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International Copyright from an American Perspective

Marshall Leaffer*

Introduction

In our age of information the international dimension of copyright law grows in importance with each day. Satellite communications and other developing technologies permit worldwide access to copyrighted works as never before. Copyrighted works can be copied cheaply and disseminated quickly, unimpeded by time, space, or national boundary. This results in copyright owners having less and less control over their creations, particularly in light of the systematic piracy of copyrighted works which occurs in some foreign countries. As the world’s largest user and producer of copyrighted works, the United States has a special interest in an orderly and responsive international regime of copyright protection. The United States’s recognition of this special interest is reflected in its March 1, 1989 entry into the Berne Convention, the oldest and preeminent multinational copyright treaty.

This Article, which is divided into four parts, provides an overview of international copyright matters from an American perspective. Part I examines the various international copyright conventions. The major focus is on the provisions of the Berne Convention and the changes in American law that permitted the United States to enter into this important international arrangement. Part II discusses the broad based protection of foreign authors conferred by the Copyright Act. Part III summarizes some of the major provisions of various trade regulation laws affecting copyright: (1) regulation of importation under the Copyright Act; (2) prohibition of unfair methods of competition in the importation of goods into the United States under the Tariff Act; and (3) forms of interna-

* Professor of Law, University of Toledo College of Law. This Article is based on chapter 12 of Professor Leaffer's treatise; M. Leaffer, Understanding Copyright Law (Matthew Bender ed. 1989) © Matthew Bender 1989, by permission.
tional trade regulation under the Generalized System of Preferences and the Caribbean Basin Recovery Act. Part IV examines the now abrogated curiosity of American copyright law known as the manufacturing clause, which required that certain books written by American authors be manufactured in the United States. Although no longer a part of the law, the manufacturing clause may still have a limited effect on previously distributed works not complying with its provisions.

Although the immediate goal of this Article is to present a general introduction to international copyright from an American point of view, it has a larger purpose. Throughout the material it is important to consider a major theme of the recent fundamental changes that have taken place in United States copyright law. Why, for example, has the United States decided at this time to enter the Berne Convention and to join the rest of the world in copyright matters? Why has recent trade legislation elevated copyright and intellectual property to the forefront of the trade agenda? And why the long awaited demise of the manufacturing clause? There are two apparent answers. First, copyright and other forms of intellectual property are a large part of world trade and, for the United States, a bright spot in an otherwise dismal balance of trade. Second, American legislators finally realized that the United States must join the world community because it is no longer the only dominant economic force in the world. One nation among many, the United States can no longer maintain a legal regime which radically departs from a world-wide consensus on certain legal standards. The subject matter of this Article reflects these basic economic realities. But none more so than Part I which traces the changing attitude of the United States toward the international conventions concerning copyright, culminating in the United States entry into the Berne Convention on March 1, 1989.

I. THE MAJOR INTERNATIONAL TREATIES INVOLVING COPYRIGHT

Worldwide copyright does not exist. The two principal
treaties, the Berne Convention and the Universal Copyright Convention, do not automatically protect an author's works throughout the world under a supranational copyright law. No matter what international agreement a country adopts, protection against infringement in any given country depends on its national laws. Thus, an author who wishes to protect his work abroad must comply with the pertinent national laws.

Although they do not establish an international copyright, the Universal Copyright Convention, and particularly the Berne Convention, have simplified the requirements for obtaining foreign copyright protection. These Conventions accomplished this goal by establishing convention minima—minimum rights which may be claimed in all member countries, regardless of any other national legislation. The difference between these two principal international conventions is the substantiality of their minima.

From 1891 until its entry into the Universal Copyright Convention in 1955, the United States relied on a series of bilateral agreements to protect its copyright interests internationally. These piecemeal arrangements became increasingly less adequate in an ever changing world of new communication technologies which do not recognize national boundaries. By the 1950s, when the United States emerged as the major exporter of copyrighted works, the need for American participation in a truly integrated system of international copyright
was apparent. The United States entry into the Universal Copyright Convention filled this need.

A. The Universal Copyright Convention

The United States was the motivating force behind the formation of the Universal Copyright Convention (UCC). At that time, the Copyright Act of 1909 was in force and its features precluded United States entry into the Berne Convention. The United States negotiated the UCC as a measure to protect temporarily United States copyright interests, and as an eventual bridge to entry into Berne. The UCC, however, turned out to be more than an temporary measure. It took more than thirty years and major revisions of American copyright law before the United States was able to enter into the Berne Convention. Although the UCC has now been supplanted by the United States's adherence to the Berne Convention, it is still important for American copyright interests because a number of countries are members of the UCC but are not members of Berne.

The UCC took effect in the United States on September 16, 1955. A revision of the convention occurred at Paris in 1971, and became effective in 1974. The UCC is administered by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and because the United States withdrew from this agency, some question our continued reliance on this Convention to provide effective protection for United

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5. The most important of the features impeding entry into the Berne Convention was the duration of copyright and the required compliance with formalities imposed by American Copyright law. For a discussion of Berne and its convention minima, see infra notes 26-46 and accompanying text.


7. As of January 1, 1989, some 26 countries are members of the UCC but are not Berne adherents. These include certain developing countries in Africa and several Latin American countries.

States's copyright interests.\(^9\)

1. Basic Provisions of the UCC

The basis of the UCC is "national treatment,"\(^{10}\) which requires all member states to accord the same protection to foreign works eligible under the UCC as that granted its own nationals' works. Additionally, the Convention specifies certain minimum legal obligations for each contracting state. There are six important elements of the Convention.

First, the contracting states must provide adequate and effective protection of the rights of authors and other copyright proprietors.\(^{11}\) Second, the published works of nationals of a contracting state must receive the same protection as that which the contracting state accords to works of its nationals first published in its own territory. The same applies to unpublished works.\(^{12}\) The convention is not retroactive and those works in the public domain of a contracting state remain there.

