The House Report on the Berne Convention Implementation Act of 1988

BERNE CONVENTION IMPLEMENTATION ACT
OF 1988

MAY 6, 1988.--Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 4262]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4262) to amend title 17, United States Code, to implement the Berne Convention for the Protection fo Literary and Artistic Works, as revised at Paris on July 24, 1971, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

Berne Convention Implementation Act

I. PURPOSE OF THE LEGISLATION

The purpose of the legislation is to allow the United States to join the Berne Convention for the Protection of Literary and Artis- tic Works,n1 the world's premier multilateral copyright treaty. This international convention has several provisions that conflict with current American copyright law. In addressing these conflicts, the implementing legislation employs a minimalist approach, making only those changes to American copyright law that are clearly required under the treaty's provisions.

The benefits of the legislation will be multifold. United States adherence to the Berne Convention will establish multilateral relations with twenty-four countries with whom such relations do not currently exist. Further, U.S. membership in the Berne Union is a part in the larger picture of reform of our trade laws, as the Berne standards, it is hoped, will ultimately serve as standards for the General Agreement on Tariffs and Trade (GATT). Since the United States runs a positive balance of trade for copyrighted items, Berne membership should contribute to a continuation of that net advantage. Moreover, the legislation is rooted in the proposition that the United States can join the Union while maintaining a strong and vibrant Library of Congress, which of course serves the public by being a depository of our cultural heritage. Last, by placing American copyright law on a fotting similar to most other countries, especially in the industrial world, our domestic law as well as the international legal system are improved. The net benefits will flow to American authors and to the American public.

II. STATEMENT OF LEGISLATIVE ACTIONS

The Committee, acting through the Subcommittee on Courts, Civil Liberties and the Administration of Justice, has devoted a great deal of time to the inquiry about whether the United States should adhere to the Berne Convention and if so, what sort of implementing legislation is necessary.

On March 16, 1987, Subcommittee Chairman Kastenmeier introduced H.R. 1623. In his floor statement, he explained that the proposed legislation was designed "to raise all the questions that must be asked for the fullest range of public and private interests to be aware of what Berne adherence will mean now and tomorrow."n2

On July 6, 1987, the Administration requested introduction of legislation that would make American copyright law compatible with the provisions of the Berne Convention.n3 Shortly thereafter, on July 15, 1987, Congressman Moorhead introduced H.R. 2962, the Administration drafted bill.n4

Both bills were based, in part, on the toil of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, a group of individuals who joined together in 1986 at the request of the State Department to identify provisions of U.S. law relevant to Berne and to analyze their compatibility with Berne. Under the leadership of its Chairman, Irwin Karp, and the guiding hand of Harvey Winter, Office of Business Practices in the Department of State, the Working Group issued a final report and formally submitted it to the executive and legislative branches.n5

Prior to creation of the Ad Hoc Working Group, and indeed prior also to the 100th Anniversary of the Berne Convention (which occurred on September 9, 1986), there was heightened interest in the United States accession to the Convention. This interest was manifested during the 99th Congress, when two days of hearings were held by the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks.n6 After the hearings, a bill was introduced in the Senate by Senator Mathias.n7

During the 100th Congress, a total of six days of hearings were held in the House of Representatives by the Subcommittee on Courts, Civil Liberties and the Administration of Justice on the two pending legislative proposals (H.R. 1623 and H.R. 2962).n8

The first two days of hearings were general in nature, covering all issued raised by U.S. adherence to the Berne Union.n9 On June 17, 1987, the Subcommittee received testimony from the Register of Copyrights (the Honorable Ralph Oman) and a law professor (Professor Lyman Patterson, School of Law, University of Georgia). On July 23, 1987, the Subcommittee heard from a panel of Administration witnesses (the Honorable Malcom Baldrige (the late Secretary of Commerce); the Honorable Clayton Yeutter (United States Trade Representative); and the Honorable W. Allen Wallis (Under Secretary of State); and the Ad Hoc Working Group on U.S. Adherence to the Berne Convention (Mr. Irwin Karp).

On September 16 and 30, 1987, the Subcommittee held hearings on the specific issue of moral rights and the Berne Convention. On September 16th, the Subcommittee heard from Peter Nolan, for the Motion Picture Association of America, and Kenneth Dam, representing IBM, both of whom advocated adherence to Berne, but who testified that current U.S. law on moral rights is sufficient for adherence. The Subcommittee also heard from David Ladd, for the Coalition to Preserve the American Copyright Tradition, and John Mack Carter, for the Magazine Publishers' Association, both of whom opposed adherence to Berne, principally on moral rights grounds. On September 30th, a panel of artists testified in favor of a strong moral rights provisions, which would permit certain artists to object to modifications in their works. Those testifying were Sydney Pollack, a film director, Frank Pierson, a screenwriter; William Smith, a visual artist; and Elliot Silverstein, a film director. Professor Edward Danich of the George Mason University Law School; also testified in support of a strong moral rights provision.

On February 9, 1988, the subcommittee conducted a fifth day of hearings, with particular focus on the jukebox compulsory license, formalities and architectural works. Testimony was received from a panel of witnesses on jukebox issues: Gloria Messinger, representing the American Society of Composers, Authors and Publishers (ASCAP); Robbin Ahrold, representing Broadcast Music, Inc. (BMI); and Wally Bohrer, representing the American Music Operators Association (AMOA). A second panel presented testimony on formalities and architectural works: Dean David Walch, on behalf of the American Library Association; and David E. Lawson, for the American Institute of Architects.

