formulation and development of international legal standards of copyright protection. It is therefore imperative that adherence to Berne be considered now. In 1990, the WIPO will sponsor another revision conference, the first such conference since the Paris Act of 1971. United States participation in the revision conference as a member of Berne would help to ensure that United States interests will at least be considered by the membership. Moreover, should the Berne minima eventually become incorporated into a GATT Code on Intellectual Property, United States interests will be further enhanced by its participation in the Berne revision conference and the development of the GATT code.\textsuperscript{33}

\textsuperscript{30} This creates the potential for a controversial dual system of copyright protection, in which foreigners are treated more favorably than nationals.

\textsuperscript{31} The disparity in protection exists primarily because of the difference in focus between the Code and Berne. The Code focuses upon the rights of the public and the owner of the copyright, whereas Berne focuses upon the author's rights. For a comprehensive discussion of the conflicting provisions of the Code and Berne, see infra part II.c.


D. AVOIDANCE OF "BACK DOOR" PROTECTIONS

Article 3 of Berne provides full protection to the work of a person who is not a citizen of a signatory if that work has been simultaneously published in a Berne country. 34 This article creates a "back door" to Berne protections for authors from the United States who publish their works "simultaneously"35 in a Berne country.36

At least three problems exist with such "back door" protection. First, a reciprocity problem exists because authors from the United States may benefit from high level copyright protections in other countries while these protections are denied to foreign authors in the United States. Although this "free ride" is beneficial to authors from the United States, it is not an appropriate solution from a political perspective.

Second, a retaliation problem exists. Although Berne provides protection through the "back door," article 637 also permits retaliation by Berne signatories against other countries (both Berne and non-Berne nations) that do not adequately and effectively protect the copyright interests of their authors and creators.38 While this retaliatory mechanism has not yet been employed by Berne countries against United States copyright interests, it is a legal tool which is available to Berne nations if they become frustrated with the use of "back door" tactics by authors from nonmember countries.39 Retaliation by Berne members against the United States appears increasingly possible in light of the current escalation of trade disputes between the United States and its trading partners in Europe and Japan.

Third, if an author from the United States simultaneously publishes in a Berne nation, suspicions may be aroused that the publication is "de minimis" and designed solely to gain the benefits of Berne protection. Such protection

34. Berne, supra note 3, art. 3, at 136.
35. The term "simultaneously" has been defined differently in several earlier versions of Berne. The meaning varies depending upon which version of the treaty a member nation has signed. The older versions of Berne do not define the term and thus leave the individual signatories room to develop their own interpretations. The 1971 Paris Act defines "simultaneously" as either true simultaneity or within 30 days of publication in a non-Berne nation. Berne, supra note 3, art. 3(4), at 136.
36. Canada, a Berne signatory, often provides recourse for United States creators. The Canadian Copyright Code defines simultaneity as publication in a Berne member nation within 14 days of publication within a non-Berne country. However, the Canadian Code also forbids the importation of works published in a non-Berne member country for fourteen days. Copyright Act, CAN. REV. STAT. ch. C-30, § 3(4) (1970). This effectively closes the "back door" by prohibiting the very action specified in the Canadian Code that would trigger protection under Berne. Fortunately for United States authors, this provision has not been enforced. The option to do so, however, remains available to the Canadians, should they wish to exercise it.
37. Berne, supra note 3, art. 6, at 137.
38. Id.
may be denied if a work is deemed to have been published solely for this purpose.\textsuperscript{40}

Ultimately, the issue of “back door” protection is one of integrity for the United States copyright community. Membership in Berne would provide full reciprocal treatment of United States and foreign authors and would eliminate the need to use the “back door.”

II. SPECIFIC ISSUES REGARDING ADHERENCE

Justifying the ratification of Berne is a simpler task than is reconciling the specific rights and obligations it embodies with particular provisions of the United States Copyright Code. Once a consensus is reached that there are compelling reasons for the adoption of Berne, there remains the difficult determination of whether the current United States copyright system can incorporate the requirements of Berne, or whether instead the existing system must yield in order to honestly and completely incorporate Berne protections. Before confronting the potential conflicts between specific provisions of Berne and the Code, two questions need to be addressed: first, whether adoption of Berne would be constitutional, and second, whether Berne is an executory treaty or a self-executing one.

A. CONSTITUTIONAL IMPEDIMENTS

United States consumers of copyrighted works have questioned whether Berne’s extensive protection of authors’ rights would be unconstitutional if written into the United States Copyright Code.\textsuperscript{41} This inquiry reflects fundamental policy differences between the United States Copyright Code and Berne.

The argument for unconstitutionality is fairly straightforward. The Constitution states that “Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Dis-

\textsuperscript{40} See \textit{Hearings, supra} note 1, at 267 (statement of Morton Goldberg, representing the Information Industry Ass’n) (“if an infringement action were brought in [the Berne] country, a court might seek to find some technical defect in the simultaneous publication”); id. at 149 (statement of Irvin Karp, Counsel, Authors League of America, Inc., and Chairman, Ad Hoc Group on U.S. Adherence to the Berne Convention) (“Many allegedly ‘simultaneous’ publications may not withstand close examination.”).

\textsuperscript{41} See \textit{Hearings, supra} note 1, at 366 (statement of Edward A. Merlin, Vice-President, Government Relations, National Cable Television Ass’n) (“Our American commitment to balance the public’s interest in access to creative works against the private interest of authors may create a situation of friction with some of the concepts of the Berne Convention . . . .”); see also id. at 360 (statement of August W. Steinleibner, Chairman, Educators’ Ad Hoc Committee on Copyright Law) (Committee’s concerns ‘raise the Constitutionality of any further restriction on the use of intellectual works’).
coveries.” Thus, the primary purpose of copyright is to ensure that creative works are made available to the public. The means designed to ensure that end is the existence of incentives for authors in the form of limited monopolies in their works. The existing Code embodies the notion of a limited monopoly. Copyright owners have exclusive rights in their works for a limited term. These exclusive rights are, however, heavily circumscribed by extensive provisions such as the fair use exceptions, the compulsory license provisions, and formalities such as notice, registration and deposit. These provisions serve to maintain the constitutional bias in favor of public accessibility to copyrighted works. Because adherence to Berne would require implementing legislation that would necessarily alter this fundamental, constitutionally predicated bias to promote author’s rights, such alterations are arguably unconstitutional.

A spokesman for the National Cable Television Association, a trade association whose members are consumers of television productions, expressed this concern as follows:

The United States can be distinguished from most other countries by the commitment it has made as a society to . . . the free flow of information and ideas. . . . These principles have been reflected in America’s copyright laws . . . . Our American commitment to balance the public’s interest in access to creative works against the private interest of authors may create a situation of friction with some of the concepts in the Berne Convention, which was developed by countries which do not agree with the value we place on the robust flow of ideas.

The spokesman then quoted Justice Stewart in *Twentieth Century Music Corp. v. Aiken,* who summarized this view of the constitutional limitation: “creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting availability of literature, music and the other arts.”

42. U.S. CONST. art. I, § 8, cl. 8.
43. 17 U.S.C. § 106 (1982) (granting copyright owners the exclusive rights to reproduce the work, to prepare derivative works based upon the original work, to distribute copies of the work, to perform the work publicly, and to display the work publicly).
44. Id. § 302(a) (setting duration of copyright protection as life of the author plus fifty years after the author’s death).
45. Id. § 110; see infra part II.c.2 for a discussion of the fair use exceptions.
47. Id. §§ 401-406.
48. Id. §§ 408-412.
49. Id. § 407.
50. *Hearings, supra* note 1, at 368-69 (statement of Edward A. Merlis, Vice President, Governmental Relations, National Cable Television Ass’n).
51. 422 U.S. 151 (1974).
52. Id. at 156 (emphasis added).
It is certainly the case that the Constitution favors public availability of artistic works over artists’ rights. It is also true that Berne does not weigh these interests in the same manner. Thus, a superficial examination of the issue could yield the conclusion that the two are incompatible. Such a conclusion would, however, be premature.

Although the text of the Constitution does convey an underlying policy of providing public accessibility to literary, artistic, and scientific works by limiting the exclusivity of creator’s rights, it does not define the scope of these limitations. Indeed, the Constitution only requires that there be a temporal limitation on a creator’s exclusive rights. There is no indication that authors’ rights must be limited in other respects. Berne is compatible with this concept of limitation. In fact, Berne provides for most of the same limitations delineated in the Code, including the constitutionally mandated temporal limitation. The fact that Berne does not contain all of the specific limitations of the Code does not necessarily imply that its ratification would be unconstitutional.

Furthermore, it can be argued that the best manner in which to provide adequate incentives to creators of intellectual property (thereby fulfilling the constitutional end of public availability) is to protect authors’ rights more fully. Berne does provide for an expanded scope of rights. These expanded rights would presumably create additional incentives for authors to produce, publish, and distribute their works.

Courts in the United States have implicitly recognized that a policy choice increasing authors’ rights does not necessarily run afool of the Constitution. In the recent Second Circuit decision in Salinger v. Random House, Inc., the court held that an author’s unpublished letters were not subject to fair use, thus striking the balance between the rights of the creator and those of the public in favor of the creator. Developments such as this indicate a judicial recognition that the parameters of the “exclusive rights . . . for limited times” are somewhat flexible and may be redefined within permissible

53. The “moral rights” provision of article 6bis and the “droit de suite” provision of article 14ter indicate that Berne strikes this balance in favor of the author. Berne, supra note 3, art. 6bis, at 137, art. 14ter, at 139.