Third, a foreign UCC work satisfies formalities such as notice, registration, and manufacture, which may be part of a contracting state's copyright law, "if from the time of first publication all the copies of the work . . . bear the symbol '©' accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright."\(^{13}\) A member state may, however, require additional formalities, such as deposit, registration, and manufacturing for works first published within its territory by foreign nationals or by its own nationals wherever they may be published. Thus, this provision does not excuse formalities for works which are first published in the United States by either a United States citizen or a foreign national. In addition, a work first published abroad

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9. A country does not have to be a member of UNESCO to participate in the UCC but without membership the United States would not be able to influence the future direction and policy on international copyright matters within the organization that administers the UCC. See S. REP. NO. 352, 100th Cong., 2d Sess. 4 (1988).

10. See 3 Nimmer on Copyright, supra note 4, § 17.04[B] n. 10 and accompanying text.

11. UCC (Paris Act), supra note 2, at art I.

12. Id. at art. II.

13. Id. at art. II.
by a United States citizen was always subject to formalities under United States law.\textsuperscript{14}

Fourth, member states must grant a minimum copyright term of either twenty-five years from publication, or the life of the author plus twenty-five years.\textsuperscript{15} Fifth, contracting states must grant exclusive translation rights to foreign authors of other member states for at least seven years. After this term expires, a compulsory licensing arrangement can be instituted.\textsuperscript{16}

Finally, the UCC contains a "Berne safeguard clause," which prohibits a Berne Convention country from denouncing Berne and relying on the UCC in its copyright relations with members of the Berne Convention.\textsuperscript{17} This provision came about through the efforts of Berne Union members who feared that the UCC was a step backwards and wanted to prevent Berne principles from being undermined by its members adhearing to the UCC. Thus, the United States, now a member of Berne, cannot look to the UCC for protection of any work originating from a Berne country even though that country may also adhear to the UCC.

2. The Paris Revision of the UCC

Demands made by developing countries led to the Paris revision of the UCC in 1971.\textsuperscript{18} This revision, which became effective in 1974, allows developing countries to obtain compulsory licenses under certain conditions in order to translate copyrighted works for teaching, scholarship, and research. It also allows reproduction of copyrighted works for use in systematic instructional activities.

This Paris revision strengthened Convention minima for adequate and effective protection by adding basic rights which ensure an author’s economic interest. These included the

\textsuperscript{14} Id. at art. III.
\textsuperscript{15} Id. at art. IV.
\textsuperscript{16} Id. at art. V.
\textsuperscript{17} Id. at art. XV; Id. at Appendix Declaration relating to Article XVII.
\textsuperscript{18} The United Nations General Assembly designates "developing countries" by a nation's cultural, social, and economic development; for example, Algeria, Barbados, Cambodia, Dahomey, and Ecuador are considered "developing countries." See Dawid, Basic Principles of International Copyright, 21 BULL. COPYRIGHT SOC'Y 1 (1973). See also UCC (Paris Act), supra note 2, at art. Vbis.
The revision, however, excluded protection of the author's moral rights. In addition, the revision suspended the Berne safeguard clause which permitted developing countries to withdraw from Berne and adhere to the UCC.

B. The Berne Convention

Until its adherence on March 1, 1989, the United States was the only major western country not to be a member of the oldest multilateral copyright convention, the International Union for the Protection of Literary and Artistic Works—the Berne Convention or Berne Union (Berne). The Berne Convention, first established in 1886 in Berne, Switzerland, has been revised six times. The current text, which is the one the United States presently observes, is the 1971 Paris revision. The World Intellectual Property Organization (WIPO), an intergovernmental organization with headquarters in Geneva, Switzerland, administers the Convention.

19. UCC (Paris Act), supra note 2, at art. IVbis.
20. Cf. id. Many countries recognize an artist's moral or personal right in his work to prevent mutilation, alteration and false suggestion even after the work is legally transferred. In contrast, American copyright law is rooted in economic rights and once copyright of the work is transferred, the author can no longer control uses of his work. See generally Leaffer, Of Moral Rights and Resale Royalties: The Kennedy Bill, 7 CARDOZO ARTS & ENT. L.J. 234, 239-42 (1989) (discussing moral rights and their lack of express recognition under American law).
21. UCC (Paris Act), supra note 2, at Appendix Declaration Relating to Article XVII. The Berne Safeguard Clause prohibits a Berne Convention country from denouncing Berne and relying on the UCC and its copyright relations with members of the Berne Convention. The Paris Revisions, which granted wider translation and instructional privileges with respect to the UCC, reflected the desires of developing nations to reduce their treaty obligations. Furthermore, it allowed them more latitude in withdrawing from Berne without abandoning protections previously accorded their authors.
22. As of January 1, 1989, the other notable non-adherents to Berne are the Soviet Union and China. The Soviet Union is a member of the UCC; China is not.
24. The Berne Convention, signed Sept. 9, 1886, was supplemented by the Additional Act and Declaration signed at Paris, May 4, 1896. The Convention was revised at Berlin, Nov. 13, 1908; Rome, June 2, 1928; Brussels, June 26, 1948; Stockholm, July 14, 1967, (but not ratified); Paris, July 24, 1971.
25. WIPO is a specialized agency with the United Nations system. Its Central role is to conduct studies and provide services designed to facilitate protection of intellectual property. Its Director General is chief of the Berne Union.

The first twenty articles contain substantive provisions of the Berne Convention, followed by administrative provisions and an appendix incorporating special provisions for developing countries. The substantive provisions include both specific and general obligations imposed on its membership. Other rules are optional with the member country. Similar to the UCC, the Berne Convention is based on national treatment and compliance with convention minima. The Berne Convention, however, has established convention minima more substantial than those found in the UCC.

First, the Berne Convention covers a broad subject matter which encompasses ""literary and artistic works" [which] . . . include every production in the literary, scientific and artistic domain, whatever may be mode or form of its expression . . . ."\(^{26}\) An illustrative list of works such as choreography, painting, and architecture is provided. Compilations and derivative works are protected as well.\(^{27}\) The Convention, however, expressly excludes "news of the day or . . . miscellaneous facts having the character of mere items of press information" from obligatory protection.\(^{28}\) Furthermore, protection of industrial design is optional and is left to national law.\(^{29}\)

Second, the Berne Convention protects published or unpublished works of an author who is a national of a member state.\(^{30}\) This protection is also extended to a work of a non-national of a member state if the author first published the work in a member state, or simultaneously published the work in a non-member and member state. Under the Paris and Brussels texts of Berne, an author simultaneously publishes a work if it is published in a member country within thirty days of the work’s first publication in a non-member country.\(^{31}\)

Even before the United States entered the Berne Conven-
tion, American authors could enjoy Berne privileges by simultaneously publishing their works in a Berne country. For example, American authors often published their works in Canada within thirty days of publication in the United States. Because Canada adhered to the Paris text of Berne, American authors benefited from Berne despite the United States's non-adherence. This technique of obtaining the benefits of Berne despite the United States's non-adherence is known as the "back door to Berne."