On February 10, 1988, the subcommittee held a sixth and final day of hearings. Testimony was presented on all issues by Professor Paul Goldstein, School of Law, Stanford University; Barbara Ringer, Former Register of Copyrights; August W. Steinhilber, Chairman, Educators Ad Hoc Committee on Copyright Law; and Morton David Goldberg, Information Industry Association.

In addition to the six hearing days, during a congressional recess that occurred in November 1987 (during the Thanksgiving holiday week), a delegation of five Committee Members travelled to Geneva, Switzerland, and Paris, France, for consultations with foreign copyright experts from government, academia and private industry on whether the U.S. should join the Berne Convention and, is so what changes would be necessary in our current copyright law. The trip was the first time any country has ever requested foreign consultation on deomestic legislation required to join an international intellectual property treaty. Recognized experts in international copyright law from major industrial nations (the United Kingdom, France, West Germany, the Netherlands, Spain, Switzerland, Denmark, Sweden, Finland, and Israel), a socialist country (Hungary), and one developing nation (India), met with the Members in Geneva at the World Intellectual Property Organization--an arm of the United Nations. Bringing to bear their diverse experiences on the question of U.S. adherence to Berne, the consensus of the consultants was that the U.S. should and can adhere to Berne without making major changes in U.S. law.n10

In Paris, the Members met with international film producers and also with international film directors. The former expressed their concern about moral rights, contending that such laws impinge on the rights of copyright owners and their ability to make and effectively exploit films. They favor a system akin to the one currently in effect in the United States, where the producer, rather than the director or screenwriter, has final control over a flim. The directors, on the other hand, advocated stronger moral rights laws in the United States, and decried changes in films made without the consent of the director and screenwriter. Additionally, while in Paris, the Members met with representatives of the

French government (Ministry of Culture and Communications) and a performing rights society (SACEM). The French public and private representatives all generally expressed support for U.S. adherence to the Berne Union.

On March 9, 1988, the Subcommittee on Courts, Civil Liberties and the Administration of Justice marked-up H.R. 1623. After general debate, the subcommittee--a quorum of Members being present--approved a substitute amendment. Conceptually, the amendment--offered by Chairman Kastenmeier--adopted a minimalist approach: that is, the adherence of the United States to the Berne Convention can be accomplished with only minimal changes to United States law.

The amendment eliminated sections in H.R. 1623 relating to moral rights and architectural works. It was premised on a finding that current American law is adequate on those subjects to allow the United States to join the Berne Convention. By removing all references to moral rights in the bill, the amendment leaves current law exactly where it is and allows it to develop--or not develop--in exactly the same way it would have developed--or not developed--had the United States not adhered to Berne. As to architectural works, the amendment was premised on the conclusion that the United States should not move precipitously on an issue that touches very fundamental concepts, long drawn in law, with respect to the non-protection under copyright of creativity more appropriate to design or patent protection. In this regard, the amendment merely clarified that architectural plans are already protected under the general category of pictorial, graphic and sculptural works. Last, the amendment made it abundantly clear in the bill's findings and declarations that Berne is not self-executing. After the vote on the substitute amendment, the subcommittee voted to report the measure to the full Committee in the form of a clean bill.

On March 28, 1988, the clean bill--H.R. 4262--was introduced by Subcommittee Chairman Kastenmeier, with twelve cosponsors: Mr. Moorhead, Mr. Synar, Mrs. Schroeder, Mr. Crockett, Mr. Berman, Mr. Bryant, Mr. Cardin, Mr. Fish, Mr. DeWine, Mr. Coble, and Mr. Slaughter (of Virginia).

On April 28, 1988, the Committee considered H.R. 4262. After general debate, two amendments were offered by Chairman Kastenmeier. The first confirmed and clarified the provisions of the bill relating to moral rights and self-execution of the treaty. The second made technical changes to the sections of the bill relating to coin-operated phonorecords (jukeboxes). Both amendments were adopted by voice vote. Then, with a quorum of Members being present, H.R. 4262 was favorably reported by voice vote, no objections being heard.

III. BACKGROUND

This background statement places U.S. adherence to the Berne Convention, and the proposed implementing legislation, in the larger context of three subject matter areas: first, the Berne Convention in international copyright law; second, the Berne Conven- tion and international trade; and, third, the underlying philosophy of the implementing legislation.

A. THE BERNE CONVENTION IN INTERNATIONAL COPYRIGHT

In order to appreciate the importance of U.S. adherence to the Berne Convention, it is useful to start with the Convention's history and successive revisions, its role in international copyright, administration of the Convention by the World Intellectual Property Organization, the relationship of Berne to the Universal Copyright Convention, and Berne and developing countries.

The Berne Convention is the oldest and most respected international copyright treaty.

In 1886, the Convention was concluded at Berne, Switzerland and the Berne Union came into being. Since then, the Convention has been successively completed and revised seven times: at Paris (1896), Berline (1908), Berne (1914), Rome (1928), Brussels (1948), Stockholm (1967), and most recently, at Paris (1971). From an initial membership of eight states, the Union now boasts seventy-seven members, adhering to one or more of the principal Acts of the Union.