54. Compare 17 U.S.C. § 302(a) (1982) (copyright term of life of author plus fifty years after author’s death); id. § 102(b) (protection for expression; no protection for mere facts) and id. § 115 (compulsory licensing for sound recordings) with Berne, supra note 3, art. 7, at 137 (same term of copyright protection); id. art. 2(8), at 135 (same protection for expression, not facts) and id. art. 13(1), at 138 (same compulsory licensing for sound recordings).


56. Id. at 99-100. Fair use is a statutory limitation on a copyright owner’s exclusive rights that, for example, permits use of a work by the public for educational purposes without remuneration to the author. 17 U.S.C. §§ 107, 110 (1982).

B. IS BERNE A SELF-EXECUTING TREATY?

The status of Berne as either an executory or a self-executing treaty is another preliminary issue to be considered in studying the possibility of United States adherence. If the treaty is self-executing (that is, if no implementing legislation is necessary), the treaty itself would provide private rights of action in United States courts. If it is only executory, on the other hand, private rights of action would only arise from implementing legislation.

Not surprisingly, the consensus is that Berne is an executory treaty. The Ad Hoc Working Group on United States Adherence to the Berne Convention (Ad Hoc Group), relying primarily on the WIPO Guide and United States case law, concluded that Berne is an executory treaty. In its report, the Ad Hoc Group noted that while the WIPO Guide indicates that the 1948 text of Berne "provided for a protection founded on the Convention itself," implying that the treaty may be self-executing, the Guide also permits other countries, including "those following the British tradition," to implement Berne by domestic legislation, indicating that the treaty is executory, at

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58. The policy underlying Berne is also more realistic than that underlying the Code. It is a fiction to posit that an author's creative motivation rests in pleasing the public. While public recognition may be fulfilling on a certain level, an author as an artist creates for self-fulfillment. Ultimately, from a historical perspective, the creation may benefit the public. However, it is unrealistic to assume that production for the public is the author's sole source of motivation. The drafters of the Constitution implicitly recognized this fact when the incentives they created for authors included those other than public gain. The Berne minima are more reflective of the creator's egocentric motivations than is the Code, which is premised on the notion that public accessibility is paramount.


60. If a treaty is considered executory, domestic legislation implementing the treaty can be written to incorporate, subtly or more expressly, national trade and policy preferences particular to the country enacting the legislation.

61. The Ad Hoc Group was commissioned by the State Department to study the possible consequences of adherence by the United States to Berne. Its detailed report, analyzing each relevant section of the Code vis-a-vis Berne, was submitted to the State Department on December 31, 1985, and was used by Sen. Mathias, Sen. Leahy, and Rep. Kastenmeier in drafting their legislative proposals.

62. WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) (1978) [hereinafter WIPO GUIDE].

63. Ad Hoc Report, reprinted in Hearings, supra note 1, at 502 (citing WIPO GUIDE, supra note 61, at 21).

64. Id. The Ad Hoc Report quotes the WIPO Guide, which states that "It is that legislation, and not [Berne] itself, that gives [Berne] nationals the right to sue in their courts... The matter is governed by each country's constitutional rules." Id.
least in common law countries. The executory nature of Berne may be reinforced by article 36(1) of Berne itself, which provides that "[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention."65

The conclusion of the Ad Hoc Group is bolstered by support from United States case law. In United States v. Postal,66 the Fifth Circuit held that a treaty which "expressly provide[s] for legislative action" is not self-executing.67 In Mannington Mills, Inc. v. Congoleum Corp.,68 the Third Circuit interpreted article 17 of the Convention for the Protection of Industrial Property69 (a treaty which, like Berne, is administered by the WIPO) as expressly providing for legislative action.70 The court found article 17, which mirrors the language of article 36(1) of Berne, to contain "an expression contrary to the concept of a private right of action"71 and held that the treaty was executory.72 Applying the Mannington Mills analysis to the identical language of article 36(1) of Berne, the Ad Hoc Group concluded that Berne is also an executory treaty.73

This conclusion is echoed by an attorney-adviser for the Copyright Office, who notes that "although both courts and commentators have indicated that certain provisions of a treaty can be self-executing and other provisions only executory . . . the major provisions not compatible with domestic law are not self-executing."74

One commentator, however, has concluded that certain provisions of Berne may be self-executing. In his statement to the Subcommittee, Professor Don Wallace noted that

all or parts of articles 2, 4, 5, 6bis, 7, 8, 9, 10, 11bis, 12, 13, 14, 15 and 18,
and probably other articles of the Convention, would seem, by a combination of the operation of their terms and the operation of article VI of the

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65. Berne, supra note 3, art. 36(1), at 145 (emphasis added). There is at least one other plausible reading of article 36, one that would require adoption of domestic legislation designed to ensure the enforcement and effectiveness of the treaty provisions, rather than enactment of substantive legislation designed to codify the treaty into domestic law.
66. 589 F.2d 862 (5th Cir. 1979).
67. Id. at 876.
68. 595 F.2d 1287 (3d Cir. 1979).
69. Concluded Mar. 20, 1883, 25 Stat. 1372, 161 C.T.S. 409, as revised 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305. Article 17 provides that "[e]very country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention." It mirrors article 36(1) of Berne.
70. Mannington Mills, 595 F.2d at 1298-99.
71. Id. at 1298.
72. Id. at 1299.
73. Ad Hoc Report, reprinted in Hearings, supra note 1, at 505.
74. C.O. Memorandum, supra note 59, at 63.
U.S. Constitution, the so-called Supremacy Clause, to be self-executing. These provisions, according to Professor Wallace, contain language that "create[s] rights and duties in private parties." For example, article 2(6) provides that literary and artistic works listed in article 2(1) "shall enjoy protection." Conversely, those articles that Professor Wallace finds not to be self-executing do not directly create private rights and duties. Article 2(7), for example, that relates to applied art, industrial designs, and models, makes it explicit that "it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws" to such works, and the conditions under which such works shall be protected.

Professor Wallace's argument attempts to counter the contrary position of the Ad Hoc Group by showing that reliance upon article 36 would be justified only with respect to those particular provisions of Berne that provided explicitly for implementing legislation. Article 36 would, however, have no effect on other provisions which are, according to Wallace, self-executing. Within this framework, Mannington Mills and Postal would merely reinforce the proposition that treaty provisions that provide for implementing legislation are not self-executing. What Wallace would reject, presumably, is the conclusion that because one or several treaty provisions require implementing legislation, the entire treaty is executory.

In light of the conflicting interests of the groups concerned with United States adherence to Berne (consumers, creators, and owners of intellectual property) it is unlikely that Berne will be considered self-executing. Thus, United States compliance with Berne "to the maximum extent possible" is also not likely. Current proposals for implementing legislation reflect a desire that the United States adhere to Berne in order to obtain the vast benefits of membership, while making only minimal changes to the Code. In other

75. Hearings, supra note 1, at 196 (statement of Don Wallace, Jr., Prof. of Law, Georgetown University Law Center).
76. Id.
77. Id. (citing Berne, supra note 3, art. 2(6) (emphasis added)).
78. Id. at 196-97 (citing Berne, supra note 3, art. 2(7)).
79. Id. at 197-98. According to Prof. Wallace, article VI of the United States Constitution commands this result. "Because of Article VI, to the extent the Convention is 'self-executing,' it would become law for us by its own force and also supersed prior, inconsistent legislation, e.g. provisions of the Copyright Act." Id. at 197.
80. Sen. Mathias himself noted that "minimal changes to existing law" was one of the principles underlying his bill. 132 CONG. REC. S14,508, S14,509 (daily ed. Oct. 1, 1986) (introductory remarks for S. 2904). The Senator further noted that "other changes that may be useful or desirable can be considered on their merits after our entry into the Berne Union." Id. Upon consideration of Sen. Mathias' extensive dedication to the project of United States adherence to Berne, this policy choice was likely a political one rather than one founded upon the belief that the minimal changes were all that were in fact necessary for full, unequivocal compliance. From a logistical standpoint, support for accession is easier to rally when there are no fundamental changes to make in domestic law. The Kastenmeier bill provides for more extensive changes to the Code, but Kastenmeier noted that his
words, the United States would concede that it no longer can rely on whatever "free ride" it can get but that it does not want to pay full fare for the entire passage.\footnote{81}

This policy choice is reflected in the suggestion that the Senate lay to rest any concerns over the status of the treaty by amending the Code to include the provision that "[t]he Congress finds and declares that the Berne Convention is not self-executing, and that the obligations of the United States thereunder may only be performed pursuant to appropriate legislation."\footnote{82} The Mathias bill as proposed, and the Leahy and Kastenmeier bills currently before the Congress, all contain language to this effect.\footnote{83}

Although the merits of this policy may be questioned, the fact remains that it is safer for Congress to ratify the treaty while making explicit its intention that the treaty as a whole not be self-executing. Because intention of the parties is a principal tool used by courts to determine the status of a treaty, such an explicit statement is likely to discourage litigation concerning the status of Berne. Together with the fact that the four corners of Berne do not unequivocally require a finding of self-executing status and that the WIPO has authorized member countries to adopt implementing legislation, a statement of intent by Congress as to the executory nature of the treaty would likely persuade a United States court that the treaty is not self-executing.\footnote{84}

\footnote{81} The bill was intended to provide a forum for discussion rather than to serve as a realistic attempt at attaining compliance. 133 Cong. Rec. H1293, H1294 (introductory remarks of Rep. Kastenmeier for H.R. 1623) ("the goal of the bill is to stimulate debate . . . about the Berne convention"). Sen. Leahy echoed this goal when he noted that "[t]he bill I introduce today generally follows the minimalist approach of making only those changes to our law which are necessary in order to comply with Berne, without disrupting the smooth operation of the U.S. copyright system." 133 Cong. Rec. S7369, S7369-70 (daily ed. May 29, 1987) (introductory remarks of Sen. Leahy for S. 1301).