Simultaneous publication, however, did not prove to be the panacea it may have appeared to be at first glance. First, it could be costly, depriving the less wealthy author of the ability to avail himself of the privilege. Second, seeking protection under the simultaneous publication privilege was not altogether certain in conferring the benefits of Berne. This uncertainty lies in the how the term "publication" is interpreted under the Berne Convention. Berne defines "published work," which could be synonymous to "publication," as requiring the author to supply enough copies to satisfy the public's need for the work. Under this interpretation of "publication," an American author would have to do much more than send a couple of copies of a book to a Canadian distributor in order to meet Berne publication requirements, even though this act would be sufficient to constitute "publication" under United States law. In addition to these difficulties, an author taking the "back door" route had to verify that the country chosen adhered to a text of Berne that allowed the thirty day publication privilege. For those countries adhering to the Rome text only, simultaneous publication means that publication must take place on the same day in the two countries, a task impossible to fulfill for many authors.

Third, Berne also provides protection for a work without compliance with formalities outside the country of origin. Thus, if a work originates in a member country it must be

32. See generally 3 NIMMER ON COPYRIGHT, supra note 4, § 17.04[D] (for a detailed overview).
33. Berne Convention (Paris Text), supra note 1, at art. 3(3) (defining "published work").
34. See 4 NIMMER ON COPYRIGHT, supra note 4, § 17.04[D].
36. Berne Convention (Rome text), supra note 1, at art. 4(3).
protected in all Berne countries without being subjected to any prerequisite formalities. The Berne Convention, however, does not govern protection of works in their country of origin. Therefore, formalities can be imposed on works in their country of origin.

Fourth, the Berne Convention has established a minimum term of protection of life plus fifty years or an alternative term of fifty years from publication for anonymous or pseudonymous works. As is generally the case for all Berne provisions, the member country can grant a term of protection in excess of the minimum term.

Finally, the Berne Convention requires that certain exclusive rights be protected under national law. These rights, on the whole, are quite similar to the array of economic rights found in the Copyright Act. In some ways, however, Berne is not as extensive as American law. For example, Berne is silent on distribution and display rights while American law is not. Berne also recognizes certain limitations to exclusive rights such as a fair use privilege and also may limit the right of recording musical works as provided for in the Copyright Act.

In addition to these exclusive economic rights, Berne also requires that the author's moral right be recognized and endure beyond his life. This concept is alien to United States copyright law, but may have received de facto recognition.

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37. Berne Convention (Paris text), supra note 1, at art. 5(2).
38. Id. at art. 7(1) - (3).
39. Id. at art. 7(6).
40. Id. at art. 11(2)bis.
41. See id. at art. 8(1) (translation right); id. at art. 9(1) (reproduction); id. at art. 11(1) (public performance); id. at art. 12 (adaptation).
42. Id. at art. 9(2), 10, 10bis.
44. See Berne Convention (Paris text), supra note 1, at art. 6bis which provides in part:

(1) Independently of an 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 honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights . . . .
when considered in the entire context of American unfair competition and defamation law.\(^{45}\)

2. United States Entry Into Berne

Before its entry into Berne on March 1, 1989, the United States was the only major western country which was not a party to the Convention.\(^{46}\) Because the United States had traditionally been the world's largest exporter of copyrighted works,\(^{47}\) it had a strong interest in joining the world's largest and preeminent copyright convention which encompasses seventy-seven nations and includes the United States's major trading partners. The impetus for joining Berne was greater than ever because the United States had withdrawn from UNESCO, the United Nations's organization which administers the UCC. Although withdrawal from UNESCO did not preclude its membership in the UCC, the resulting consensus was that the United States could no longer influence UNESCO internal policy. It was important for the United States to have a major role in influencing the direction of international copyright matters because of the increase in organized international piracy of copyrighted works of American authors.\(^{48}\) The entry of the United States into Berne appeared to be the logical solution to its the current isolation in the world copyright system.

Major changes have taken place in both the substance of and attitudes about American copyright law since the initial refusal of the United States to enter into Berne in 1886.\(^{49}\) The United States had taken a more internationally orientated approach in joining the UCC and by recognizing the principle of


\(^{49}\) The refusal of the United States to enter Berne in 1886 was the result of rivalries between American and British publishing houses over the national treatment doctrine and the extension of protection to non-resident foreigners.
national treatment. More important, however, the provisions of the 1976 Copyright Act eliminated many of the impediments to Berne adherence. This Act, however, still failed to comply with certain substantial and explicit convention minima required for Berne membership, and major amendments to the Act were needed to make membership possible.


On October 31, 1988 the Berne Convention Implementation Act was enacted and on March 1, 1989 the United States officially entered the Berne Convention. The Act, however, declared that the Berne Convention was not self-executing under United States law. This means that rights and responsibilities dealing with copyright matters will be resolved under the domestic law—state and federal—of the United States. Thus, special implementing legislation was needed to modify the Copyright Act so that it complied with the general and specific obligations of the Berne Convention.

In drafting the implementing legislation, Congress took a minimalist approach. The term "minimalist" means that only the essential changes necessary to comply with Convention obligations were made to American law. An example of this minimalist approach can be found in the treatment of moral rights, which are specifically recognized in the Berne Convention. Congress believed that the protections afforded by American copyright, unfair competition, defamation, privacy, and contract law served to prevent improper alterations of an author's work, and were already sufficient to meet the needs of

50. Under the "national treatment" principle each member nation must treat persons entitled to Convention benefits the same way it treats its own nationals.