The Berne Union includes nations from all regions of the globe, at all levels of development. In the Western Hemisphere, Canada and 10 Latin American Republics adhere to Berne; in Europe, virtually every major state in Western and Eastern Europe adheres. Twenty-four states of Africa and 10 from Asia and the Pacific adhere. Membership includes highly industrialized nations such as Japan, Canada and France; industrializing countries such as India, Brazil and Mexico and developing countries such as Benin and Sri Lanka.

Major states not members of the Berne Union include the Soviet Union, China and the United States of America.

1. History of the Convention

The Berne Convention of 1886 culminated over 25 years of study and conferences which were undertaken by representatives of authors and artists, journalists, publishers, academics and governments, acting to replace the growing patchwork of European bilateral copyright arrangements with a simple, multilateral treaty respecting authors rights. These bilateral agreements often imposed a variety of conditions and restrictions upon rights as well as a variety of formalities which had to be complied with as conditions of protection.

In 1878, during a Literary Congress at Paris, the International Literary and Artistic Association was founded. In 1882, the Association adopted a resolution stating "that the need for the protection of intellectual property was the same in all countries, and that complete satisfaction of this need could only be obtained by the constitution of a 'union for literary property'* * *."n11

Between 1884 and 1886, the Swiss Federal Council convened three sessions of a diplomatic conference to develop an international convention for the protection of literary and artistic works. In September, 1886 the Berne Convention emerged.

The original Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign authors in all countries; (4) the abolition of formalities for the recognition and protection of copyright in foreign works; and, (5) ultimately, the promotion of uniform international legislation for the protection of literary and artistic works.

The first Berne Convention was a simple document in which two cardinal principles were established, both of continuing vitality today:

a. *The Union:* the states adhering to the Convention organized themselves into a Union for the protection of the rights of authors in their literary and artistic works. In forming the Union, the original members contemplated an essentially political as well as legal undertaking: that adherents to the Convention would function as a cooperative unit which would continue in existence regardless of future accessions or withdrawals from the Convention itself.

b. *The Rule of National Treatment:* one of the cornerstones of international copyright is the rule, first recognized for copyright in the Berne Convention, that authors should enjoy in other countries the same protection for their works as those countries accord their own authors.

During the century of its existence, the Convention has been revised five times to meet changed conditions and technological development affecting authors' rights. Successive texts have generally improved and extended rights accorded authors and copyright proprietors; and, in 1967, the Berne Union confronted the special challenges to copyright policy posed by the emergence of numerous developing countries on the world scene.

2. Successive Revisions of the Berne Convenion

a. *1908 Berlin Act.* The principal achievement of the Berline Revision Conference was the prohibition of formalities as a condition of the enjoyment and exercise of rights under the Convention. The minimum duration of protection was set at the life of the author and fifty years post mortem, but made subject to exceptions for each country so as to make it less than a mandatory rule. The Convention further expanded the minimum subject matter of copyright under the Convention, including photographs. Moreover, the Berlin Revision recognized the exclusive rights of composers of musical works to authorize the adaptation of these works and gave explicit protection to the authors of cinematographic works.

b. *1928 Rome Act.* This revision was the first to recognize expressly the "moral rights" of authors: the right to claim authorship of a work and the right to object to modifications of the work which prejudiced the honor or reputation of the author. The Rome revision specifically recognized the right to authorize broadcasting of works, leaving details to be elaborated by national legislation.

c. *1948 Brussels Act.* This revision established the term of protection of life of the author and fifty years *post mortem* as mandatory. It added improvements in copyright protection including recognition of the right of public recitation; rules governing mutual recognition of optional "resale royalty" laws (so-called "droit de suite"); extension of the broadcasting article to secondary transmissions, including by wire; and, express recognition of cinematographic works and works produced by processes analogous to cinematography as distinct subjects of copyright protection.

d. *1967 Stockholm Act.* For the first time, the implicit right of reproduction was expressly established in the Convention and special rules governing exceptions to that right were also included. Significant new rules relating to reconciling different national rules of authorship and ownership of motion pictures, defining the "nationality" of films for Convention purposes, were added at this revision. Protection was extended to include authors having habitual residence in a Union country, regardless of their citizenship. Finally, this revision established a "Protocol Regarding Developing Countries," which would have allowed developing countries broadly to limit rights of translation and reproduction. The 1967 Stockholm Act has not and will not come into force. It has effectively been superseded by the 1971 Paris Act.

e. *1971 Paris Act.* The 1971 Paris Act of Berne--the only Act now open to accession--is essentially the 1967 Stockholm Act with significant revisions made to the Protocol Regarding Developing Countries. The thrust of these revisions will be discussed in the context of relations with developing countries.n12

3. The Administration of the Convention

The Berne Convention is administered by the World Intellectual Property Organization (W.I.P.O.), an intergovernmental organization with headquarters located in Geneva, Switzerland. The W.I.P.O. is a specialized agency within the United Nations system of organizations. It is responsible for the administration of various Unions, each rooted in a multilateral treaty and dealing with aspects of intellectual property. The twin objectives of the W.I.P.O. are to promote the protection of intellectual property throughout the world and to ensure administrative cooperation among Union states.

As regards copyright law, the W.I.P.O. plays a central role in promoting the vitality of the Berne Union.n13 The Convention itself establishes that the W.I.P.O. serves as the International Bureau of the Union.n14 It is charged with special functions including publication of information concerning protection of copyright and providing expert services to countries of the Union on copyright matters. Its most important functions in respect of copyright, however, are twofold: first, to conduct studies and provide services "designed to facilitate the protection of copyright"n15 ; and second, the specific responsibilities of the Director General of the W.I.P.O. as the chief executive of the Berne Union and its representative.