\footnote{82} Although this may seem cynical, the various positions taken by those who have analyzed the issue reflect this policy. In particular, The Ad Hoc Report frequently concludes that the Code and Berne are not in fact incompatible because some Berne signatories currently do not comply with various Berne provisions. See supra note 25 and accompanying text (discussing countries that do not afford moral rights protection).

\footnote{83} U.S. Copyright Office, Implementing Legislation to Permit U.S. Adherence to the Berne Convention: A Draft Discussion Bill & Commentary 11 (1986) [hereinafter C.O. Draft Bill] (prepared at the request of Senate Judiciary, Subcommittee on Patents, Copyrights and Trademarks, for a hearing held Apr. 15, 1986) (copy on file at Georgetown Law Journal; see Ad Hoc Report, reprinted in Hearings, supra note 1, at 505 (suggesting that any doubt about Berne's executory status could be resolved by Senate statement of intent that Berne not be construed as self-executing). Prof. Wallace notes that such a statement may raise questions as to our good faith in the international arena. He points out that good faith in treaties is a requirement of the Vienna Convention on Treaties which, although not signed by the United States, is nevertheless regarded as a codification of the customary international law of treaty relations. Hearings, supra note 1, at 198.

C. SPECIFIC CONFLICTS BETWEEN THE CODE AND BERNE

In addition to the issues of the constitutionality of Berne and its status as an executory treaty, a separate debate exists over particular provisions of the Code that appear to conflict with Berne. The debate between opponents and proponents of Berne adherence becomes heated primarily in this context, because underlying the respective provisions of the Code and Berne are fundamental notions of copyright which are often incompatible.85 There is inevitably some domestic consumer group opposed to alteration of the balance struck by a particular Code provision and a corresponding copyright creator or owner who regards the incorporation of the balance struck by Berne as essential to his interests. What follows is a discussion of a number of these conflicting provisions, including moral rights, fair use, architectural rights, the notice requirement, and the jukebox license.

1. Moral Rights

Article 6bis of Berne, perhaps the most controversial of its articles, provides as follows:

(1) Independently of the author's economic rights, and even after the transfer of 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 honour or reputation.86

All of the elements of article 6bis invite controversy. Initially, the phrase "[i]ndependently of the author's economic rights" raises an immediate con-
flict. The Code is based upon a system of granting incentives to authors to create primarily in the form of limited economic monopolies. Under United States law the phrase "the exclusive right" in the copyright clause of the Constitution has generally been interpreted to mean the exclusive economic right of creators. Thus, the concept of granting other than economic rights to authors is a new one from a policy perspective. The second clause of article 6bis, "even after the transfer of said rights," appears to conflict with the pervasive common law notion that once property is alienated, the previous owner no longer has rights thereunder.

Third, article 6bis provides that "the author shall have the right to claim authorship of the work." This clause, better known as the "paternity provision," allows an author the right to have his name appear on his work at all times. The right to claim authorship is perhaps the least controversial of the elements of article 6bis. Although there is no provision for paternity rights in the Code, the Ad Hoc Group argues that a combination of state law and federal trademark law provides the same protection. At least one case indicates, however, that there is no obligation for successors in interest to identify the original author.

Finally, there is the phrase "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 honour or reputation." This right, called the "right of integrity," gives the author control over the work even after its sale or transfer. The principle underlying the right of integrity conflicts with the generally accepted view that once an individual owns something, it belongs to him and he is free to do with it what he will. For example, under the Code, legal owners of a valuable print or poster could cut it up into several pieces and then display or sell the pieces, without violating the rights of the creator of the original work. Such an action would violate article 6bis. As to written works, the phrase also arguably conflicts with the

88. Berne, supra note 3, art. 6bis(2), at 137.
89. J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 40 (1975) (at common law, a fee simple absolute is "the most common of all the estates, and corresponds most closely to what the layman means by ownership. It is freely alienable . . . it is freely devisable. . .").
90. WIPO GUIDE, supra note 61, at 4.
91. Section 43(a) of the Lanham Act prohibits the false designation of origin of goods and false descriptions and representations of such goods, including intellectual and artistic works. 15 U.S.C. § 1125(a) (1982).
93. See Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (in contract between artist and publisher, agreement that publisher identify artist will not be implied; in absence of explicit contractual provision to the contrary, publication of pictures without signature of artist does not constitute misrepresentation or unfair competition).
first amendment. 94

Primarily because of these fundamental conflicts between Berne and United States copyright law, a provision for moral rights has never been included in the Code. Although there is movement toward recognizing these rights, 95 these conflicts have not been sufficiently reconciled to allow for federal codification of moral rights. For this reason, Senators Mathias and Leahy each sought to permit United States accession to Berne without introducing a moral rights provision into the Code. 96 The result was a finding that state common law, together with section 43(a) of the Lanham Act 97 and section 106(2) of the Code, 98 provide substantial protection for an equivalent of moral rights. 99 Because article 6bis provides that protection shall be afforded "by the legislation of the country where protection is claimed," and "legislation of the country" is unspecified, 100 this combination of statutory and common law has been deemed sufficient to render United States law in compliance with article 6bis.

The Mathias bill relied on this combination rather than searching for a

94. See Hearings, supra note 1, at 359 (statement of August W. Steinhilber, Chairman, Educators' Ad Hoc Committee on Copyright Law) ("Does this mean that educators cannot criticize, study, or otherwise lawfully use intellectual materials if the author objects?").
95. See 132 CONG. RECS. S14,508, S14,509 (daily ed. Oct. 1, 1986) (statement of Sen. Mathias accompanying introduction of S. 2904) ("[the bill is not intended to influence the independent development of moral rights in U.S. law"); C.O. Draft Bill, supra note 82, at 18 ("We note, too, recent Congressional proposals for the introduction of moral rights into title 17."); Hearings, supra note 1, at 156 (statement of Irwin Karp, Counsel, The Authors League of America, Inc.) ("The protection of authors' moral rights has been expanding under U.S. law—federal and state, statutory and common . . . .") (emphasis in original).
96. Although the Kastenmeier bill does provide for moral rights, Rep. Kastenmeier has since indicated that he no longer believes that such a provision is necessary to adhere to Berne. Cong. Robert Kastenmeier, Testimony Before the Subcomm. on Patents, Trademarks and Copyrights, of the Senate Comm. on the Judiciary on U.S. Adherence to the Berne Convention 8 (Feb. 18, 1988). Kastenmeier has adopted the Mathias and Leahy position and has indicated that in any event, legislation containing a moral rights provision would not be likely to pass. Id.
97. 15 U.S.C. § 1125(a) (1982). Section 1125(a) may provide some protection of the right of paternity. It does not, however, provide the full panoply of moral rights.
98. Section 106(2) provides that "the owner of copyright . . . has the exclusive right . . . (2) to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2) (1982). Presumably, this derivative rights provision would afford the copyright owner a degree of moral rights in his work since the provision can be interpreted to mean that only the author may alter the work in any way, thus preserving the owner's moral interest (as distinguished from his economic interest) in the work. The most evident problem with the use of § 106(2) as a vehicle for moral rights protection is that the provision protects owners' rights not authors' rights. The crux of the moral right is the protection of the noneconomic interests of the artist or the creator of the work, which transcend the transfer of ownership rights.
99. See 133 CONG. RECS. S7369, S7370 (daily ed. May 29, 1987) (statement of Sen. Leahy) ("there are substantial grounds for concluding that the totality of U.S. law provides protection for the right of paternity and integrity sufficient to comply with 6bis . . . .") (quoting Ad Hoc Report).
100. Dr. Bogsch, Director of the WIPO, advised that the term "legislation" as used in article 6bis "includes a country's decisional as well as statutory law." Ad Hoc Report, reprinted in Hearings, supra note 1, at 460.
manner in which to implement article 6bis directly. In his sectional analysis, Senator Mathias noted that

moral rights are substantially available under U.S. law, although not integrated in the Copyright Act. Contract law, trademark, unfair competition and defamation provide means to redress invasions of rights akin to moral rights. In addition, the present right of authors under title 17 to authorize the creation of derivative works provides a potential source of protection for certain moral rights.101

The Mathias bill avoided the possibility that article 6bis would become a part of United States law by providing that Berne is not self-executing.102 Senator Leahy also relied upon the same premises in concluding that the addition of a moral rights provision to the Code is unnecessary.103

102. The bill provides:

[It] is the further intent of the Congress that the provisions of the Berne Convention shall be given effect under title 17 of the United States Code, as amended by this Act, and any other relevant provision of Federal or State law, including common law, and shall not be directly enforceable in any action brought on the basis of the Berne Convention itself.


The composition of the Mathias bill reflects the conclusions of both the Ad Hoc Group and the Copyright Office. Unlike the Mathias bill, however, the Copyright Office does present two alternative proposals for amending the Code in this regard. “Alternative A” would “freeze” the current state of the law, C.O. Draft Bill, supra note 82, at 17, and provides that “[t]his title does not afford to the owner of copyright in a work any greater or lesser moral rights than those afforded to works under the law, whether Title 17 or the common law or statutes of a state, in effect on [insert date], as held applicable and construed by a court in an action brought under this title.” Id. at 16-17.

“Alternative B,” on the other hand, would provide for rights of paternity, “the most direct element of moral rights.” Id. at 18. Under “Alternative B,” “[t]he author of a copyrighted work, even after the transfer of one or all of the exclusive rights, shall have the right to claim authorship of his or her work during the work’s term of copyright.” Id. at 17.