51. At the request of the U.S. State Department, individuals with significant experience in copyright formed an Ad Hoc Working Group on U.S. Adherence to the Berne Convention to consider possible U.S. adherence to Berne. The final report addresses items of conflict, including notice and registration. For the complete, detailed text, see Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in 10 COLUM. J. L. & ARTS 513 (1986) [hereinafter Ad Hoc Working Group].


53. Id. § 2(1).


55. Berne Convention art. 6(1)bis.
Berne adherence.\footnote{56 \textit{See} M. Leaffer, \textit{supra} note 45, § 8.24 (discussing moral rights); \textit{see also} 2 Nimmer on Copyright, \textit{supra} note 4, § 8.21 (discussing the moral right as recognized in art. 6bis of the Berne Convention).} There are five major aspects of the Berne Implementation Act which amended the 1976 Copyright Act. First, the Berne Convention provides that the enjoyment and exercise of an author's rights shall not be subject to any formality. Thus, to enter Berne, the United States had to eliminate certain formalities contained in the Copyright Act such as notice and registration. Under the Copyright Act, omission of notice could lead to forfeiture of copyright.\footnote{57 17 U.S.C. § 405 (1988). \textit{See generally} M. Leaffer, \textit{supra} note 45, §§ 4.8-.14 (discussing notice).} In addition, registration was a prerequisite for bringing suit for infringement and obtaining certain remedies.\footnote{58 \textit{See} 17 U.S.C. §§ 401, 411 (1988). \textit{See generally} M. Leaffer, \textit{supra} note 45, §§ 7.1-.7 (discussing registration).} These requirements were contrary to Berne because they affect the "enjoyment and exercise of rights under copyright."\footnote{59 Berne Convention (Paris text), \textit{supra} note 1, at art. 5(2).} The most significant change to American copyright brought about by the Berne Convention Implementation Act was the abrogation of the notice requirement for publicly distributed works on or after March 1, 1989. For these publicly distributed works, notice of copyright is permissive and omission can no longer forfeit copyright.\footnote{60 \textit{See} 17 U.S.C. § 401(a) (1988).} Although notice is no longer required for publicly distributed works, it is still recommended. In fact, the Berne Convention Implementation Act encourages proper notice. For causes of action arising after March 1, 1989, proper notice on a work will preclude a defendant from asserting "a defense based on innocent infringement in mitigation of actual or statutory damages."\footnote{61 \textit{See id.} § 401(d), 402(d).} The new permissive notice provisions, however, are not retroactive. A work publicly distributed before the effective date of the Berne Implementation Act will be governed by the prior provisions\footnote{62 \textit{See id.} § 405(a), (b), (f).} and is still subject to possible forfeiture.

Before the Berne Convention Implementation Act, recor-
dation of an interest in a copyright was a condition precedent to bringing a suit for copyright infringement. The Berne Implementation Act abrogated this requirement for causes of action arising after March 1, 1989. However, even after March 1, 1989, recordation remains a highly recommended procedure for the owner of an interest in copyright because it is still important in determining the priority between conflicting transfers.

Opinions differed on whether registration as a prerequisite for bringing an infringement suit was a formality incompatible with Berne. The Berne Convention Implementation Act took a compromise approach to this issue. Instead of flatly repealing this requirement, the legislation adopted a two tier approach to registration. For works originating in a Berne country, the Berne Implementation Act abrogated the registration requirement as a precondition to bringing suit. Registration will still be required, however, to bring suit when a work is either first published or simultaneously published in the United States or for an unpublished work when all the authors are nationals, domiciliaries, or permanent residents of the United States.

Although registration is no longer required for works from a Berne country, the incentives to register remain. First, the prima facie evidentiary value of the certificate of registration, which shifts the burden of proof to the copyright owner in an infringement suit, is unchanged. Second, registration remains a prerequisite for obtaining statutory damages and attorney's fees. Moreover, statutory damages for infringement of copyrighted works have been doubled, further encouraging

63. See id. § 205(d) (repl. by Pub. L. 100-568 (effective Mar. 1, 1989)).
64. See id. § 205. See generally M. Leaffer, supra note 45, § 5.12 (discussing recordation).
66. See id. § 411. See also id. § 101 (defining country of origin of a Berne Convention work). In addition, registration to bring an infringement suit will be required when a work is published in foreign nation that does not adhere to the Berne Convention and all the authors are nationals, domiciliaries, or permanent residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States. Id. See generally M. Leaffer, supra note 45, § 7.6 (discussing copyright registration).
68. Id. § 412.
registration of copyright. In sum, the Berne Implementation Act, with the exception of permissive notice, has done little to weaken the necessity of complying with formalities, and in some cases, has increased the rewards of compliance.

Second, the Berne Convention includes architectural works and works of applied art as part of minimum subject matter protection. Accordingly, the Copyright Act has been amended to include architectural plans in the definition of pictorial, graphic, and sculptural works. This amendment does not, however, effectively change United States law concerning architectural plans. Thus, even for causes of action arising after March 1, 1989, it is an infringement of copyright to reproduce an architectural plan without consent of the copyright owner. To construct a building that is represented in the architectural plans, however, remains subject to the Copyright Act. In addition, the Berne Implementation Act did not change the law regarding three dimensional works of architecture and applied art. Even for causes of action arising after March 1, 1989, three dimensional architectural works are not protected as such and works of applied art are protectable only as to their features separable from the useful object.

Third, a jukebox compulsory license was clearly contrary to the requirements of the Berne Convention. The Berne Convention calls for the exclusive right of authorizing the public performance of a musical work. The Convention deemed the jukebox license a limitation on the copyright owner’s performance right in a musical work which allowed the public performance of foreign works without the copyright owner’s consent. To bring the jukebox license requirement into harmony with Berne requirements, a new provision

69. Id. § 504(c).
70. Berne Convention (Paris text), supra note 1, at art. 2(1).
73. See generally M. Leaffer, supra note 45, § 3.14 (discussing copyright in architectural works).
74. See generally M. Leaffer, supra note 45, § 8.20 (discussing jukebox licenses).
replaces the compulsory license with a voluntarily negotiated one. The new provision establishes a mechanism that gives the parties a year from the effective date of the Berne Implementation Act, March 1, 1989, to negotiate a voluntary license. If the parties are not able to formulate a negotiated license within this time, the previous compulsory licensing requirement system is applied.

