

COPYRIGHT

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What is copyright? A policymaker in the United States will tell you that copyright is an instrument of consumer welfare, stimulating the production of the widest possible array of literary and artistic works at the lowest possible price. Ask the question of a practitioner on the European continent, and he will tell you that copyright is at best a watered-down version of author's right—that grand civil law tradition that places the author, not the consumer, at the center of protection. A low protectionist will tell you that copyright is a monopoly that undesirably drives up the price of goods in the marketplace. A high protectionist will tell you that copyright is a property right—no more, no less—and one without which we would have very few creative works in the marketplace.

Ask the question of a United States trade official and she will tell you that copyright is one of the strongest net contributors to the nation's balance of trade. Ask the question of a school teacher in Thailand and he will tell you that copyright is what stands in the way of getting textbooks into the hands of his students. Ask the question of an anthropologist digging through the remains of the 1976 Copyright Act a century from now and she might tell you that copyright is the symbol of a nation's cultural aspirations. Ask the same question today of a manufacturer of novelty knickknacks and he will tell you that copyright is simply what enables him to meet his payroll at the end of the week.

Confronting this welter of competing perspectives, it is tempting to agree with Professor Lyman Ray Patterson that "the basic and continuing weakness of copyright law in this country" is "the absence of fundamental principles for copyright."¹ No one interested in copyright can afford to overlook Ray Patterson's masterful history of Anglo-American copyright law. But on this point I think Ray is wrong. I believe that there does in fact exist a cohering view of copyright, a view that reconciles most if not all of the competing antiphonies, and one that offers a sound prescription for public policy as well.

Under the view that I propose, copyright is not about protecting authors or publishers, nor is copyright singularly about securing authors' welfare or consumers' welfare. Copyright is not about bolstering international trade

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1. L. Ray Patterson, *Copyright in Historical Perspective* 8 (Vanderbilt U Press, 1968).

balances, nor is it about protecting art, high or low. Copyright is about none of these things; and copyright is about all of them.

Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air, and intense, devouring labor, an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*. Copyright is as much about the pages of deleted text, the scenes that lie on the cutting room floor, as it is about the refined work, the final cut, that ultimately reaches the author's public. But copyright—and authorship—are only in part about the act of creation. If creation is all there was to authorship, copyright could comfortably leave the author scribbling alone in his far-off garret. Authorship in its contemporary sense implies not just an author, but an audience; not just words spoken, but individuals spoken to.

By "authorship" I mean authors communicating as directly as circumstance allows with their intended audiences. Copyright sustains the very heart and essence of authorship by enabling this communication, this connection. It is copyright that makes it possible for audiences—markets—to form for an author's work, and it is copyright that makes it possible for publishers to bring these works to market. (As should by now be evident, when I speak of "publishers" I mean the whole range of intermediaries—book publishers, music publishers, motion picture producers, record producers—whose business it is to bring works to market.)

To be sure, copyright law and policy in different places may emphasize one or another particular object over another. An emphasis on consumer welfare is the hallmark of copyright jurisprudence in the United States, just as an emphasis on author's right is the hallmark of the continental regimes. But viewed globally, and in the round, it is authorship that provides the cohering theme.

I believe that the historical materials support the view that copyright is at heart a vehicle of authorship, a means for connecting an author to his audience and enabling audiences to repay the author's effort. Contemporary decisions of the United States Congress and courts also support this view of copyright. But my aim today is as much to prescribe as it is to describe. I hope to show not only that copyright is about authorship, but also that authorship offers a helpful benchmark for copyright reform.

Authorship presupposes autonomy. For authorship to flourish, authors must enjoy autonomy in their work. Authors must be protected from the influence of anyone other than their intended audience. Authors must also have the elbow room needed to ply their craft, freeing them to create those works that they believe their audience desires. Both requirements have a legal dimension. Copyright law must protect authors from any influence other than their audience; it must not judge authors' efforts by too exacting a standard; and it must not impose too severe a prohibition against authors' borrowing from others.