Within this framework, the Berne Union through the W.I.P.O. conducts an ambitious program examining the relevance of the Convention to new media of creation, exploitation and consumption of copyrighted works. During the past decade, the W.I.P.O. has facilitated examination within the Union of the copyright aspects of cable television, satellite transmissions, including direct broadcast satellites, the rental of copies of protected works, private copying, and access to protected works by developing countries.

In the recent past, the W.I.P.O. has organized a comprehensive survey of contemporary challenges to the balanced protection of copyright and consumer interests confronting the major categories of works protected under copyright. This endeavor, spanning some seven meetings, has permitted states party to the Berne Convention (in addition to the Universal Copyright Convention [UCC]) to assess the full range of changes in market environments confronting the effective exercise and enjoyment of copyright.

4. The Relationship Between the Berne Convention and the Universal Copyright Convention

By the close of the Second World War, it had become apparent that the entry of the United States and a number of other American Republics into the Berne Convention would require major amendments to national copyright laws and, therefore, was not likely in the near future. In order to bring these states of the Western Hemisphere into simplified multilateral copyright relations with the rest of the world, particularly Berne members, a project to develop a new multilateral instrument was launched.

Under the auspices of the UNESCO, with the key objective being rapidly to bring the U.S.A. into multilateral copyright arrangements, the UCC was concluded in 1952. The United States ratified the Convention and became a member in 1955. In 1971, the UCC was revised simultaneously with the Berne Convention in order to permit the introduction in the Convention of provisions identical to the developing country concessions agreed upon for the Berne Convention.

The UCC now has 80 adherents and provides a simple avenue for protection on the basis of national treatment, with few minimum treaty requirements relating to the level of protection. Unlike the Berne Convention, the UCC--both the

1952 and 1971 texts--was drafted so as to require as few changes in United States internal law as possible before adherence. Thus, in certain regards--minimum terms of protection, posture on formalities and definitions of significant terms such as "publication" and "copies" of works--the UCC reflects the law in effect in the United States prior to 1978.

The UCC was created with the full assistance of the founding members of the Berne Union. One of the signal and crucial achievements in developing the UCC was the agreement to safeguard the integrity of the Berne Union against erosion by the lower level UCC. The means by which this was achieved is found in Article XVII of the UCC and its Appendix Declaration. Article XVII and the Appendix Declaration of the UCC established two protective rules: first, that among states party to both the Berne and Universal Conventions the terms of the Berne Convention govern; and, second, that a developed state party to both the Berne and Universal Conventions cannot withdraw from the Berne Convention and thereafter rely upon the Universal Convention for copyright relations with states remaining in both Conventions. However, a state withdrawing from Berne would be obligated to protect the works of other states party to Berne and the UCC, even though reciprocal protection is not forthcoming. As a practical matter, however, pre-existing bilateral copyright arrangements of states could continue to serve as a basis for copyright protection even in cases where the "safeguard" provisions of the Universal Copyright Convention come into play.

A question concerns the future role of the Universal Copyright Convention in United States international copyright relations after adherence to berne. Several observations are in order.

First, U.S. continued adherence to and vigorous participation in the work of the Universal Copyright Convention is obviously of undiminished importance. The United States would establish new or clarified copyright relations with a significant number of states now party only to Berne; however, it must not be forgotten that twenty-six states which belong to the UCC are not members of the Berne Union. With the exception of the Soviet Union, these states are principally developing countries of Africa and Latin America. A large number are neighbors of the United States from Central America and the Caribbean basin.

The membership of these 26 countries in the Universal Copyright Convention is important to the United States for two related reasons: the direct value of the Convention as a basis for protection of U.S. works in these countries; and, even if the United States asserts its influence to bring states outside of multilateral copyright into Berne, achieving global coverage for copyright protection requires us to urge UCC membership as well.

Second, it has been observed that one of the problems with the UCC is a lack of influence within the Secretariat flowing from our withdrawal from UNESCO.n16 The questions of United States participation in the UCC and UNESCO are perhaps related, but not necessarily so. Membership in UNESCO is not required for participation in the UCC and the United States continues to serve on the UCC Intergovernmental Committee and participate in the substantive work program of the Committee.

United States adherence to the Berne Convention does not and should not be taken as having any consequence whatsoever for the larger, political question of U.S. re-entry into UNESCO.

5. The Berne Convention and Developing Countries

The Berne Convention has played a constructive role in encouraging national creativity in developing countries through the enactment of national legislation based on the provisions of the Convention itself.n17 Today, there is an augmented awareness of the importance of copyright in the developing world.

In 1900, of the twelve states members of the Berne Union only one (Tunisia) would today be considered a developing country. Indeed, with the exception of Japan, the Convention was totally European in membership.

On the eve of the Diplomatic Conference to draft the Universal Copyright Convention in 1952, the number of developing countries party to a text of the Berne Convention had reached eleven of a total of forty-two states. Today, developing countries constitute a slight majority of the 78 of the Berne Union, the bulk having joined in the 1960's and early 1970's. Nine of the states joining in this period declared continuing adherence to the Convention following achievement of independence.