As proposed by the Copyright Office, “Alternative A” is merely a manner in which to secure whatever level of moral rights protection is already provided by federal and state law. The problem with this proposal is that it may hinder, if not entirely prevent, the further development of moral rights in the United States. The Authors’ League of America, Inc., representing 14,000 American writers and dramatists who support the incorporation of moral rights provision into the Code, argues that “[t]he protection of authors’ moral rights has been expanding under U.S. law—federal and state, statutory and common—and that development should not be blocked, clouded or preempted by such an amendment to the Copyright Act.” Hearings, supra note 1, at 156 (statement of Irwin Karp, Counsel, The Authors League of America, Inc.) (emphasis in original).

Alternative “B,” providing for codification of paternity rights, is a concession, albeit a relatively inexpensive one. As noted above, the paternity right is the least controversial component of moral rights, in part because author recognition is not a concept that clashes in any significant way with United States notions of copyright, and in part because § 43(a) of the Lanham Act may already protect those rights indirectly. See supra note 91 (§ 43(a) prohibition against false designation of origin or contents of goods imported into U.S.).

103. Sen. Leahy, introducing his bill, noted that:

American copyright law currently does not explicitly provide for moral rights. But it does grant to authors the exclusive right to prepare derivative works, which protects authors against any unauthorized distortion, mutilation, or modification, regardless of its effect on
There are significant problems with relying upon a combination of state law and section 106(2) of the Code to create protection for moral rights. First, state laws are not uniform and are subject to changes which could ultimately render them inconsistent with Berne and its moral rights mandate. These effects, especially for foreign authors, could prove to be great. If a foreign author should file suit in a state court for violation of his moral rights, it is entirely possible that those rights may not be protected in the particular forum to which the author is relegated. Even assuming that all states currently protect moral rights or their equivalent, state law could change and abrogate the rights relied upon by the proposed federal legislation to ensure compliance with Berne.

Second, section 301 of the Code, the federal preemption provision, provides that all state law rights that are equivalent to the exclusive rights granted by section 106 and are the subject matter of copyright under section 102 are preempted. Although state common law copyright theories such as unfair competition, tort, contract, and rights of publicity have flourished alongside federal law under the Code, the issue of what constitutes an “equivalent” state law right continues to be litigated. Thus, should a


104. Sen. Mathias cited state contract, trademark, unfair competition, and defamation laws as “provid[ing] means to redress invasions of rights akin to moral rights.” 132 CONG. REC. S14,508, S14,509 (daily ed. Oct. 1, 1986). States differ in the nature and extent of the protections provided within the scope of these laws. Thus, while the reputation interest of the sort guaranteed by Berne’s moral rights provision may be protected by the defamation laws in one jurisdiction, others may reject such protection as outside the scope of the law.

105. Although a foreign author may, by virtue of the nature of his work, have the option of forum shopping, this will not always be the case. Moreover, even if the author has access to a federal forum, the federal forum would apply the substantive law of the state in which the court sits since the issue would be one of state law. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

106. 17 U.S.C. § 301 (1982). A two-part preemption test is embodied in this provision. The first part of that test, the “equivalency” prong, provides that any state law rights that are equivalent to those rights granted by § 106 of the Code are preempted. The second prong, the “subject matter” prong, provides that any state law rights that are the subject matter of copyright as defined in § 102 of the Code are also preempted.

107. For a recent analysis of the preemption issue, see Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986) (court rejected baseball players’ claims that they owned publicity rights in their performances, because games as recorded on tape belonged to team’s owners; Code preempts state law right of publicity). The court held that § 301 preempts the state common law right of publicity, reasoning that “[a] right under state law is ‘equivalent’ to one of the rights within the general scope of copyright if it is violated by any of the rights set forth in § 106.” Id. at 676 (footnote omitted). The court noted further that “a right is equivalent to one of the rights comprised by a copyright if it is infringed by the mere act of reproduction, performance, distribution or display.” Id. at 667. Although the right to create derivative works was not men-
court find that a particular right granted under state law is equivalent to an
exclusive right granted by the Code, the state law will be preempted. If the
state law was one relied upon to protect a moral right, the party seeking
equivalent protection in the future would have to look to the Code for pro-
tection. Moreover, the question of what qualifies as the subject matter of
copyright under section 102 of the Code is also vulnerable to an interpreta-
tion that could result in preemption of state law rights relied upon to protect
moral rights. Thus, it is entirely possible that a foreign plaintiff, seeking
redress in a state court for breach of his moral rights through the right of
publicity or another state law right, could find his claim preempted by sec-
tion 301.

Thus, the sole predictable remedy for a violation of moral rights offered by
the Mathias and Leahy bills may lie in section 106(2) of the Code, the derive-
tive rights provision. The Ad Hoc Group found that an “unauthorized
‘distortion, mutilation or other modification,’ would be actionable as in-
fringement under Section 106.” This protection is also minimal, however,
and does not achieve the ends sought by the moral rights provision of Berne.
As Professor John Kernochan has noted, the Code protects the rights of
copyright owners, not authors. Thus, the creator of a work would not be
titled to complain should a “distortion, mutilation or other modification”
of his creation occur, if he no longer was the copyright owner. This issue
would be particularly relevant in the work-for-hire context. In this con-

106. Baltimore Orioles illustrates the potential for preemption under the subject matter prong of
§ 301 of the Code. The court found that a baseball player’s performance, although arguably not
“fixable” (and thus technically not “subject matter” under § 102 since that section requires that a
work be “fixed” in a tangible medium for federal copyright laws to apply) was nevertheless subject
matter under the Code whenever it was captured, or “fixed,” on camera. 805 F.2d at 675. Thus,
the state law “right of publicity,” which arguably protected the player’s performance, was pre-
empted by the Code whenever that performance was fixed on camera. The right of publicity has
been cited as a state law right which provides protection for certain moral rights. Ad Hoc Report,
reprinted in Hearings, supra note 1, at 464, 466.


111. Hearings, supra note 1, at 169-70 (statement of John M. Kernochan, Prof. of Law, Colum-
bia University School of Law). Professor Kernochan also notes that §§ 110(4), 203, and 304 may
also provide minimal protection of moral rights. Id.

112. A work is considered a “work made for hire” if (1) it is prepared by an employee within the
scope of his or her employment, or (2) it is specially ordered or commissioned for use as a contribu-
tion to a collective work. 17 U.S.C. § 101 (1982) (definition of “work for hire”). Examples of
works made for hire are computer software programs designed by engineers employed by a corpora-
tion, articles written by columnists employed by a newspaper or magazine, or patents created by
employees of a company. Work-for-hire arrangements by definition undermine the moral rights of
authors. Professor Kernochan is particularly disturbed by recent case law broadening the scope of
works for hire, thus resulting in the further constriction of the rights of authors. Hearings, supra
note 1, at 170.
text, the Code affords no protection to the actual creator of the work. Professor Kernochan has noted that "[t]he work-for-hire concept is generally antithetical to the droit moral view of art-works as linked to the personalities of the individuals who in fact create them."113 Predictably, proponents of work-for-hire arrangements find moral rights disturbing.114

This struggle again reflects the tension in United States copyright policy between authors' rights and public availability of intellectual and artistic works. The Mathias bill and the Leahy bill attempt to resolve the issue of moral rights by claiming that existing laws sufficiently protect them. As has been demonstrated, the solution proposed by both Leahy and Mathias is fraught with difficulties.

As submitted, the Kastenmeier bill does not absolutely reject federal codification of moral rights and in fact contains a provision for the protection of moral rights.115 Despite Congressman Kastenmeier's recent change of heart regarding moral rights, his bill has not been withdrawn and its moral rights provision is still worthy of consideration because it provides another approach to resolving this issue. The bill provides that:

Independently of the copyright in a work other than a work made for hire, and even after a transfer of copyright ownership, the author of the work or the author's successor in interest shall have the right, during the life of the author and fifty years after the author's death—(1) to claim authorship of the work; and (2) to object to any distortion, mutilation, or other alteration of the work that would prejudice the author's honor or reputation.116

On its face, this proposal for section 106 of the Code, which mirrors article 6bis of Berne, ensures full compliance with the treaty. It provides both for rights of paternity and for rights of integrity without relying upon state common law, thus avoiding the problematic aspects of the Mathias and Leahy bills. It also addresses the concerns of those industries that rely upon the work-for-hire arrangement by providing an exception to moral rights as to these works. The bill even responds to the concerns of consumers of copyrighted works, by proposing the addition of section 119, "Limitations on the

113. Hearings, supra note 1, at 170. "Droit moral" is the French language equivalent of "moral rights."
114. See, e.g., id. at 374 (statement of Edward A. Merlis, Vice President, Government Relations, Nat'l Cable Television Ass'n) ("A real-time medium such as a cable programming service could not operate if it were vulnerable to the subjective whim and caprice of each author of the works it telecasts."); id. at 214 (statement of Carol Risher, Director, Copyright, Ass'n of American Publishers) ("Our members cannot properly conduct their businesses under the cloud of essentially subjective judgments . . . as to whether a particular revision . . . is a 'distortion' . . . ").
moral rights of authors,”117 which would permit an author to contract away his moral rights.118 Proposed section 119(b) would also allow publishers to make necessary alterations “in accordance with customary standards and reasonable requirements of preparing a work for dissemination.”119

Thus, through existing section 106 and proposed section 119, the Kastenmeier bill would endeavor to ensure compliance with Berne, address the concerns of copyright consumers, and resolve conflicts with United States copyright policy generally. There are, however, several problems inherent in the Kastenmeier approach. First, if amended as proposed, section 119 would effectively abrogate the concept of the unalienability of moral rights. This concept is reflected in article 6bis of Berne, which provides that “even after the transfer” of the tangible product of an author's creative endeavors, the author retains an interest in the work.120 Article 6bis thus acknowledges that there is a psychological nexus between the author and his work which cannot be severed, contractually or otherwise. In proposed section 119, the Kastenmeier bill evidences a lack of understanding or respect for this interest by providing for the possibility of a contractual severance of this psychological nexus. The analytical error of the Kastenmeier proposal lies in creating a link between the tangible work and the moral right, whereas the link actually exists between the moral right and the author. Section 119 as proposed by the Kastenmeier bill may provide for the elimination of an author's legal recourse in the protection of his moral right, but it cannot eliminate the psychological nexus, because, by definition, this nexus cannot be severed. Berne article 6bis offers a legal recourse to protect the psychological nexus, whereas section 119 purports to eliminate both the nexus and the protective mechanism.