Fourth, the Berne Convention Implementation Act provides no retroactive protection for any work that is in the public domain in the United States. Thus, the obligations of the United States under the Berne Convention will apply to works that are protected in the United States on the effective date of the Act. Furthermore, the Act does not apply to causes of action arising before its effective date.

Finally, unrelated to Berne compatibility, the Berne Convention Implementation Act doubled the amount of statutory damages that can be recovered in lieu of actual damages and profits in copyright infringement actions. Doubling the statutory damages enhances the incentives to register a work because statutory damages cannot be sought without registration, even for works originating in a Berne country.

4. Benefits to American Authors and Copyright Owners from Berne Membership

Membership in Berne eliminates the need for American authors and copyright owners to use the costly and risky "back-door to Berne" procedure to protect their works in some twenty-four Berne countries with which the United States has no other copyright relations. For the most part, however, the tangible benefits that Berne membership brings to American copyright owners may not be felt immediately. These benefits will manifest themselves over the long term due

76. Id.
78. Id. § 13(b).
80. Entry will enable the United States to have copyright relations with some 24 new countries. See S. Rep. No. 352, 100th Cong., 2d Sess. 3 (1988).
to the United States's more effective influence over the direction of international copyright policy.

C. Other Copyright Related Conventions

1. The Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms

Signed in Geneva in 1971 and effective in 1974 in the United States, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms provides international protection for sound recordings. In this Convention each member nation agreed to protect the nationals of other member nations against the unauthorized manufacture, importation, and distribution of sound recording copies. The Convention is based on national protection and has minimum requirements for participation. For example, one requirement is a twenty-five year minimum term measured from the date a sound recording is embodied in tangible form in a phonorecord or cassette disk. Another requirement is a notice provision, identical to United States law, which is deemed to fulfill all other formalities. In addition, this Convention limits compulsory licenses. They are allowed only for teaching or scientific research.

This convention should be distinguished from the Rome Convention of 1961 entitled the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. The Rome Convention, unlike later phonogram conventions, protects performances embodied in sound recordings. The United States has not ratified the Rome Convention because American law does not recognize performance rights in sound recordings.

81. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, reprinted in 4 NIMMER ON COPYRIGHT, supra note 4, at app. 29.
84. See generally M. LEAFFER, supra note 45, § 8.27 (discussing performance rights in sound recordings).
2. Brussels Satellite Convention

In 1984 the United States ratified the Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, known as the Brussels Satellite Convention. The purpose of this Convention is to combat the misappropriation of satellite signals on an international level. The need for a special international agreement covering satellite transmission was apparent from its inadequate treatment in the major international copyright conventions. Although the UCC and the Berne Convention provide for the exclusive right to broadcast, it is unclear whether the term "broadcasting" in these conventions covers satellite transmissions. The Brussels Satellite Convention fills this void.

This Convention creates no new rights for programs transmitted by satellite. The contracting states, who agree to provide adequate protection against the priacy of satellite signals, are responsible for implementing the treaty. The United States viewed its copyright and communication laws as adequate in this regard. Thus, unlike adherence to the Berne Convention, the United States perceived no need for specific implementing legislation to join the Brussels Convention.

The focus of the Convention is the unauthorized distribution of signals, not their unauthorized reception. Thus, reception of signals for private use is not a violation of the Convention. Moreover, the signal is the object of protection, not the content of the material sent by the signal. Accordingly, the convention protects the emitter or carrier, not the copyright owner of the program material.

3. Copyright in the Americas: Buenos Aires Convention

The United States and seventeen Latin American nations adhere to the Buenos Aires Convention which took effect in

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85. The United States signed the treaty in 1974 but did not ratify it until 1984.
86. UCC art. IVbis.
87. Berne Convention (Paris text), supra note 1, at art. 11bis.
88. Satellite signal piracy is also referred to as "signal poaching," or the unauthorized use of program-carrying satellite signals. See generally Dember, Securing Authors' Rights In Satellite Transmissions: U.S. Efforts to Extend Copyright Protection Abroad, 24 COLUM. J. TRANSNAT'L L. 73, n.2 (1985).
The Convention's basic provision, is that once copyright is obtained for a work in one member country, protection is given by all member countries without further formalities provided that there appears in the work a statement that property rights are reserved. This statement usually appears as "all rights reserved." The United States Copyright Office, however, takes the position that works under the Buenos Aires Convention: (1) have no special status under American law; (2) must satisfy all formalities imposed on national authors; and (3) use of "all rights reserved" is insufficient for copyright notice. Under this view the Buenos Aires Convention does not appear to serve any practical purpose because virtually all the countries in the Americas are members of the UCC which provides similar protection. In addition, the UCC has clearer terms and has more adherents.

II. FOREIGN AUTHORS

A. Unpublished Works

Nationals and domiciliaries of foreign nations may protect their works in the United States in the same manner as an American citizen if the foreign author meets the conditions set forth in the Copyright Act. These conditions vary depending on whether the work is published or unpublished. The rule for unpublished works of foreign authors is simple and all inclusive: the Copyright Act protects all works qualifying for statutory copyright protection from the moment of creation no matter what the nationality or domicile of the author. As long as the work has not gone into the public domain, the Copyright Act provides protection for an unpublished work of

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89. The Buenos Aires Convention was not the first inter-American treaty governing copyright in which the United States participated. The first was the Mexico City Convention of 1902 which governed copyright relations between the U.S. and El Salvador, until that country's adherence to the UCC in 1979. See generally Rinaldo, The Scope of Copyright Protection in the United States under Existing Inter-American Relations: Abrogation of the Need for U.S. Protection Under the Buenos Aires Convention by Reliance Upon the UCC, 22 BULL. COPYRIGHT SOC'Y 417 (1975).

90. Buenos Aires Convention art. 3, reprinted in 4 NIMMER ON COPYRIGHT, supra note 4, at app. 28.

91. See Compendium of Copyright Office Practices II, §§ 1005.01(b), 1104.02.


93. See id. § 104(a). See also 1 NIMMER ON COPYRIGHT, supra note 3, § 5.05.
a foreign author in the United States in the same way as an unpublished work of an American author.