A. Authors and Their Audiences

Authorship in some form has existed from the time that humans emerged as sentient beings, first daubing an arresting image on a cave wall. But for authorship to blossom in its modern form, as a bond between the author and any audience whom the power of his vision can command, three conditions had to coincide: a technology that could bring the author's work within the reach of any who desired it; a political environment in which no sovereign could impede the communication between the author and his intended audience; and an economic system that would facilitate, not thwart, communication between the author and his audience.

The needed technology came first. Gutenberg's invention—in the West, at least—of movable type opened the door to the mass dissemination of writings. To be sure, the early printed books were not cheap, and it took some time for books to become available to the masses at a price they could pay. But by the fifteenth century the path was cleared for getting works to the public in the form of affordable copies.

More than two centuries passed before the conditions of political and economic life began to conduce to authorship. Until the 1700s, sovereigns in England and on the continent had kept communications under their thumb, imposing monopoly and licensing controls on the new printing technologies in order to bar the dissemination of dissident views. But with the great revolutions of the eighteenth century came the political freedom and the commercial channels that—together with cheap printing—for the first time ensured authors the ability to commit their vision, and their livelihood, to the marketplace for ideas and the marketplace for goods. It is no accident that the first copyright acts appeared at this moment in history.

I appreciate that this picture may seem too stark for some. Benjamin Kaplan has observed that "copyright has the look of being gradually secreted in the interstices of the censorship."² But, though history grinds slow, there is no denying that events of consequence occur. Looking back, there can be no question that—to take two examples—the Statute of Anne in 1710 and the French decrees of 1791 and 1793 were events of consequence, liberating authors from the control of the sovereign and engaging them for the first time with the demands of unlimited audiences.

All this talk of authorship—of copyright securing an author's autonomous relationship with her audience—sounds very uplifting. But then come the doleful social critics. Copyright, they tell us, is not about authors nor is it about authorship. Copyright, they say is about commerce—it is about publishers and publishing. Citing the historical record, these doubters tell us that the first copyright statutes were victories not for authors but for the lowly printers who had shrewdly waged their cause under the authors' banner. Hasn't copyright, these skeptics ask, merely traded the sovereign's control of authorship for control by publishers? What sphere of personal autonomy,

2. Benjamin Kaplan, *An Unhurried View of Copyright* 4 (Columbia U Press, 1967).

what possibility for authorship, can exist when it is publishers who determine those works that will reach the marketplace?

These are complex questions. It would certainly be convenient to my view of authorship if publishers were transparent—neutral mediators between the author and her public. In fact, and no less than other institutions, publishers do fall victim to bureaucratic stubbornness and personal guile. Such failings do stand in the way of authorship. But, in the main, what publishers do is publish. Publishers differ in the size and nature of the markets they seek to reach, in their horizon for profit, long or short term, and in their predictions of what the public will buy. Small presses and independent bookstores abound, as do independent motion picture producers and, to a lesser extent, distributors. Overall, it is not publishers or producers—not even the much-scorned media conglomerates—who decide what will be published. It is consumers who decide. A consumer-driven market for authorship is, to be sure, not perfect. But it is better than the alternative.

I have spoken so far only of authorship's emergence from state control into the vibrant workings of the marketplace, and not yet of law's role in perfecting copyright as a market mechanism. What implications do the general points just made have for public policy? What protection must copyright offer if it is to sustain authorship in the marketplace?

Copyright encompasses one of the few areas of human endeavor in which one can create value without diminishing the material resources available to others. Even so, the fact that copyright enables authors to charge a positive price for the use of their works has social consequence. The economists Robert Cooter and Thomas Ulen have described the dilemma of granting private property rights in public goods such as works of authorship that embody information: "Without a legal monopoly not enough information will be produced, but with the legal monopoly too little of the information will be used."³

Should public policy start from the premise that the copyright glass is half empty or half full? The low protectionists say half-empty, arguing that authors and publishers should receive no greater economic returns than they needed to produce a particular work. If it would have taken no more than \$100,000 to get Margaret Mitchell to sit down at her typewriter to pound out *Gone With the Wind*, and to get her publisher to publish the book, this is all they should receive—and not the hundreds of millions of dollars of value that *Gone With the Wind* has since produced in the marketplace. The low protectionists would have Congress trim copyright law's exclusive rights to correspond to the needed incentives. At the least, the low protectionists would urge Congress to refrain from extending new rights unless and until it is convinced that the revenues that the new right will secure are needed to induce artistic production. To take a recently-debated example: If motion picture authors and producers would still produce and distribute motion pictures without a

3. Robert Cooter & Thomas Ulen, *Law and Economics* 135 (Scott, Foresman, 1988).

video rental right, there is no reason for copyright to outlaw unauthorized video rentals.