Although the proposal for section 106 would likely be controversial in the absence of proposed section 119, the combination of these two provisions is tantamount to not having a moral rights provision at all. While unsophisticated consumers of copyrighted works may not require contractual waiver of moral rights as a condition to a transfer of the work, more sophisticated consumers will inevitably require a contractual waiver. Thus, authors will be faced with a choice of either relinquishing their work together with their moral rights, or else not relinquishing the work at all. Either way, someone loses. If an author parts with his work, his moral rights will not be protected (and Berne will not complied with). If an author instead chooses not to part with his work, society will lose (and the constitutional principle of public availability of works will have been abrogated). Protection of moral rights

117. Id.
118. Id. § 9.
119. Id.
120. Berne, supra note 3, art. 6bis, at 137.
would be available only in a transfer between an unsophisticated buyer and an author, or to an author who possesses enough leverage to ensure contractually that he retains these rights.

Furthermore, from a technical standpoint, the ability to contract away moral rights as provided for in proposed section 119(a) raises the question as to whether an author could, for example, sell the work to A and the moral rights to B. Although moral rights, at least as defined by Berne, are not economic rights, they do have pecuniary value once they are the subject matter of a contract. Thus, an author may be tempted to sever the rights and perhaps realize a greater return on his or her creativity.

A third difficulty with proposed section 119 is its provision permitting necessary alterations for the "preparation of works for dissemination." Although this provision proposes to eradicate the fears of publishers and editors by allowing for "necessary editing, arranging, or adaptation," the standard by which these necessary adaptations will be judged, "in accordance with customary standards and reasonable requirements," would fail to give authors or creators any protection. "Reasonable requirements" will be judged by "customary standards," i.e., the accepted practice in the industry. Presumably because the accepted practice in the industry is to edit, arrange, and adapt without concern for an author's moral rights, it is unclear that authors and creators will be subject to the same editorial decisions they now face.

In sum, the contractual waiver exception, the work-for-hire exception, and the "preparation of works for dissemination" exception all serve to erode moral rights to the point where little more protection is provided than that already available under the Code. Thus, while the Kastenmeier proposal on its face appears to protect moral rights as required by Berne, it actually offers little more protection than is provided by the Mathias and Leahy proposals.

As the foregoing discussion illustrates, lawmakers have gone to creative lengths to avoid incorporating Berne's moral rights mandate into the Code. While it is certainly the case that a bill without a moral rights provision would be more likely to pass through the legislative process unimpeded, such a bill would be in conflict with the letter and spirit of Berne. Professor Kernochan has identified the problem as follows:

[W]e are lacking in the protection of the droit moral as such. We have not as yet really faced up in any significant measure (in the Copyright Act or elsewhere) to the theoretical basis on which article 6bis rests—i.e., a contin-

121. See Berne, supra note 3, art. 6bis(1), at 137 ("independently of the author's economic rights").
123. Id.
124. Id.
using nexus between the author and his work even after transfer of rights in it to others.\footnote{125}

The issue then is whether the United States wants to understand and recognize this nexus by completely incorporating Berne article 6bis into the Code. The battle has been waged between consumers and owners of copyrighted works who seek to retain exclusive control, within the existing scope of copyright protection, over "their" works, and authors who, like it or not, retain that nexus and seek to have it legally recognized. Ultimately, because the severance of this nexus is only artificial, the balance should tip in favor of the authors, and their moral rights should be recognized by any legislation passed to implement Berne.

2. Fair Use

The fair use provisions of both the Code and Berne provide exceptions to the exclusive rights of copyright owners. Typically, educational, religious, and charitable uses of copyrighted works are considered "fair," and these users need not obtain permission from or pay the copyright owner for their use. The fair use exceptions of the Code and Berne reflect the balance struck by copyright-producing societies in favor of certain specified public uses of copyrighted works.

Neither the Mathias bill nor the Leahy and Kastenmeier bills propose alterations to sections 107 and 110 of the Code, which provide for exemptions to the exclusive rights of copyright owners granted by section 106.\footnote{126} The bills' treatment of these provisions is consistent with the views of the Copyright Office\footnote{127} and the Ad Hoc Group who have also declined to recommend any changes to the Code in this regard.\footnote{128} The conclusions of the Copyright Office and the Ad Hoc Group reflect the fact that the Code and Berne are similar in many respects. Nevertheless, certain inexpensive alterations to the Code would ensure full compliance with Berne and ought to be considered. Each fair use exception in the Code will be discussed in turn.

Section 110(1) of the Code provides an exemption for works used in face-

\footnote{125. *Hearings*, supra note 1, at 169 (statement of Prof. Kernochan) (emphasis added).}
\footnote{126. Section 107 provides for limitations on exclusive rights based upon (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (1982). Section 110 provides for (1) educational exemption in face-to-face teaching; (2) instructional transmissions; (3) performances of non-dramatic literary and musical works in the course of religious services; (4) non-profit and charitable performances; (5) public reception of broadcasts; (6) performances at annual horticultural or agricultural fairs; (7) performances in vending establishments; (8) & (9) performance exemptions for handicapped audiences; and (10) non-profit performances by fraternal or veterans' organizations. *Id.* § 110.}
\footnote{127. C.O. Draft Bill, *supra* note 82, at 3 (no change proposed because Code in conformity with Berne Convention).}
\footnote{128. Ad Hoc Report, *reprinted in* *Hearings*, supra note 1, at 535.}
to-face teaching activities.\textsuperscript{129} Article 10(2) of Berne, the only express exception in Berne, requires that domestic legislation provide for the use, "to the extent justified by the purpose," of works for teaching, "provided such utilization is compatible with fair practice."\textsuperscript{130} Article 10(3) adds that "mention shall be made of the source and the name of the author."\textsuperscript{131} Thus, section 110(1) of the Code appears to be in full compliance with article 10(2). The only potential difficulty is that section 110(1) does not require, as does Berne, that the user mention the source and the name of the author.\textsuperscript{132} A minor alteration of Code section 110(1) to require source and name recognition would render that provision fully compliant with Berne and should be implemented.

A number of the Code's fair use exceptions can be reconciled with Berne through the use of "minor reservations understandings."\textsuperscript{133} A "minor reservations understanding" constitutes the means by which exceptions have been made to exclusive rights of Berne authors.\textsuperscript{134} Such an "understanding" acknowledges the right of member nations to preserve those national laws regarding exemptions which are based on local customs, educational needs, and general culture.\textsuperscript{135} "The term 'reservations' is not used . . . in a technical sense; it imports instead an understanding that derogation from the literal language of [Berne] can be made in relatively minor instances without giving rise to a violation of the convention."\textsuperscript{136} Several such reservations have already been recognized as valid by Berne revision conferences, and, in fact, these reservations cover most of the exemptions provided for by section 110 of the Code. The pertinent exceptions are the following:

(1) A number of Berne nations have laws that permit instructional broadcasting exceptions to authors' exclusive rights.\textsuperscript{137} These laws allow for the unfettered use of copyrighted works as long as the users are broadcasting for

\textsuperscript{130} Berne, \textit{supra} note 3, art. 10(2), at 138. It could be argued that article 10(2) allows, but does not require, nations to provide this exception because the article does not expressly indicate whether a country must legislate as to this exemption. It is, however, more likely that this exemption is mandatory since the language of the article provides that "[i]t shall be a matter for legislation . . . to permit the utilization . . . ." \textit{Id.}
\textsuperscript{131} Berne, \textit{supra} note 3, art. 10(3), at 138.
\textsuperscript{132} \textit{Id.} at 437-438.
\textsuperscript{133} Ad Hoc Report, \textit{reprinted in Hearings, supra} note 1, at 541.
\textsuperscript{134} Ad Hoc Report, \textit{reprinted in Hearings, supra} note 1, at 437-38.
\textsuperscript{135} \textit{Id.} at 438-39.
\textsuperscript{136} Id. at 440-41.
instructional or educational purposes. Section 110(2) of the Code,\textsuperscript{138} the instructional transmissions exception, provides for the same free use of works for educational broadcasts. Complete compliance, once again, would necessitate the addition of a provision for crediting the author and the source, as is required by article 10(3) of Berne.\textsuperscript{139}

(2) The performance of non-dramatic literary and musical works in the course of religious services "falls squarely within the express language of the Brussels and Stockholm Conference declarations on minor reservations and is one of the most widely adopted of public performance exemptions in the laws of Berne Union countries."\textsuperscript{140} This reservation affords religious organizations the unfettered right to use designated works as long as such use is in the course of religious services. Section 110(3),\textsuperscript{141} the Code exception for performances of non-dramatic literary and musical works in the course of religious services, parallels the Berne reservation.