B. Published Works: The Five Bases for Protection in the Copyright Act

The Copyright Act sets forth five broad, overlapping categories for published works. A foreign author must fall within one of these categories to be eligible for protection in the United States.

First, one or more of the authors must be a national or domiciliary of the United States or a country with which the United States has copyright relations under a treaty, or the author may be a stateless person. The term "domicile," consists of two requirements: (1) residence in the United States, and (2) intent to remain in the United States. Mere residency without the requisite intent is insufficient for status as a domiciliary in the United States. The resident must manifest intent by establishing ties such as declarations, marriage, payment of taxes, voting, or establishing a home.

Even foreign authors not domiciled in the United States may claim copyright under United States law if, on the date of publication, the author is a domiciliary or national of a treaty nation. Treaty nations are those adhering to the Berne Convention, the UCC, the Buenos Aires Convention, or countries with which the United States has bilateral arrangements such as China, Romania, Thailand, and the Philippines.

Second, if the work is first published in the United States or in a UCC country, it will receive non-discriminatory protection under United States law. When an author first publishes his work in a UCC country, the publication must have occurred no earlier than September 16, 1955—the date on which the United States became a member of the UCC. If the author publishes his work before that date, it is irrevocably in

95. Id. § 104(b)(1).
97. The texts of these agreements are reprinted in the appendices in 4 Nimmer on Copyright, supra note 4. See also International Copyright Relations of the United States, Circular R38(a).
the public domain unless it can be protected on some other basis. Third, a published work of a foreign author receives protection if it was published by the United Nations, by any United Nations specialized agencies, or by the Organization of American States.99

Fourth, Berne Convention works are protected.100 A work qualifies as a Berne work if the work is unpublished and one or more of the authors is a national of a nation adhering to the Berne Convention.101 For published works, a Berne work is created if it is published first in a Berne country.102 Because the United States adheres to the Paris text of the Berne Convention, a work that is published simultaneously in a nation adhering to Berne and in a nation not adhering to Berne will be protected under United States law. Under the Paris revision of Berne, a work is considered to have been simultaneously published in two or more nations if the dates of publication are within thirty days of one another.103 If the basis of protection is publication in a Berne member country, the publication must have taken place after the United States’s effective entry into the Berne Convention—March 1, 1989.

Fifth, the Copyright Act protects works which are the subject of a Presidential proclamation. This proclamation must extend protection to works which originate in a specific country that extends protection to United States’s works on substantially the same basis given to its own works.104

III. TRADE REGULATION AFFECTING INTERNATIONAL COPYRIGHT MATTERS

A. Infringing Importation of Copies or Phonorecords

1. The Copyright Act

International commercial counterfeiting is a big and an ever expanding business. As a result, the provisions of the

99. Id. § 104(b)(3).
100. See id. § 104(b)(4).
101. See id. § 101.
102. Id.
103. Id. (defining a Berne Convention work).
104. Id. § 104(b)(5). Presidential proclamations issued under the 1909 Act remain in force today. See also 17 U.S.C. Trans and Supp. Prov. § 104.
Copyright Act,\textsuperscript{105} which prohibit the importation of infringing copies or phonorecords acquired abroad, have become more important than ever to United States copyright owners. The United States Customs Service, an arm of the Department of the Treasury, may seize and forfeit the imported infringing articles.\textsuperscript{106} The Customs Service issued regulations implementing the provisions of section 602.

To benefit from section 602 the copyright owner must record his registered copyright with the United States Customs Service. Each application must be accompanied by a registration certificate issued by the United States Copyright Office and five copies of any copyrighted work. A filing fee of one hundred and ninety dollars is required. The Service then records the copyright notice and issues a copyright notice to its officers, accompanied by identifying documents and information about suspected infringing copies or phonorecords.\textsuperscript{107}

The Customs Office may hold articles suspected as being "pirated" or infringing copies of copyrighted works. Then officials will notify the importer who is given thirty days to file a denial that the articles are piratical.\textsuperscript{108} If the importer does not file the denial within thirty days, the articles are deemed piratical and are subject to seizure and forfeiture.\textsuperscript{109}

The Customs Service has promulgated regulations which set forth a procedure to be used in order to substantiate the parties' claims.\textsuperscript{110} The copyright owner must file a bond to compensate the importer for any loss he may wrongly suffer.\textsuperscript{111} The owner also has the burden of proving that the articles are piratical.\textsuperscript{112} The Commissioner of Customs makes the ultimate decision based on evidence submitted by the parties. If the copyright owner wins, the articles are forfeited. In other words, the articles are either destroyed or sent back to the country of origin. If the importer's position is upheld, the bond is forfeited to him.

\textsuperscript{105} Id. § 602, 603.
\textsuperscript{106} Id. § 603(c).
\textsuperscript{107} 19 C.F.R. § 133.33 (1989).
\textsuperscript{108} Id. § 133.43(a). See also id. § 133.42 (defining "piratical" goods).
\textsuperscript{109} Id.
\textsuperscript{110} Id. § 133.43.
\textsuperscript{111} Id. § 133.43(b)(2)
\textsuperscript{112} Id. § 133.43(c)(1).
Section 337 of the Tariff Act of 1930 provides relief against unfair methods of competition and unfair acts in the importation or sale of articles in the United States. This includes patent, trademark, copyright, and mask work infringement which occur in connection with the importation of goods into the United States. For registered copyright and mask works, a complainant must show that imported goods are infringing a registered copyright or mask work. Section 337 can be invoked only if, in regard to imported articles, an industry in the United States exists or is being established.

An industry is considered to exist under section 337 of the Tariff Act if there is in the United States: "(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing." For an unregistered copyright or mask work a complainant has an extra burden in having to prove injury to the industry. The United States International Trade Commission (USITC) administers the statute and is required to make determinations based on administrative hearings which are similar to federal court litigation.

Under the Commission's rules, the complaint must contain a detailed statement of facts that consist of more than mere allegations. Within thirty days after receipt of a complaint, the Commission must decide whether to go forward...


with an investigation of the matter. If the Commissioner decides the case warrants investigation he assigns it to an administrative law judge who is in charge of the investigation. The Commission is empowered to issue temporary exclusion orders prohibiting the entry of merchandise during the pendency of an investigation.