No understanding of the role of the Berne Convention in relation to developing countries is possible without coming to grips with the Stockholm revision conference, the challenge to the integrity of the global copyright system posed by the Protocol Regarding Developing Countries adopted at that Conference and the complex diplomacy which, in 1971 at Paris, resolved the Protocol crisis.

By the mid 1960's the growing number of developing countries in the United Nations system and in the Berne and Universal Copyright Conventions generated political pressures for the inclusion in the Berne Convention of special provisions designed to facilitate access to protected works by developing countries and, in other ways, to permit reservations on obligations deemed too onerous by developing countries. Through a series of preparatory meetings, a program for consideration of such special provisions was developed for the Stockholm Conference.

In a highly charged politicized atmosphere, the Stockholm Conference Protocol Regarding Developing Countries was adopted in a form which would have permitted deep cuts in the levels of copyright protection that developing countries would accord to protected works. The minimum term of protection could be reduced to life plus 25 years *post mortem*; exclusive rights with respect to broadcasting and retransmissions of broadcasts could have been cut back to the level provided for in the 1928 Rome text, at least for non-commercial braodcast undertakings; translation and reproduction compulsory licensing systems would have been permitted; and, any use of a work (including performance, broadcasting and translation) for "teaching, study and research" would be allowed subject only to compensation at a level accorded national authors.

The struggle for control of the future of the Berne Convention was only one front in a conflict which also embroiled the Universal Copyright Convention. In 1966, efforts by developing countries were initiated in UNESCO to seek repeal of the "safeguard" provisions of the UCC. This effort was put on hold pending the outcome of the Stockholm revision conference.

The crisis which emerged out of Stockholm, though resting on technical matters and involving many different aspects of copyright, was essentially simple: no developed country was prepared to ratify the Stockholm Act because of its integral Protocol. Since a state cannot be bound by the terms of a treaty to which it has not adhered, the Stockholm Act could never serve as a basis to redefine the legal rights and privileges of the parties to this copyright dispute. The response of the developing countries was to threaten a revision conference for the Universal Copyright Convention, suspension of its safeguard clause, followed by wholesale withdrawals from the Berne Convention. The unravelling of the entire fabric of international copyright seemed possible.

In 1970, largely under the leadership of the United States through the Universal Copyright Convention, a compromise program was developed under which both Berne and the UCC would be revised to include less drastic concessions to developing countries, centered largely upon limited compulsory licensing options for translation and reprint rights in support of educational and developmental objectives. This program succeeded and in 1971 Berne and the UCC were jointly revised at Paris.

Since that time, relative stability in the Berne Convention has prevailed. Only two members of the Berne Convention and four members of the UCC have declared their intention, in accordance with the requirements of the two Conventions, to avail themselves of the compulsory licensing privileges of the Conventions. Indeed, as yet, no compulsory licenses have been issued in any of those countries.

The entire experience of the Stockholm Protocol had a material impact on the copyright related activities of the World Intellectual Property Organization. The establishment of a Permanent Committee on Development Cooperation in the Field of Copyright and Neighboring Rights to plan and coordinate the growing development assistance programs of the W.I.P.O. and the creation of the Joint International Copyright Information Service to assist users in development countries in obtaining licenses from rightsholders in developed countries represent positive long-term institutional responses.

B. THE BERNE CONVENTION AND INTERNATIONAL TRADE

Recently, protection of intellectual property, including copyrights, has become an international trade issue.n17a Improved technology and communications greatly facilitate the global disemmination of ideas, cultural views, and creative activity. Technological changes also facilitate the unauthorized copying of the creative work-product.

The United States, as a leader in the creation and global exploitation of copyrighted works, has a great interest in a strong and viable international copyright system.n18 Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and second when the limited term of protection expires and the creation is added to the public domain.

If framed properly, copyright protection fosters creative activity and innovation and encourages investment in commercialization of new ideas and technology. Trade in goods protected by American copyright law and the licensing

of the rights to copyrighted works have expanded rapidly in the recent past. Domestic industries relying upon copyright protection to stimulate creative efforts represent a broad range of interests including all types of publishing, motion pictures, music and sound recordings and computer software. Goods and services produced by these industries consistently results in a trade surplus for the United States. A positive trade balance also sustains American jobs thereby stimulating the domestic economy.n19

Recognizing the benefits of preserving rights of authors and providing incentives for future activities, our trade negotiators have engaged in a series of bilateral and multilateral efforts to persuade foreign countries to improve their protection of copyrightable works. The American negotiating position has been placed at a disadvantage with regard to improved copyright protection in foreign countries, however, because the United States neither belongs to the Berne Union nor has a copyright law that would allow us to join. Adherence of the United States to the Berne Convention will strongly encourage other countries to adopt and enforce high levels of protection.

In bilateral negotiations, foreign countries often point to the perceived deficiencies in U.S. protection, creating an excuse to avoid making improvements to their own laws. By way of illustration, in bilateral negotiations with Singapore and Korea, the American negotiators were repeatedly asked the difficult question of why the United States as pushing so hard for strong copyright protection in these countries while we did not adhere to the Berne Convention.

The absence of the United States in the Berne Union is also a significant consideration when our trading partners decide whether to adhere to the Berne Convention or to the Universal Copyright Convention, which obligates signatories to provide less protection to copyrighted works. The Republic of Korea, for example, recently joined the UCC rather than Berne as part of that country's revision of its copyright laws undertaken in connection with the unfair trade investigationn20 of Korea's protection of intellectual property. It is difficult for U.S. negotiators to argue that countries such as Korea should adhere to the Berne Convention when the United States has not taken the step itself.