The high protectionists respond that it would be wonderful if a publisher could, *ex ante* and with absolute perfection, pick the one manuscript each year that will enjoy the success of *Gone With the Wind*, and thus be able to reject all the other submissions. Unfortunately or fortunately—depending on your point of view—such confident predictions about public tastes are impossible. A publisher needs many more times the \$100,000 consumed by *Gone With the Wind* to cover the costs of the many works that do not return a profit in the marketplace.

I think the high protectionists have the better of the argument—at least from the viewpoint of sustaining the conditions for authorship. Consider for a moment the effects of patronage—whether from the Renaissance princes or the United States Congress' modern Medicis. Patronage supports only those authors whose creative efforts meet the patron's taste. Patronage depresses authorship by shutting the author off from the wider audience that he might hope to reach.

A weakened copyright system, of the sort for which the low protectionists sometimes press, would tend in the same direction as patronage. In a world where fewer rights secure fewer paying markets, publishers would be even more inclined than they are at present to seek the common denominator that will ensure them some economic return. They will spurn investments aimed at markets that, having no obligation to pay copyright tribute, will not repay copyright investment. The availability of risk capital would decline, as would the willingness of publishers to try untried authors in the marketplace. A robust copyright, by contrast, will mix the hope of high return on some works with risk of loss on others, giving publishers, if not quite a lottery, then at least a portfolio that will promote investment and sustain a wider variety of authorship than could command support under any other legal system.

Most discussions of the rights properly to be conferred by copyright center on the ultimately unyielding question, how much investment in music, art and literature is enough investment? This inquiry overlooks the no less important, far more productive, question of copyright's effect on the *direction* of investment in music, art and literature. Authors and publishers will direct their efforts and their resources toward those audiences that will pay for their works. Whenever Congress withholds a right from a particular market, allowing free use, it effectively shuts off the most effective means of communication between an author and her audience—the price mechanism. Assured of exclusive rights in some markets—the theatrical and television motion picture markets, for example—authors and producers will shape their works to the tastes of theater and television audiences. Denied rights in other markets—the home videotape rental market, for example—authors and producers have no reason to aim their efforts at the possibly quite different tastes of audiences in these markets. To the extent that the tastes of

audiences that get the work free diverge from the tastes of those who pay, the variety of works overall will diminish, as will authorship generally.

Against all this is the low protectionist view that copyright is a monopoly that unnaturally forces up prices. If we follow the economists' prescription noted earlier, this is to some extent inevitable. But I think it is important to separate the price consequences of the copyright property from the price consequences of the patent property—consequences that policymakers too often confuse. Patent protection may well confer market share and effectively result in monopoly pricing. In copyright, however, a high degree of substitutability invariably obtains. Although we would prefer not to admit it, one author's expression will always be substitutable for another's. Were Elmore Leonard's publisher imprudent enough to charge \$75 for a copy of his latest work, I expect Leonard would soon see many of his readers migrate to the works, perhaps, of James Ellroy at \$19.95, not to speak of paperback reprints of the classics—Chandler, Hammett and Cain—at \$4.95.

I find it consoling that, despite the longstanding academic debates over high and low protection, the United States Congress has for two centuries pursued a steady course of expanding the scope of copyright to encompass new, economically valuable uses of copyrighted subject matter. To be sure, Congress has always tempered the extension of copyright with recognition of the problem of transaction costs—the problem that some individual uses of copyrighted works will be so dispersed that any eventual license royalties will not repay the expense of enforcement and negotiation. Also, inevitably, political compromise or surrender has sometimes blunted the extension of rights. The failed motion picture videocassette rental bill⁴ of some years back is one example. Congress' failure so far to give a performance right to sound recordings is another.