(3) The minor reservations understanding has been applied to non-profit and charitable performances, thus rendering section 110(4), the Code's exception for non-profit charitable performances, compliant with Berne.\textsuperscript{142} Section 110(4),\textsuperscript{143} the Code exception which grants the right to use copyrighted works in non-profit and charitable performances without the permission of the copyright owner, is similar to the exemptions claimed in the law of several Berne member nations.\textsuperscript{144}

(4) The public reception of broadcasts using an ordinary receiver, such as a single television set or radio, is also the subject of a minor reservation. Thus, section 110(5),\textsuperscript{145} the Code exception for the public reception of broadcasts with receivers of the kind commonly used in homes, is consistent with Berne.\textsuperscript{146} The additional use of a loudspeaker, however, does not constitute fair use and is prohibited by Berne.\textsuperscript{147}

The remaining exceptions contained in section 110 of the Code are more difficult to reconcile with Berne. Performances at annual horticultural or

\textsuperscript{138} 17 U.S.C. § 110(2) (1982).
\textsuperscript{139} Ad Hoc Report, reprinted in Hearings, supra note 1, at 441.
\textsuperscript{140} Id.
\textsuperscript{141} 17 U.S.C. § 110(3) (1982).
\textsuperscript{142} Ad Hoc Report, reprinted in Hearings, supra note 1, at 441-44 (citing § 50(1) of the Austrian copyright law, which permits public delivery of a published work when such delivery is related to charitable purposes).
\textsuperscript{143} 17 U.S.C. § 110(4) (1982).
\textsuperscript{144} Ad Hoc Report, reprinted in Hearings, supra note 2 at 441-44.
\textsuperscript{146} For example, the Code, like Berne, allows the viewing of a copyrighted work on a television screen in a bar or restaurant, as long as the screen used is a traditionally-sized one. Id.; Berne, supra note 3, art. 11bis.
\textsuperscript{147} Ad Hoc Report, reprinted in Hearings, supra note 1, at 442-43 (citing Berne, supra note 3, art. 11bis(1)(iii)).
agricultural fairs, which are exempted by section 110(6), 148 are the subject of a minor reservation only by Canada. 149 The Ad Hoc Report nevertheless indicates that section 110(6) complies with Berne because the activities exempted could be covered under the non-profit and charitable performances exception of section 110(4). 150 The problem raised by the Ad Hoc Group's approach is that agricultural and horticultural fairs are for-profit enterprises. Although such fairs are generally organized by entities of state and local governments, they do generate private profits. Thus, the United States (together with Canada) would have to establish a precedent for a minor reservation, justifying such a reservation on the grounds that the exemption is vital to the customs and culture of the United States. While an argument can be made that such fairs are integral to United States culture, an amendment to section 110(6) to provide for a contractual agreement between the author and fair organizers would better conform to the letter and spirit of Berne.

Section 110(7) of the Code, 151 which permits performances in vending establishments such as record stores, is also problematic. Although two Berne nations (West Germany and Austria) provide for this exception, 152 it appears to contravene article 11(1) of Berne, which grants authors of musical works the exclusive right to authorize the public performance of their works "by any means or process." 153 Record stores do not fit the traditionally recognized exceptions to article 11(1), which include "popular societies, military bands, students and the like." 154 Moreover, minor reservations are generally made in the name of culturally significant non-profit activities. Although it is perhaps true that "[u]se within commercial establishments . . . is necessary in order to properly serve . . . customers," 155 it does not necessarily follow that such use should be free of charge or without authorization from the author or owner of the copyright. Such use would be in compliance with Berne if it were made subject to an agreement between owners of vending establishments and authors or owners of copyrighted works.

Sections 110(8) and (9) of the Code, 156 which provide exemptions for performances to handicapped audiences, are the only such provisions in the world. 157 Although several nations provide for special formatting of copy-

150. Id. at 443.
152. Ad Hoc Report, reprinted in Hearings, supra note 1 at 444.
153. Berne, supra note 3, art. 11(1), at 138.
154. Ad Hoc Report, reprinted in Hearings, supra note 1, at 437 (citing S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 396 (1938)).
155. Id. at 444 n.26 (citing Dittrich, Copyright in Austria, in INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 322 (S. Stewart ed. 1983)).
righted works for use by the handicapped, the United States is the only nation to legislate such a broad exemption.\footnote{Id.} The Ad Hoc Group notes that because of the significance of these provisions for the United States, Congress should expressly state its intention to retain sections 110(8) and (9) intact.\footnote{Id. at 444.} Another possibility would be to provide for the use of works by the handicapped through voluntary agreements between users and the authors. Most signatories of Berne and members of the Universal Copyright Convention provide for the licensing of works to the handicapped in this manner.\footnote{Id. at 445.}

Finally, Code section 110(10),\footnote{Ad Hoc Report, \textit{reprinted in Hearings, supra} note 1, at 445.} which permits non-profit performances by fraternal or veterans' organizations, appears to be the least tenable of all the section 110 exemptions. The Ad Hoc Report summarily dismisses non-compliance, noting that "this new exemption does not clearly exceed the limitations imposed in similar provisions of the copyright laws of Berne Union countries."\footnote{Id. at 444.} There is no indication in the Report as to what "similar provisions" exist or how closely section 110(10) parallels these provisions. Without more definitive support, section 110(10) should also be the subject of voluntary agreements between users and copyright owners.

3. Subject Matter—Architecture

One of the most controversial and potentially divisive conflicts between Berne and the Code stems from the ample protection Berne affords to architects. Berne provides that members shall protect "the rights of authors in their literary and artistic works."\footnote{Berne, \textit{supra} note 3, art. 1, at 135. Also included in article 1 are "works of applied art." Id. "Applied art" includes works of "pictorial, graphic and sculptural" form. 17 U.S.C. \textit{§§} 101, 113 (1982). Works of applied art are protected by the present Code to the extent that their utilitarian function is separable from their artistic expression. Neither the Mathias nor the Kastenmeier bill suggests alteration of the Code with regard to these works. The Ad Hoc Report found that such works are protected under United States law to the extent that their "artistic features are . . . separate from, and independent of, the utilitarian aspects of [the] useful article." Ad Hoc Report, \textit{reprinted in Hearings, supra} note 1, at 506. The report noted that in the event the artistic component is not separable, at least conceptually, from its function, patent and trademark laws, as well as state common law, ultimately may serve to render United States law compliant with Berne. Id. at 513-14. This argument is particularly persuasive because article 2(7) of Berne allows nations to reduce protection for works of applied art. Under article 2(7), Berne member nations are permitted in their domestic legislation to delimit the extent and conditions of copyright protection of works of applied art. Article 2(7) implicitly recognizes that protection need not be provided solely by national copyright laws. See Berne, \textit{supra} note 3, art. 2(7), at 135 (under article 2(7) member nations must provide some protection, either under copyright or as industrial designs or models; members may legislate non-copyright protection); cf: Ad Hoc Report, \textit{reprinted in Hearings, supra} note 1, at 508 (works of foreign governments protected under 17 U.S.C. \textit{§} 104(b)(b) (1982), thus U.S. complies.}
and artistic works” are “works of . . . architecture.”

The Code does not protect structural works of architecture although it does provide copyright protection for architectural drawings. Because the Berne provision is mandatory (stating that members “shall” protect), the Mathias, Leahy, and Kastenmeier bills all contain provisions granting protection to works of architecture, albeit in different forms.

The Mathias bill explicitly provided for the protection of “buildings, monuments, and other structures.” In cases of infringement, the bill provided that

the court shall have discretion to enjoin construction of the infringing structure or order its demolition or seizure, and in exercising its discretion the court shall consider [(1)] whether construction of the structure has substantially begun, [(2)] the infringement was willful, and [(3)] whether monetary recovery would be wholly inadequate as a remedy for infringement.

The Kastenmeier and Leahy bills, on the other hand, track the Copyright

with Berne, which protects “official texts”); id. at 509 (computer programs and databases protected under 17 U.S.C. § 102(a)(1982) as literary works, thus U.S. law complies with articles 1 and 2(1) of Berne, which define literary and artistic works to include “every production in the literary [and] scientific . . . domain”); id. (protection of mask works for semiconductor chips under 17 U.S.C. §§ 901-914 (Supp. IV 1986), the Semiconductor Chip Protection Act, not incompatible with Berne because unclear whether mask works protected under Berne).

164. Berne, supra note 3, art. (2)(I), at 135. This article provides a nonexhaustive list of the subject matter of protection, including the material traditionally covered by copyright law such as subject matter protected under 17 U.S.C. § 102 (1982).

165. 17 U.S.C. § 102(a)(5) (1982) (providing copyright protection to pictorial and graphic works). Article 2(1) of Berne provides for protection of both works of architecture and “illustrations . . . plans, sketches and three dimensional works relative to . . . architecture.” Berne, supra note 3, art. 2(1), at 135. In contrast, the Code merely provides protection for drawings, and contains no provision for the protection of architectural works. Under present United States law, a work of architecture constitutes an utilitarian object whose artistic form is not considered separable from its useful function. See Ad Hoc Report, reprinted in Hearings, supra note 1, at 511 (“useful articles as to which the art is inseparable from the utilitarian aspect—are unprotectable under copyright”). Useful articles are protected by the Code only to the extent that their design “incorporates pictorial, graphic or sculptural features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article.” 17 U.S.C. § 101 (1982) (defining pictorial, graphic, and sculptural works). Thus, while conceptually separable artistic decorations may be protected by the Code, the building itself it not. Id. at 511.