Lack of U.S. membership in the Berne Convention makes it necessary to negotiate a series of bilateral copyright agreements with countries that are members of the Berne Union. Current negotiations with Thailand, a member of Berne, to confirm copyright protection of U.S. works provide an excellent example of the strain placed on U.S. relations resulting from non-adherence to Berne.

Following adherence to the Berne Convention, the United States will be able to establish copyright relations with twenty-four countries that are members of Berne. Two of these countries--Egypt and Turkey--are substantial trading partners. U.S. adherence to Berne will not only ensure protection of U.S. works but will promote trade in copyrighted works.n21

The United States successfully placed the topic of trade-related aspects of intellectual property on the agenda of the Uruguay Round Negotiations under the auspices of the General Agreement of Tariffs and Trade (GATT). The GATT meeting of Trade Ministers in Punte del Este recognized the relationship between trade and the protection and enforcement of intellectual property rights. Implicit in this recognition is the presumption that inadequate and ineffective protection of intellectual property rights can result in trade distortions.

U.S. membership in the Berne Union would contribute to the success of these multilateral negotiations.

First, adherence will mainfest a firm and sustained commitment to achieving strong and uniform protection for intellectual property worldwide. Our trading partners will no longer be able to question the U.S. political will to gain that objective. Many participants in the Uruguay Round negotiations on intellectual property view increased participation in existing international conventions as the initial step in the protection of intellectual property rights. U.S. adherence to Berne could provide an incentive for other countries to reexamine their participation in international agreements.

Second, the substance of any multilateral agreement resulting from the Uruguay Round effort will undoubtedly reflect the international consensus embodied in the Berne Convention. U.S. membership in the Berne Union means that our trade negotiators can argue strongly for responsible standards without letting inconsistencies in U.S. copyright law change the focus of discussion as to why the U.S. currently does not--or cannot--belong to Berne. The United States should not be perceived as imposing a double standard on the rest of the world.

There is a potential danger of establishing international legal standards through trade agreements and GATT negotiations which, however desirable to particular private interests, are higher than those of our domestic law. Our trade negotiators obviously do not have the power to legislate. Only Congress can pass new or amend old laws.

The Berne Convention represents an international consensus on copyright protection. The United States should be in a position to take advantage of that consensus, to encourage other countries to join the common ground, and to use it to encourage expansion of legitimate trade. As to the latter, the relationship of Berne adherence to promotion of U.S. trade is clear. American popular culture and information products have become precious export commodities of immense economic value. That value is badly eroded by low international copyright standards. Berne standards are both high, reasonable and widely accepted internationally. Lending our prestige and power to the international credibility of those standards will promote development of acceptable copyright regimes in bilateral and multilateral contexts. Ultimately, a strong and viable international legal regime will develop to the benefit of the United States, not only to the advantage of proprietary interests but also to the public good.

C. PHILOSOPHY OF THE LEGISLATION

Although vigorous debate and varying viewpoints occurred during the Subcommittee's inquiry and the Committee's consideration of particular points identified in the proposed legislation, an overwhelming consensus existed on two objectives: to utilize a minimalist approach, amending the Copyright Act only where there is a clear conflict with the express provisions of the Berne Convention (Paris Act of 1971); and further, to amend only insofar as it is necessary to resolve the conflict in a manner compatible with the public interest, respecting the pre-existing balance of rights and limitations in the Copyright Act as a whole.

In determining whether to amend and how to amend, the paramount goal of the Berne Convention Implementation Act of 1988 (H.R. 4262) is to place American law in compliance with the provisions of the treaty and not necessarily to seek an ideal solution to the problem. Ideal solutions to issues take much congressional time, require careful examination of often conflicting interest, and generally lead to the legislative processing of a bill designed to solve a carefully defined question. That methodology is not used for the Act. Rather, the approach used in all sections of the bill, including the findings and declarations, is the same: to modify American law minimally to place it in compliance with the provisions of the Berne Convention while respecting the constitutional provisions that apply to all such legislative endeavors.

It must be stressed that the "minimalist" approach taken to legislation enabling the United States to join the Berne Union does not mean minimizing the requirements of the treaty, nor casting a blind eye towards the long term implications of this step for the development of international copyright law. The objective of the Berne Union is development of "effective and harmonious" copyright laws among all nations.n22 Once the United States becomes a member of the Union, other members will expect from us a due and careful regard for their values; and, by the same token, other countries will have to consider the deeply felt legal, economic and social values reflected in American copyright law and which we believe are important elements of a responsible international copyright system.

The balance between national values and international harmony embodied in the Berne Union has been best expressed by Professor Paul Goldstein:

When I think of the Berne Union in a larger frame, the picture that most frequently recurs is of a great number of ships--some large, some small, some grand, some modest--moored to a dock. There are as many differences between the ships as there are cultural, economic and political differences between nations. But there are important similarities, too. And, most important, all of the ships, grand or modest, and whatever their differences, rise and fall with the same tide.n23

Nearly twelve years ago Congress passed the Copyright Act of 1976, the first general revision of our copyright law since 1909. Congress did so only after years of work--starting in the early fifties, continuing with 22 days of hearings and 51 days of mark-up in 1965, and ending with 17 days of hearings and 25 days of mark-up in 1975-76.