To some extent, technology can repair politically motivated omissions. For example, emerging pay television systems under which a subscriber can view a current film in her home, saving the bother of a trip to the rental store, may soon obliterate the nonpaying rental market, while at the same time returning revenues to motion picture producers. This prospect suggests that the failure to pass a video rental bill may diminish in economic consequence. But technology can also exacerbate political omissions. Digital audio transmission of audio recordings is an example. With digital audio transmission at hand, and their favorite recordings available on command, music lovers may stop buying records and tapes; at the least, their inclination to purchase phonorecords will dwindle. Recording artists and their producers will consequently lose revenues from record, tape and disc sales. If Congress continues to deny recording artists and producers a performance right in their sound recordings, they will receive no revenues from home performances to make up the difference. Deprived of any paying market for sound recordings,

4. S 33, Consumer Video Sales/Rental Amendment of 1983, 98th Cong, 1st Sess (Jan 25, 1983).

their production of sound recordings will diminish—to the point, possibly, at which sound recordings disappear.

Putting these cautionary observations to the side, I think it is historically accurate to say that, in general, Congress has given copyright owners rights to every market in which consumers derive value from their works and in which transaction costs do not stand in the way of negotiated payments. Indeed, Congress' record in meeting the challenge of the new dissemination technologies invites comparison with the high protectionist model of the continental author's right tradition. Legislators in this country may sometimes invoke a low protectionist credo, in sharp ideological contrast to the high protectionist creed of author's rights; but, all in all and with few exceptions, the practical results on both continents have been roughly the same.

B. Authors and Their Works

Authorship not only requires authors to have direct access to their audience. Authorship also requires that authors enjoy some not inconsiderable margins—some copyright elbow room—in working within the legal system. Copyright must be quick to protect any work that bears the impress of an author's personality, and careful when prohibiting one author's borrowings from another.

The question of elbow room arises any time a court must determine whether the product of an author's labors evinces sufficient original expression to qualify for copyright. In the United States, the judicially-evolved rules on protectible subject matter reflect the belief that authorship is more likely to flourish if Congress, the courts and the Copyright Office are not too exacting in the demands they make on works seeking admission into copyright. "E.T. Phone Home" may not rise to the level even of the minimally expressive, "Euclid alone has looked on Beauty bare," the line from Edna St. Vincent Millay that Judge Frank told us would qualify for copyright.⁵ A circus poster may not rise to the artistic level of a Mary Cassatt. But for authorship to flourish, those who seek to be authors must receive the same welcome as those who succeed as authors. Justice Holmes' perception in *Bleistein v. Donaldson Lithographing Co.*,⁶ the circus poster case, that copyright law should not allow the tastes of one generation to control the works available to the next, similarly argues for substantial elbow room at the threshold of protection.

Authorship also requires copyright law to give authors some freedom of movement in drawing on the works of other authors for theme, inspiration and ideas, even though—copyright being evenhanded—this means that their works will be subject to the same sort of borrowings by others. The principle at work here is the commonplace that all works of authorship build on the

5. *Heim v Universal Pictures Co.*, 154 F2d 480, 487 n8 (2d Cir 1946).

6. 188 US 239 (1903).

works and traditions that precede them. Copyright gives a limited property right that at once promises an author protection for the product of her mind, and ensures her the freedom to borrow unprotected elements from the copyrighted works of others. Learned Hand's "abstractions" test⁷ and Zechariah Chafees' "patterns" test⁸ leave no doubt that this is the most delicate balance in all of copyright.

These two points—that copyright should give authors elbow room when seeking protection for their own works, and when drawing on the works of others—are connected. The connection is particularly evident in a comparison of copyright protection for works of creative authorship—works clearly reflecting the impress of an author's personality—and utilitarian works—fact works and functional works—in which an author's personality leaves only the faintest, if any, trace. The connection, roughly speaking, is that the thinner is a work's creative content, the thinner will be its protection.