The litigation of section 337 cases takes place before an administrative law judge who conducts the litigation similar to a federal court judge. If the judge finds a violation, and the defendant does not appeal to the USITC, an in rem order excluding the infringing articles from the United States may be issued. This “exclusion order” is often a more effective remedy than an injunction because the latter would require personal jurisdiction over foreign manufacturers or exporters. In addition, articles subject to an exclusion order can be seized and forfeited in certain clear instances of bad faith by the owner or importer of the articles.

The exclusion order, however, does not take effect immediately. The President has sixty days to review it for possible veto. At the end of this period the order becomes effective although a review of the Commission’s determination is available to the Court of Appeals for the Federal Circuit. Unlike private litigation, the plaintiffs in these cases do not have to bear the cost of service and enforcement of the order.

B. Broad Based Trade Legislation

Intellectual property rights, a major United States export, and a bright spot in an otherwise dismal balance of trade, have become a major focus in United States trade negotiations. Unfortunately, organized and systematic piracy

118. Id. § 210.12.
119. Id. § 210.24.
120. Those instances are when “...the owner, importer, or consignee of the article previously attempted to import the article into the United States” or the article was previously denied entry into the United States” by a previous exclusion order. 19 U.S.C. § 1337(i) (1988).
122. At the Bretton Woods meetings in 1944, the participants recognized a post-war need to reduce trade barriers and establish freer trade. Representatives of twenty-two countries, including the United States, negotiated the General Agreement on Tariffs and Trade (GATT) in 1947 in Geneva to assist in accomplishing the goal of Bretton Woods. Under the auspices of GATT, periodic, multi-national trade negotiations have
of United States intellectual property has become a major industry in some countries. Alarm over this ever-increasing piracy and concern about the balance of trade has led to the passage of new legislation such as that incorporated into the Omnibus Trade and Competitiveness Act of 1988. This legislation uses economic reward and punishment to encourage other countries to provide adequate protection to American intellectual property owners.

The 1988 amendments to the Trade Act of 1974 have continued the trend toward increased sanctions against foreign countries that deny adequate and effective protection to intellectual property. The United States Trade Representative (USTR) is required to identify "priority" nations that deny this protection. These "priority" countries become the target of unfair trade investigation. If a foreign country's acts are found to deny adequate protection, the USTR must recommend trade sanctions to the President who has certain deadlines in taking the necessary action. These sanctions could include cessation of trade concessions, imposition of duties, and withdrawal of designation under the Generalized System of Preferences.

The Generalized System of Preferences (GSP), enacted in 1974 and revised with amendments as part of the International Trade and Investment Act of 1984, is one of the legislative attempts to encourage proper protection of American interests. The GSP rewards foreign countries who properly protect American interests by conferring duty-free treatment on specific categories of goods exported to the United States by certain developing countries. The GSP also contains discretionary and mandatory sanctions that are to be used in order to punish improper treatment of American intellectual property. The harshest mandatory provision of the GSP dictates that countries shall automatically lose their duty-free

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benefits for acts of nationalization and seizure of United States patents, trademarks, and copyrights. The President, however, may allow benefits to certain countries if they provide "adequate and effective protection" for United States intellectual property.

Similar to the GSP, and instituted in 1983, the Caribbean Basin Economic Recovery Act confers duty-free status to certain products exported by Caribbean countries. Status is based in part on a country's adequate protection of United States intellectual property. The legislation includes both mandatory and discretionary criteria for inclusion in the program.

IV. THE MANUFACTURING CLAUSE

The manufacturing clause, a prominent feature of both the 1909 and 1976 Copyright Acts, prohibited the importation of English language literary works by American authors unless the works were manufactured, printed, and bound in the United States. In effect, the manufacturing clause was protectionist legislation which benefitted American printers at the expense of American authors. A unique and much criticized feature of American law since 1891, the manufacturing clause was a trap for unwary authors, a barrier to United States participation in the Berne Convention, and a violation of the General Agreement of Tariffs and Trade. Fortunately, by its own terms, it expired on July 1, 1986.

Even though the manufacturing clause is currently dead,

126. See 19 U.S.C. § 2462(c)(5).
128. Under the 1976 Act the work could be manufactured in Canada as well as the United States. See 17 U.S.C. § 601(a).
129. 26 Stat. 1106 (1891).
131. Section 601 was originally to be repealed as of July 1, 1982, though the House Report suggests the even earlier date of January 1, 1981. See H.R. REP. No. 1476, 94th Cong., 2d Sess. 166 (1976). Section 602 was amended by Pub. L. No. 97-215, 96 Stat. 178 (1982) to extend the date of repeal to July 1, 1986. President Reagan vetoed the Act of July 13, 1982, but the veto was overridden by the House and the Senate, and Section 601 expired July 1, 1986.
it cannot be totally ignored. It is of continuing, though lim-
ited, importance because of its effect on non-complying works
under both the 1976 and 1909 versions of the Copyright Act.

A. Manufacturing Clause Under the 1976 Copyright Act

The manufacturing clause extended to “copies of a work
consisting preponderantly of nondramatic literary material
that [was] in the English language . . . .” Other varieties of
copyrightable subject matter such as pictorial, graphic, and
sculptural works were exempted. The clause also prohibited
importation of copies falling into these narrow confines if
these works were not manufactured in the United States or
Canada.

1. The “Preponderantly” Requirement

Works were subject to the manufacturing clause only if
preponderantly of nondramatic literary material in English.
In other words, the non-dramatic literary material must have
exceeded the exempted material in importance. Thus, a book
which consisted of graphics, photographs, or illustrations
with a short preface, brief captions, and an index in English
would not have met the preponderantly standard. Even if
the English language portions of the book were extensive
enough to meet the preponderantly test, however, only those
aspects were required to be manufactured in the United
States. The pictorial portion of the book manufactured
outside the United States or Canada would not have been a
violation of the manufacturing clause.