The Copyright Act of 1976 was a significant legislative achievement, one that has worked well over the years. Congressional legislators, then and now, understand that copyright legislation raises unique difficulties. While a relatively obscure discipline, copyright touches every American in their homes, schools, libraries, restaurants and workplaces. Determining the scope of a law which deeply affects how we enjoy books, films, music, television programming, computer software, information products and services, architecture and the visual arts requires great caution, particularly in a rapidly changing society such as ours that seeks a balance among the free flow of information, competition in the marketplace, and the stimulation of technological change.

It can safely be stated that Congress drafted and passed the 1976 Act with a "weather eye" on Berne.n24 In the view of the Committee, the United States implicity chose not to join the Berne Union in the past because the Congress did not want for our society the kind of copyright laws that the Convention required. There being general consensus

today that the United States should adhere to the Convention, the proposed legislation therefore signals both recognition that many obstacles to adherence were removed by the 1976 revision and a willingness to modify further our laws in order to join the Union.

H.R. 4262 was drafted after examining the level of Berne obligations under the current Paris Act, conscious of the practices of those states party to Berne at a similar stage of development as United States and that generally share our values of free speech and artistic freedom. Relying on a minimalist approach, modifications to American copyright law required by the terms of the treaty do not amount to a major structural rewrite of the Copyright Act of 1976. Congress must, however, move that Act somewhat further along in several areas where it previously stopped short of Berne compliance.

The proposed implementing legislation is clearly within Congress' power to modify, amend or expand this country's intellectual property laws. The United States Constitution confers this authority when it provides, "[t]he Congress shall have Power * * * to Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writing and Discoveries."n25

Sound copyright legislation is necessarily subject to other consideration in addition to the fact that a writing be created and that exclusive rights be protected only for a limited term. Congress must weight the public costs and benefits derived from protecting a particular interest. "The constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning."n26

The Constitution does not establish copyrights, but simply provides that Congress has the power to grant such rights if and as it thinks best. As this Committee observed during the 1909 revision of the copyright law, "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given."n27 This statement still rings true today. Recently, the Supreme Court confirmed its validity by stating that the monopoly privileges that Congress may confer on creators of intellectual property "are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."n28 Stated otherwise, the primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors.

The framers of the Constitution assigned to Congress, the most politically representative of the three branches of the federal government, the role of establishing intellectual property laws in exchange for public access to creations. In this context, the founding fathers contemplated a political balancing of interests between the public interest and proprietary rights. Congress struck that balance when it established the first patent and copyright laws. As this country has developed and as new technologies have burst upon the scene, Congress has adjusted this nations's intellectual property laws to incorporate new subject matter and to redefine the balance between public and proprietary interests. The Berne Convention Implementation Act of 1988 is a continuation of that process.

Today, we live in an age of rapid technological change, growing internationalization of various aspects of law, and increasing importance of intellectual property in world trade. The congressional role may be more complicated, but its objectives remain essentially unchanged. Congress must engage in the delicate assessment of equities between the public interest and proprietary rights.

The Berne Convention Implementation Act of 1988 is rooted in the proposition that choices are not impossible. The balancing of interests is possible. Both sides--public and private interests--will benefit.

IV. SECTIONAL ANALYSIS

SECTION 1. SHORT TITLE

Section 1 of the bill sets forth the short title: the "Berne Convention Implementation Act of 1988."

SECTION 2. REFERENCES TO TITLE 17, UNITED STATES CODE

Section 2 provides, for drafting clarity, that whenever in the proposed legislation an amendment is expressed in terms of an amendment to or repeal of a section or other provision, the reference should be considered to be made to a section or other provision of title 17, United States Code.

SECTION 3. DECLARATIONS

Section 3 sets forth three congressional declarations. Subsection (1) describes the Berne Convention, and declares that the Convention is not self-executing under the Constitution and laws of the United States. According to subsection

(2), it is only through appropriate domestic law that the United States will carry out its obligations under the Berne Convention. The Convention is not otherwise enforceable. Subsection (3) states that the amendments made by this implementing legislation, together with the laws in effect on the date the implementing legislation is enacted, are sufficient to satisfy the obligations of the United States in adhering to the Berne Convention. No other rights or interests shall be recognized or created for the purpose of satisfying these obligations.

SECTION 4. CONSTRUCTION OF THE BERNE CONVENTION

Section 4 gives guidance to the courts about how to construe U.S. adherence to the Berne Convention.

Subsection (a) describes the relationship between the Berne Convention's provisions and our domestic law. It states in paragraph (1) that the provisions of the Convention shall be given effect under title 17 of the United States Code, as amended, by this implementing legislation, and any other relevant provision of Federal or State law, including the common law. This provision must be read in conjunction with the other provisions of the law that are specified. Paragraph (2) states that the provisions of the Berne Convention are not enforceable in any action brought pursuant to the provisions of the Convention itself.

Subsection (b) states that United States adherence to the Berne Convention, and the satisfaction of United States obligations thereto, does not expand or reduce certain rights of an author of a work. Those rights are set forth in Article 6*bis* of the Berne Convention, and are commonly known as the rights to "paternity" and "integrity." In other words, the state of current law is sufficient to comply with Article 6*bis* and this implementing legislation will have no effect, one way or the other, on current law.

SECTION 5. DEFINITIONS

Section 5 of the bill modifies chapter 1 of title 17, United States Code, in two ways.