The first Copyright Act protected "maps, charts and books." Maps and charts are by nature utilitarian products, reflecting little if anything of an author's personality. The third class of works—books—could certainly encompass works of creative authorship. But, in the early years of United States copyright, the exigencies of practical life in a new nation filled this class with works of low personal creativity as well—spellers, grammars, dictionaries. Courts gave these utilitarian works only the narrowest scope of protection, protecting them against literal copying—what we would today call piracy. The result was fitting. Works of fact and function can efficiently be expressed in only a limited number of ways; it is hard—or at least socially costly—to recast them while retaining their utility. Also, in an age of improvement, there was a perceived public interest in having improved versions from competitors. It was thus natural for courts to emphasize what the competitor contributed to a work over what the copyright owner lost. Copyright's term of protection was correspondingly modest—fourteen years, with a renewal term of equal duration.

This remained pretty much the story through the middle of the nineteenth century: a predominance of utilitarian works and a low-level copyright statute aimed at ensuring competition in the dissemination of fact and function in the marketplace. With the emergence of an American tradition of creative authorship in the mid-nineteenth century—with the works of James Fenimore Cooper, Washington Irving and Nathaniel Hawthorne joining the more humble spellers, grammars and dictionaries—the copyright situation changed dramatically. Increasingly it became evident that personality and creativity resided not in language alone, but that creativity lay also in a work's deeper text, in the vision that the author sought to communicate to her audience. An author's vision could transcend a particular language—English, German, French—and a particular medium—novel, play or abridgement.

7. *Nichols v Universal Pictures Corp.*, 45 F2d 119, 121 (2d Cir 1930).

8. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 Colum L Rev 503, 513 (1945).

In 1870 Congress expanded the scope of copyright by adding an exclusive right against translations and an exclusive right against dramatizations.⁹ Courts, too, recognized that creative authorship resides in more than the surface language of a text.¹⁰ In the mid-1800's courts began to replace literal similarity as the test for infringement with a more vexing—but altogether appropriate—test of substantial similarity. It was at about this time, then, that copyright in the United States took on its double aspect: protecting not only utilitarian products, but also works of creative authorship.

How has copyright law fared in maintaining the balances struck for two distinctly different kinds of work? Professor Jane Ginsburg has admirably explicated the tensions created when two souls dwell in a single copyright body, and I will not attempt to improve on her analysis here.¹¹ But a quick accounting to the bottom line may be in order.

On the positive side, courts have generally succeeded in retaining a narrow scope of infringement protection for utilitarian copyright products (although some of the computer program decisions contain worrisome language), while giving a more generous ambit to works of creative authorship. On the negative side, a uniform term of protection for utilitarian and creative works—typically 75 years in the case of fact and functional works that are commonly made for hire—disrupts a copyright balance that, acceptable for works of creative authorship, is doubtless excessive for utilitarian products. The easy availability of preliminary injunctive relief, and copyright's virtually automatic grant of permanent relief, together with the allied array of seizure remedies, only aggravates this imbalance—a fact that prompted Professor Ginsburg to propose equitable remuneration as the remedy for infringement of copyright in works at the low end of authorship. But, apart from some rumblings in the academic community—of which Professor Jerome Reichman's observations drawn from the continental experience are certainly the most profound—the mainstream has honored the bromide that “All is for the best in the best of possible worlds.”

Until, that is, the United States Supreme Court's decision this Term in *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹² holding that the alphabetized listings in telephone directory white pages are not copyrightable. Make no mistake: *Feist* is a landmark decision. As sober an observer of copyright law as Register of Copyrights Ralph Oman said of *Feist* that “the Supreme Court dropped a bomb.”¹³ Where earlier Supreme Court decisions in this century—*Bleistein v. Donaldson Lithographing*,¹⁴ *Mazer v. Stein*¹⁵—told us what

9. Act of July 8, 1870, 16 Stat 212 c 230 § 86, 35 Cong 2d Sess.

10. See, for example, *Daly v Palmer*, 6 F Cas 1132 (CC SDNY 1868). See generally Kaplan, *An Unhurried View of Copyright* at 9-34 (cited in note 2).

11. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum L Rev 1865 (1990).

12. 111 S Ct 1282 (1991).

13. Oversight Hearing, House of Representatives, April 10, 1991.

14. 188 US 239 (1903).