Although it is clear that United States law is incompatible with article 2(1) of Berne in this regard, it is not clear what changes in the Code would be necessary in order to achieve compliance with Berne. Article 2(6) of Berne merely indicates that the works “shall enjoy protection,” presumably for the Berne duration term of life plus 50 years as provided by article 7; the nature of the protection is left unspecified. Berne, supra note 3, art. 2(6), at 135-36. For this reason, great disparity exists among Berne members in the protection granted to architecture. France, the United Kingdom, and Japan provide specific statutory protection for buildings, yet other Berne nations avoid true protection of architecture. Ad Hoc Report, reprinted in Hearings, supra note 1, at 511.


167. Id.
Office draft discussion bill and the changes suggested therein. Like the predecessor Mathias bill, the Kastenmeier and Leahy bills provide for the protection of "buildings and other three dimensional structures.." Yet, unlike the Mathias bill, they expressly protect only "the work's artistic character and artistic design." Moreover, they would further limit an owner's rights by providing that "the owner of the copyright... (1) shall not be entitled to obtain an injunction... if construction has substantially begun; and (2) may not... obtain a court order... requiring that an infringing building be demolished or seized."

While the Mathias, Kastenmeier, and Leahy bills appear to be substantially similar in many respects, in practice their language differences could yield very different results. For example, the Mathias bill would have afforded a judge substantial discretion in considering whether an injunction should be granted, by allowing the judge to consider three separate factors. From a simple grammatical standpoint, each of the three factors appears to hold equal weight in the analysis. Thus, if the Mathias bill is read broadly to mean that a plaintiff would only have had to show that one of the factors existed in order to be entitled to an injunction, the plaintiff would have been more likely to obtain relief than he would be under the Kastenmeier and Leahy bills. The latter two bills are instead worded such that if the construction has "substantially begun," a plaintiff will not be able to secure an injunction restraining construction. Additionally, under the Kastenmeier and Leahy proposals, a plaintiff would never be entitled to an injunction requiring demolition or seizure of an infringing building, even if the plaintiff could show willful infringement or inadequacy of monetary relief.

The practical result of the Kastenmeier and Leahy proposals is that a copyright owner will not be able to obtain injunctive relief for architectural works unless he demonstrates before substantial construction has begun that an infringement has occurred. Thus, the Kastenmeier and Leahy proposals inadequately protect the rights of architects because if copyrighted architectural plans were copied illicitly and without the knowledge of their owner, and were used to construct an infringing structure, the owner of the plans would not be able to stop construction of the structure, presumably because he would not be capable of recognizing his design until substantial construction had taken place. Thus, the discovery of infringement would occur too

168. See C.O. Draft Bill, supra note 82, at 13 (draft bill extends copyright protection only to the artistic character and design of a building; it precludes injunctions against infringing buildings once construction has "substantially begun" and prohibits orders for demolition or seizure).
late for him to be entitled to an injunction. This renders both Kastenmeier’s and Leahy’s proposals ineffective.

The Leahy proposal further erodes architects’ rights by providing that

[i]t is not an infringement of copyright in an architectural work for the owner of a building embodying such architectural work, without the consent of the author or copyright owner, to make or authorize the making of alterations to such building, in order to enhance the utility of the building.\textsuperscript{172}

Under the Mathias bill, on the other hand, a copyright owner would have had three distinct ways in which to convince a judge that an injunction, or even demolition or seizure of the structure, was merited. Because the Mathias bill substantially protected the rights of architects, it was arguably in compliance with article 2(I) and 2(6) of Berne. Inasmuch as Berne does not mandate that protection be in the form of injunctive relief, however, either of the two bills currently before Congress could presumably be rendered compliant by the addition of an express provision for compensatory and punitive damages in the event of either infringement or willful infringement. If this were done, an owner’s right to determine the fate of his designs might be frustrated, but he would be afforded full, automatic pecuniary relief. Moreover, the inclusion of a provision for punitive damages would act as a deterrent to infringement, further ensuring the protection of architects’ rights.

4. The Notice Requirement

Section 401 of the Code requires that copyrighted works provide notice of copyright evidenced by either the symbol (c), the word “Copyright,” or the abbreviation “Copr.” The work must also include the name of the owner and date of publication.\textsuperscript{173} Such notice is a prerequisite to obtaining a valid copyright and bringing a suit for infringement. Berne absolutely rejects such formal requirements as a condition to the exercise of rights under copyright laws.\textsuperscript{174} Authorities seem to agree that section 401 is not in compliance with article 5 of Berne.\textsuperscript{175} They do not agree, however, on how this noncompli-

\textsuperscript{172} S. 1301, 100th Cong., 1st Sess. § 119(d) (1987). This provision raises issues of moral rights, since the architect may feel that the integrity of his design has been damaged by any subsequent addition.


\textsuperscript{174} Berne, supra note 3, art. 5(2), at 136 (“The enjoyment and the exercise of these rights shall not be subject to any formality . . . .”) (emphasis added).

\textsuperscript{175} See Ad Hoc Report, reprinted in Hearings, supra note 1, at 468 (“With respect to works of foreign origin, the provisions of section 401 of U.S. law are incompatible with the provisions of Article 5(2) of the Berne Convention.”); C.O. Draft Bill, supra note 82, at 19 (“The requirement that published copies of works bear a notice of copyright as a condition for the acquisition or preservation of copyright has long been recognized as a ‘formality,’ proscribed by the Berne Convention.”).
ance should be addressed.\textsuperscript{176}

Senator Mathias proposed that the notice requirement be eliminated for works of both United States and foreign origin.\textsuperscript{177} This approach reflects a generally held distaste for the creation of a dual system of copyright protection that discriminates against United States works. Under a dual system, works of United States origin would still be subjected to a notice requirement while works of foreign origin would not. The Mathias bill, however, would not have required notice for \textit{any} copyrighted works. Moreover, it would have removed all incentives to provide notice and would have given no evidentiary weight to a copyright notice in an infringement action.

The Kastenmeier and Leahy bills, on the other hand, seek a compromise between the complete elimination of the notice requirement for all works and the creation of a dual system of copyright. They would eliminate notice as a formality while creating incentives for voluntary use of the notice\textsuperscript{178} by changing the mandatory language in section 401 of the Code from "shall" to "may."\textsuperscript{179} Their approach would comply with the Berne article 5 requirement that no compulsory formalities attach to Berne rights. The two bills would create an incentive for authors to provide notice, however, by giving

\textsuperscript{176} C.O. Draft Bill, supra note 82, at 19. The Copyright Office has proposed four different approaches:

(1) The outright deletion of the notice requirements . . . ; (2) The exception of works originating in a Berne Union country, other than the United States from the present requirements; (3) The elimination of copyright notice \textit{as a formality} and the creation of statutory, non-formality incentives for voluntary use of the notice (i.e., evidentiary value with respect to innocent infringement; relation to statutory damages at present or higher levels); (4) Completely voluntary use of the notice, the statute merely specifying a form of such notice.

In its draft discussion, the Copyright Office expressed a preference for the second option. \textit{Id.} Because the provisions of Berne apply only to works of foreign origin, Berne, supra note 3, art. 5(2), at 136 (protection within country of origin is matter exclusively for domestic laws of that country), compliance by the United States with Berne's minimum requirements must only relate to works of foreign origin. As applied to works of United States origin, the Code can remain intact and still comply with Berne. Thus, a foreign work would not be required to contain copyright notice, while a United States work would have to comply with the present § 401. While creating such a dual system is always an option with respect to each controversial provision, discrimination against United States works under United States law would be undesirable.

The Copyright Office opted for the dual system for two reasons. First, because the Office sought to change the Code as little as possible, this option appeared the least destructive to the United States copyright scheme. C.O. Draft Bill, supra note 82, at 19. Second, the Office recognizes the informational value of the notice for consumers of copyrighted works. \textit{Id.} at 19-20.

\textsuperscript{177} S. 2904, 99th Cong., 2d Sess. § 8, 132 CONG. REC. S14,510, S14,511 (daily ed. Oct. 1, 1986). This route mirrors the Copyright Office's proposed option (1).

\textsuperscript{178} H.R. 1623, 100th Cong., 1st Sess. § 10 (1987); S. 1301, 100th Cong., 1st Sess. § 5(a) (1987). Again, this approach mirrors option (3) of the Copyright Office draft bill.

evidentiary weight to the notice in the event of an infringement suit. 180 Thus, the Kastenmeier and Leahy bills would likely ensure that notice would be provided in most instances. 181 As with other proposals which seek to make the fewest possible changes to the United States copyright system, the Kastenmeier and Leahy compromise effectively creates a legal bias in favor of United States authors and copyright owners who continue to provide notice by rewarding them in the form of evidentiary weight. As a result, foreign authors will also need to provide notice in order to obtain the full panoply of legal benefits under the Code. Although notice would technically be voluntary, effectively it would not.

Congress must ultimately decide whether the retention of the notice requirement through voluntary compliance and incentives is justified by its informational utility, or instead whether the Mathias approach, the outright deletion of notice from the Code, is the proper path. Because of the problems inherent in both the dual system option selected by the Copyright Office and the compromise option provided by the Kastenmeier and Leahy bills, the elimination of notice requirement, as originally proposed by Senator Mathias, is the approach that is both the clearest and the most unequivocally compliant with Berne.