133. What constitutes manufacture is a highly technical question. Some of these
complexities are reflected in The Compendium of Copyright Office Practices, Chapters
1210, 13211 (1984), which tries to define the meaning of the term in light of 17 U.S.C.
§ 601(c).
ever, the court found the “importance” test suggested by the House Report too vague
349 (S.D.N.Y. 1981). The court adopted instead an objective, or “mechanical” test
such that “. . . a book ‘consists of preponderantly nondramatic literary material . . . in
the English language’ when more than half of its surface area, exclusive of margins,
consists of English-language text.” Id. at 352.
2. Exceptions to the Manufacturing Provisions

Several exceptions limited the manufacturing clause. It applied only to American authors and domiciliaries on the date of importation or distribution of a work into the United States. Copies imported for personal use, use by federal or state government, educational use, scholarly or religious purposes, and works in Braille were exempt. In addition, two-thousand copies of a non-complying work could be imported pursuant to certain formalities. Finally, individual authors who arranged for manufacture of the first publication abroad were exempt.

3. Effect of Non-Compliance Under the 1976 Copyright Act

Failure to comply with the manufacturing clause did not result in forfeiture of copyright. The sanctions imposed in this event were less drastic but still serious. The non-complying copies could be seized, forfeited, and destroyed by the Department of the Treasury and United States Postal Service. In addition, violation constituted a complete defense in any civil or criminal action for infringement of the copyright owner's exclusive rights to reproduce and distribute his work. To raise this defense the infringer had to prove three things: (1) That the copyright owner imported non-complying copies of the work; (2) that the infringing copies were manufactured in the United States or Canada; and (3) "that the infringement was commenced before the effective date of registration for an authorized edition of the work..." The defense extended not only to the non-dramatic literary aspects of the work, but also to aspects such as photographs or foreign language materials if the same copyright owner owned both types of materials. Although the manufacturing clause has expired, its violation can arguably be used as a defense against a non-complying work publicly distributed between January 1, 1978 and July 1, 1986—the expiration date of the manufacturing clause. Thus, the possibility of a defense based on a plaintiff's non-

137. See id. § 603(a).
138. See id. § 601(d).
139. Id. § 601(d)(3).
compliance existed until the copyright owner registered an American edition in compliance with the law.

B. The Manufacturing Clause Under the 1909 Copyright Act

The manufacturing clause under the 1909 Copyright Act was more restrictive than under the 1976 Copyright Act.\textsuperscript{140} Under its terms any printed book or periodical in the English language had to be manufactured in the United States. The same condition applied to foreign language books of American authors. The 1909 Act also prohibited Canadian manufacture. The manufacturing clause requirements encompassed not only the texts of books, but also the illustrations.

1. Ad Interim Protection

Under the manufacturing clause in the 1909 Copyright Act, ad interim copyright protection could be obtained for English language books and periodicals manufactured abroad.\textsuperscript{141} To secure ad interim protection, the claimant had to deposit and register the ad interim claim with the United States Copyright Office within six months of first publication abroad. Then, fifteen-hundred copies of the work could be imported into the United States within six months of foreign publication. Ad interim protection endured for five years, measured from the date of publication abroad. If an edition of the work were published in compliance with the manufacturing clause within the five year period, the work could claim a twenty-eight year copyright term, measured from the date of its first publication. According to some case law, failure to register within the six month period and failure to publish the complying edition within the five year period resulted in the loss of copyright protection.\textsuperscript{142}

\begin{itemize}
  \item \textsuperscript{140} 17 U.S.C. § 16 (1909 Act).
  \item \textsuperscript{141} See generally 2 Nimmer on Copyright, supra note 4, § 7.23[F].
  \item \textsuperscript{142} See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 164 (1976). The issue is whether failure to comply with manufacturing clause provisions and ad interim requirements places the work in the public domain, or invalidates an author’s copyright enforcement rights. See Hoffenberg v. Kaminstein, 396 F.2d 684 (D.C. Cir.), cert. denied, 393 U.S. 913 (1968) (failure to comply justified Copyright Office’s refusal to register a work); Bentley v. Tibbals, 223 F. 247 (2d Cir. 1915).
\end{itemize}
2. Forfeiture by False Affidavit and General Non-compliance

Under the 1909 Act,\textsuperscript{143} anyone depositing a work with the Copyright Office had to submit an affidavit swearing that the manufacturing clause requirements had been met. Furthermore, the Act provided that knowingly making a false affidavit forfeited copyright protection.\textsuperscript{144} It was unclear, however, whether failure to comply with the manufacturing clause requirements without making a knowingly false affidavit resulted in forfeiture of copyright.

Whether the work was injected into the public domain post-foreiture is still a matter of controversy.\textsuperscript{145} The answer to this question is important because neither the 1976 Act nor the Berne Implementation Act revives the works going into the public domain. Although case law is not clear on this issue, the better view is that non-compliance did not inject a work into the public domain.\textsuperscript{146} The Act specifically provided for forfeiture when a knowingly false affidavit was submitted. Forfeiture, however, was not mentioned as the result of general non-compliance with manufacturing requirements. This implied that forfeiture did not occur except where expressly stated.

CONCLUSION

This overview has revealed a series of recent fundamental changes in international copyright law from an American perspective. These changes have come about in the last few years as a result of the growing importance of copyright and intellectual property in world trade, and a realization that the United States is only one country among many in the world community. These principles are demonstrated in the United

\textsuperscript{143} 17 U.S.C. § 17 (1909 Act).
\textsuperscript{144} Id. § 18.
\textsuperscript{145} See supra notes 143-44 and accompanying text.
\textsuperscript{146} See, e.g., Hoffenberg, 396 F.2d at 684; but see Meccano, Ltd. v. Wagner, 234 F. 912 (S.D. Ohio 1916). Professor Nimmer argues that copyright in a work would not be forfeited if non-compliance was not accompanied by a knowingly false affidavit in connection with a claim for registration. In this situation copyright would have been suspended during the period of the 1909 Act, but would have been revived under the 1976 Act. Thus, non-compliance with the ad interim provisions under the 1909 Act is a moot issue today. See 2 Nimmer on Copyright, supra note 4, § 7.23[E].
States adherence to the Berne Convention, in the strengthened provisions of section 337 of the Tarrif Act, and in the encouragement of bilateral initiatives of the Omnibus Trade Bill of 1988. In addition, the long awaited demise of the manufacturing clause has finally arrived, reflecting the principle that the United States cannot afford short-sighted protectionist legislation as the world’s largest exporter of copyrighted works.