15. 347 US 201 (1954).

subject matter came within copyright's embrace, *Feist* took the hard road of telling us what subject matter falls outside of copyright. Just as the Supreme Court's 1879 decision in *Baker v. Selden*,¹⁶ describing the respective spheres of copyright and patent law, was a defining event for copyright in the industrial age, so *Feist* is a defining event for copyright in the information age.

While most observers had expected the result in the case—exempting *Feist* from liability—few, if any, had anticipated the reasoning. White page listings, the Court said, possess so little originality—so little authorship—that they should receive no copyright protection at all, not even against the literal poaching from which utilitarian products had been protected since the beginning. Here then is the situation that Justice Holmes presumably had in mind when in *Bleistein* he spoke of the “narrowest and most obvious limits”¹⁷ for excluding subject matter from copyright protection—situations in which, even indulging a wide margin for error, copyright protection for a product is unnecessary to support the authorship enterprise generally.

What is most striking about Justice O'Connor's opinion for herself and seven other members of the Court is its reliance on two bold and largely unprecedented premises. First—a point made no fewer than sixteen times in the opinion—is that creativity is part of copyright law's originality requirement. This came as a surprise to those of us who had thought that, outside the narrow field of photographs and art reproductions, originality meant only that the copyright claimant had not copied from another source. Second—a point made no fewer than thirteen times—is the Court's premise that copyright's originality standard has a constitutional dimension. Again, apart from some scattered dicta, this is pretty much new law.

What do these two premises imply for the future of copyright protection in the United States? A friend from the Max Planck Institute in Munich, who was visiting Stanford at the time *Feist* came down, observed: “This is a *very* German opinion.” What he was referring to, of course, is the strong bias in German jurisprudence, and in continental doctrine generally, against giving author's right protection to products that do not bear the impress of an author's personality. There is a strong inclination to require some evidence of “creativity”—something more than just independent creation—if a fact or functional work is to obtain author's right protection. Absent such a showing of creativity, courts and legislatures on the Continent prefer to leave the protection of these products to unfair competition law and to the law of neighboring rights.

I do not think that the Supreme Court in *Feist* was saying that the great and socially valuable investments made in databases not rising to the announced originality standard must go unprotected by intellectual property law. At least I hope that's not the message. Rather, the Court appears to be saying that if Congress wishes to protect telephone directory white pages and comparable

16. 101 US 99 (1879).

17. 188 US 251.

databases it must do so under some constitutional power other than the copyright power. The Court's reference to *The Trademark Cases* suggests that it had the commerce power in mind, and some form of federal unfair competition-misappropriation statute as the eventual legislative product.

Within such a new statutory framework, all copyright bets will be off: a short term may be prescribed, a different remedial array, possibly including compulsory licensing, may be offered, and perhaps Congress will include cognate subject matter like industrial design and computer software whose markets respond better to a low level of protection than to the high level of protection that copyright offers to works of creative authorship. In two words, a *sui generis* law—to date the province largely of academic speculation—may become a political expedient.

C. Authorship in the International Arena

Twenty-five years ago, almost to the month, Benjamin Kaplan introduced his Carpentier Lectures at Columbia with the observation that on such occasions “it is almost obligatory for a speaker to begin by invoking the ‘communication revolution’ of our time, and then to pronounce upon the inadequacies of the present copyright act. . . .”¹⁸ I have not begun my remarks today—nor shall I conclude them—by invoking those prospects. In no small part this is because Ben Kaplan, with characteristic prescience, envisioned virtually all of the technological shifts that today, and in the coming years, seem likely to bedevil our copyright system. I should add that it was the inadequacies of the 1909 Act—not the 1976 Act—of which Ben was speaking. Time flies.

I will close instead with two observations on the international scene, centering on what certainly has been the signal event in the United States' international copyright relations this century: adherence to the Berne Convention for the Protection of Literary and Artistic Works.

More than any other single document, the Berne treaty embodies the view of copyright and authorship that I have sought to describe today. Berne's prescription of broad, exclusive rights, with only stinting concessions to compulsory licenses, reflects a vision of the personal autonomy that is an essential condition of authorship. Berne's broad, indeed catholic, embrace of protected works creates the authorial elbow room that I have described, while its central focus on “works”—not “products,” but “works”—commands the presence of an author's hand, as does the *Feist* case.