5. The Jukebox License

Section 116 of the Code 182 provides for a compulsory licensing scheme under which jukebox owners pay an annual fee for unfettered use of musical works. This scheme is apparently in direct conflict with article 11(1) of Berne, which provides that authors "shall enjoy the exclusive right of authorizing . . . the public performance of their works, including such public performance by any means or process." 183 This exclusive right is limited under Berne only by certain very narrow exceptions. 184 Thus, Berne appears to re-

181. The Copyright Office notes that "[t]he question of whether to select some other options depends, in our view, upon the practical utility of the notice requirement to the United States user communities." C.O. Draft Bill, supra note 82, at 20. At least one important user community, educators, no longer opposes removing restrictions on formalities. See Hearings, supra note 1, at 357 (statement of August W. Steinhilber, Chairman, Educators' Ad Hoc Committee on Copyright Law). The notice requirement might be useful in determining ownership of a copyright in a work. This function, however, does not necessarily justify perpetuation of this historical anachronism.
183. Berne, supra note 3, art. 11(1)(f), at 138; see Ad Hoc Report, reprinted in Hearings, supra note 1, at 446 (current U.S. jukebox license probably incompatible with Berne insofar as it permits public performance without owner's consent).
184. Permissible exceptions would include "minor reservations" to the article such as "religious ceremonies, performances by military bands and the requirements of education and popularization." Ad Hoc Report, reprinted in Hearings, supra note 1, at 448 (citing WIPO GUIDE, supra note 61, § 11.7).
quire that public performances of a work be authorized by its creator.185 Such a requirement is incompatible with section 116 of the Code, which explicitly limits an author's exclusive right to authorize public performance in the case of jukeboxes.186 While this conflict is of little significance economically, it illustrates how the relative political leverage of different groups of copyright users can affect legislative efforts to comply with Berne. As demonstrated below, it also illustrates legislative efforts to show good faith when it is least expensive to the extant system.

The Mathias bill would have amended section 116 to abolish the compulsory licensing system for jukebox operators after December 31, 1988.187 Under the terms of the Mathias bill, jukebox operators would thereafter have had to negotiate privately with the copyright owners in order to secure performance rights. Jukebox operators would no longer be granted compulsory licenses by law. The Kastenmeier and Leahy bills, on the other hand, retain section 116 of the Code, but render it applicable only if the operator and copyright owner fail to reach an agreement regarding use of the owner's

185. A thorough analysis of this conclusion can be found in Ad Hoc Report, reprinted in Hearings, supra note 1, at 446-52.
186. Section 116(a) provides:

In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform a work publicly by means of a coin-operated phonorecord is limited as follows: (1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless—(A) such proprietor is the operator of the phonorecord player, or (B) such proprietor refuses or fails, within one month after receipt by registered or certified mail or a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).


Under Berne, on the other hand, the exclusive right of copyright owners to authorize public performances of their musical works on a jukebox is not subject to exceptions. Ad Hoc Report, reprinted in Hearings, supra note 1, at 447-48. The legislative history of Berne reveals that the Stockholm Conference opposed any compulsory license for the public performance of recorded music. Id. at 448-49. Finally, the Ad Hoc Group has rejected the possibility that Berne might allow a compulsory license to prevent monopolies. Id. at 449-50.

187.

The provisions of subsections (a) through (d) of this section shall remain in effect until January 1, 1988. Thereafter, the exclusive right, under section 106(4) to publicly perform a nondramatic musical work embodied in a phonorecord by means of a coin-operated phonorecord player shall not be limited by subsections (a) through (d) of this section and, unless authorized by the copyright owner, such performance shall be actionable as an act of infringement. . . .”

works. 188

Apparently fearing that section 116 would impede United States accession to Berne, the Director General of the WIPO has recently offered two reasons why the provision may not be incompatible with Berne. First, while section 116 may not meet Berne’s minimum requirements, the Director General noted that the license is “not of sufficient importance from an economic viewpoint to require any change in United States law to permit Berne adherence.” 189 Second, because the jukebox industry is in decline in the United States, 190 section 116 is becoming less significant as a practical matter and thus might be viewed as compatible with Berne. 191

The Ad Hoc Group rejected the Director General’s reasoning, arguing that section 116 on its face is incompatible with Berne and, suggested the need for a legal foundation for compatibility. 192 The Group’s rejection of what it calls the “political appeal” of these arguments, however, might have been hasty. The personal opinion of the Director General of the WIPO, although an informal one, carries significant weight in matters of treaty ratification. Moreover, because the effects of section 116 on international copyright relations would be minimal if not insignificant, other Berne signatories are unlikely to object to its retention in the Code.

Viewed in this light, the elimination of section 116 as proposed by the Mathias bill appears to be an effort to show good faith on the part of the United States in an area which would impose the least cost on the United States copyright system. It is precisely because the economic impact of the jukebox industry is of little significance and because the industry is in decline that a proposal to eliminate compulsory licensing is easily made. Constituents who would be harmed by the elimination of the requirement are, even on a global scale, relatively few in number. Yet, as the Director General of the WIPO has argued, the reverse is also true. Because the global impact would be minute, and because the effect of section 116 on international copyright relations is likely to be insignificant, there is no reason not to save the license for the sake of those remaining 255,000 jukeboxes 193 that still gener-

188. H.R. 1623, 100th Cong., 1st Sess. § 8 (1987); S. 1301, 100th Cong., 1st Sess. § 116 (1987). Sen. Leahy’s bill differs slightly from H.R. 1623 in that it delineates the applicable procedures if voluntary agreements between copyright owners and jukebox operators are not reached. Id. § 116(e)-(g). The proposals in these two bills reflect the suggestions of the Copyright Office draft discussion bill. See generally C.O. Draft Bill, supra note 82, at 14-16 (discussing jukebox license).
189. Hearings, supra note 1, at 14 (statement of Dr. Arpad Bogsch).
190. Id. at 390 (statement of Elroy Wolff, representing the Amusement and Music Operators Ass’n) (only approximately 225,000 jukeboxes in operation in the U.S.).
191. Id. at 17 (statement of Dr. Arpad Bogsch).
193. Hearings, supra note 1, at 390 (statement of Elroy Wolff, representing the Amusement and Music Operators Ass’n).
ate $5,197,548\textsuperscript{194} in annual royalties.

The Copyright Office proposal and the Kastenmeier and Leahy bills reflect this conciliatory approach. They neither leave section 116 intact nor eliminate the provision entirely. Instead, the Copyright Office proposal and the bills provide authors with the opportunity to exercise their exclusive rights to authorize public performance by means of voluntary negotiations with jukebox operators. Under this approach, agents could be appointed by either or both parties. Only in the event that such negotiations failed would section 116 in its present form become effective.\textsuperscript{195} Thus, the Copyright Office proposal and the Kastenmeier and Leahy bills arguably fulfill the Berne requirement that creators be granted the exclusive right to authorize public performances of their works. This right would be limited only if it were not voluntarily exercised.\textsuperscript{196} While these proposals regarding jukebox licensing technically would "add at least one more layer to a system that is already in place and working,"\textsuperscript{197} they would in effect add nothing. Thus, the Kastenmeier and Leahy bills would secure compliance with Berne while retaining the rights that jukebox operators and copyright owners now exercise.

III. CONCLUSION

The foregoing analyses reflect the tensions that surface when Berne adherence is contemplated. In each of the particular areas discussed, a tension exists between a desire to obtain the benefits of United States adherence to Berne, and a desire to maintain the balance of rights between owners and consumers of intellectual property as established by the Code. A tension also exists between the desire to make the fewest possible changes in the present system while still complying with Berne, and the reality that such minimal, often superficial compliance may not provide the protections sought by authors and owners of copyrighted works. Finally, a tension exists between the essentially pro-consumer policies underlying the United States copyright scheme and the pro-author policies underlying Berne.

\textsuperscript{194} Ad Hoc Report, reprinted in Hearings, supra note 1, at 451.


\textsuperscript{196} The possibility that § 116 might become effective if authors and operators do not reach agreement appears to be incompatible with article 11(1) of Berne. Berne, supra note 3, art. 11(1), at 138. Nevertheless, the Copyright Office proposal and the Kastenmeier and Leahy bills effectively eliminate § 116 from the Code. Theoretically, it may be possible that § 116 would remain effective in the event of an impasse in negotiations, but such an impasse is unlikely. In fact, owners and operators, through their respective agents, have already announced the conclusion of successful negotiations concerning a voluntary agreement such as that proposed by the Copyright Office. Ad Hoc Report, reprinted in Hearings, supra note 1, at 451; see Hearings, supra note 1, at 391 (statement of Elroy Wolff, representing the Amusement and Music Operators Ass'n).

\textsuperscript{197} Hearings, supra note 1, at 392 (statement of Elroy Wolff, representing the Amusement and Music Operators Ass'n).
This note advocates a resolution of those tensions in favor of full, realistic compliance with Berne albeit that such compliance would alter the system established by the existing federal copyright statute. Congress should reject attempts to achieve only a minimum level of compliance with Berne. Although full compliance would significantly alter the balance struck by certain existing Code provisions between creators and consumers of copyrighted works, the change would ultimately benefit everyone. The new system would more adequately protect the rights of creators of intellectual property while improving the United States trade balance by encouraging the exports of copyrighted works.

The former Mathias bill and the two bills currently under consideration take the initial step toward compliance, but they would not make the important changes necessary to implement Berne honestly. They are merely "fine tuning [the Code] in order to meet Berne's standards." As proposed, the bills constitute an attempt to reconcile the Code with Berne while making minimal alterations to the United States system. Because United States adherence to Berne is a significant concern of many domestic industries and an important step in the general formulation and integrity of an international law of intellectual property, United States adherence is essential. Any implementing legislation enacted by Congress should, therefore, accurately reflect the intent of the drafters of Berne in order that the interests of the international intellectual property community be protected.

_Doriane Lambelet_

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