The genius of Berne lies not, as some in the United States today would have it, in moral right, nor even in author's right. The genius of Berne resides in its promotion of authorship, in removing all barriers between an author and his possible publics. Berne's prohibition on formalities, though not introduced until 1908, is no afterthought. The prohibition bars government-imposed hurdles—registration, notice—that separate the act of creation from

18. Kaplan, *An Unhurried View of Copyright* at 1 (cited in note 2).

the public's receipt of works. In a word, Berne eliminates the last remnants of the licensing, privilege and printing monopolies that copyright first began to shrug off in the early eighteenth century as it started its gradual progress toward sustaining authorship.

Membership in the Berne Union raises two questions for the United States. First, what are our obligations to Berne members whose systems more fully comply with the spirit of Berne than our own? Second, what are our obligations to Berne members, and prospective Berne members, whose legal systems and methods of enforcement less fully comply with Berne's strictures than our own?

What are our obligations on the high side? With commendable foresight, Congress in the 1976 Act moved us to the life plus fifty year term of protection mandated by Berne, and the Berne Implementation Act removed remaining obstacles—principally the notice and registration formalities—to Berne adherence. Congress' recent, express addition of architectural works to the subject matter of copyright ironed out one Berne wrinkle, and a bill now pending to lift the renewal formality would ease another.

It seems unlikely, however, that there will be any forward movement in the form of federal legislation expressly embodying the moral right prescription of Article *6bis*. I believe that the recent amendments to the 1976 Act giving visual artists highly circumscribed rights of integrity and attribution represent a door being closed rather than a door being opened. The reason for this has less to do with industry opposition than with the allocation of power in our federal system. Protection of reputational interests of the sort contemplated by Article *6bis* has in the United States traditionally resided in the states rather than in the federal government. To my knowledge, no other Berne member country divides up legislative competence quite as the United States does, nor, consequently, suffers this jurisdictional constraint. Section 43(a) of the Lanham Act—a commercially driven, consumer oriented provision—may be the best that moral right advocates can hope for on the federal level.

On the other side of the Berne ledger: What are our obligations to Berne members and prospective Berne members whose economic systems are less developed than ours? Here, of late, the trade process looms large, sometimes almost obscuring the Berne process in its efforts to improve the United States' intellectual property balance of trade. In the main, I believe that our trade negotiators have got it right, at least to the extent that they have focused on piracy—the production and distribution of unauthorized knockoffs. No economically undeveloped country, however depressed its economy, has much of lasting value to gain from piracy—certainly not in terms of promoting domestic conditions of authorship.

Apart from a modesty befitting a nation that in its first century viewed itself as a developing country, with no foreign copyright obligations, a proper respect for political and cultural traditions abroad suggests that the United States would do best to confine its trade efforts to piracy. For the nation's initiatives to cut deeper—for example, into rules on fair use or fair dealing, or

into standards of substantial similarity—could well disrupt local cultural values and educational needs. I think, too, that it would be desirable to promote schemes of equitable remuneration for the reproduction and translation of educational materials generally in economically undeveloped countries. These are the very tools that these countries need to lift themselves to the levels of literacy and numeracy that competition in the international marketplace requires. To be sure, copyright plays a small part in a landscape of perennial famine, natural disaster and political repression. But it can still play a part.

Membership in the Berne Union is, at bottom, an act of faith. It is an act of faith that requires member nations with more highly developed economic, legal and political systems to trust that other member nations will—however gradually—move toward, rather than away from, the Berne model of authorship. If the United States—its Congress, its courts and its executive branch—is to keep that faith, it must, as it has already begun to do, move toward a system of rights, unfettered by formalities, that will help sustain authorship in all of its varied forms. But this country must also, with a befitting combination of charity, and a cold eye on the long horizon, accept the short term struggles of economically and politically less developed nations to advance toward those conditions of authorship that in this country we accept, or I hope we soon will accept, as virtually a birthright.