First, the definition of "pictorial, graphic, and sculptural works" is changed by adding a reference to "architectural plans" in the list of protectible subject matter. Since the protection of architectural works is required by the Berne Convention, this provision merely buttresses the proposition that the United States already complies with Berne standards. Stated otherwise, under current law rightsholders of two-dimensional architectural plans or blue-prints enjoy copyright protection in such works as "pictorial" works. Section 5 therefore certifies that such protection exists.

Second, section 101 of the Copyright Act is amended by inserting two new definitions: the "Berne Convention" and a "Berne Convention Work." The Berne Convention is defined as the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto, up to and including the revision done at Paris, France, in 1971. A work is a "Berne Convention work" in the following circumstances: (1) in the case of an unpublished work, one or more of the authors is a national of a state adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a state adhering to the Berne Convention, on the date of first publication; (2) the work was first published in a state adhering to the Berne Convention, or was simultaneously published in a state adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention; (3) in the case of an audiovisual work if an author is a legal entity, that author has its headquarters in a state which adheres to the Berne Convention, or if an author is an individual, that author is domiciled, or has a habitual residence in a state adhering to the Berne Convention; and (4) in the case of a pictorial, graphic, or scuptural work embodied in a building or other structure if such work is incorporated in a building or other structure located in a state adhering to the Berne Convention.

SECTION 6. NATIONAL ORIGIN

Section 6 of the bill relates to the national origin of Berne Convention works. It amends section 104 of title 17 in two ways: protection for foreign works is explicitly extended to "Berne Convention works" and the proscription against self-execution is codified. This letter codification is fundamental to the entire question of implementing legislation and of adherence to the Convention. It should be absolutely clear that the provisions of the Berne Convention do not create a right or interest in a work eligible for protection under title 17 of the United States Code. Section 6, subsection (c), also provides that any rights or interests in a work eligible for protection under title 17, or under other Federal or State statutes or the common law, may not be claimed and shall not be expanded or reduced, by virtue of, or in reliance upon, the Berne Convention's provisions or the United States adherence thereto.

SECTION 7. PREEMPTION WITH RESPECT TO OTHER LAWS

Section 7 adds a new subsection (e) to section 301 of title 17, United States Code, relating to Federal preemption with respect to other laws. The new subsection provides that the scope of Federal preemption is not affected by the adherence of the United States to the Berne Convention or the satisfaction of the obligations of the United States thereunder.

SECTION 8. SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS

Section 8 of the bill proposes changes to the current jukebox compulsory license by creating a new licensing system based on negotiations, with the compulsory license used as a fall-back should negotiations fail.

A new section 116A makes the present coin-operated phonorecord (jukebox) compulsory license system--that seems clearly incompatible with the Berne Convention--subordinate to negotiated licenses where such licenses come into force. The new provisions would authorize such licenses as they come into force and would formalize a negotiating process that could totally supplant the compulsory license. If, after a year, negotiations fail to provide consensual licenses for virtually all music, or if negotiations are terminated at some future date, then a compulsory license that is substantially the same as that provided in current section 116 is available as a fall-back to ensure that jukebox music will always be available to the public. The Copyright Royalty Tribunal would retain jurisdiction over rate-making and distribution functions only to the extent that negotiations fail or consensual licenses expire or are terminated. In that circumstance, and after the filing of a petition, the Tribunal would meet within a year after the failure of negotiations.

The Berne Convention does not allow expressly for compulsory licensing of non-broadcast public performance of music, music as is done presently in the jukebox business. The outright elimination of the compulsory license would, of course, be a solution. But, the variations of laws and regulations that exist in the United States and many of the Berne Union's member states warrant an intermediate position to be taken in the matter. Thus, section 8 encourages voluntary negotiations but permits government intervention if the negotiations fail--a result which may be fairly analogous to various forms of government intervention in Berne countries.

In 1985 jukebox operators and the performing rights societies entered into an arrangement whereby compliance with the compulsory license provisions can lead to rebates on statutory royalties. Section 8 is rooted in this approach towards close, voluntary cooperation.

Specifically, subsection (c) authorizes copyright owners of non-dramatic musical works and operators of coin-operated phonorecord players to negotiate and agree upon the terms and rates of royalty payments for performances of such works and the proportionate division of fees paid among various copyright owners, and to designate common agents to negotiate, agree to, pay, or receive such royalty payments. The purpose of this provision is to authorize the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc.--the three performing rights organizations named in current section 116 of the Copyright Act--to negotiate jointly with the Amusement and Music Operators of America (AMOA), the terms and rates of licenses for performances of copyrighted musical works in any, some or all of their repertories by jukeboxes.

The joint activity among owners of copyrights and operators of coin-operated phonorecord players and their organizations authorized by section 116A would generally be procompetitive since the market involving jukeboxes is dispersed among many small participants for whom negotiation of individual licensing agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce individual agreements when the revenues produced by a single jukebox are so small. Although subsection (c) authorizes certain joint conduct necessary to achieve mutually agreeable terms and rates of licenses for jukebox performances of copyrighted musical works, and, where voluntary agreements are not achieved, provides for use of a compulsory licensing mechanism based on existing law *(17 U.S.C. 116),* it is not an authorization for joint conduct extending beyond those statutory terms. Restraints that are ancillary to the authorized joint conduct would, for example, not be accorded any special treatment under this subsection. Existing law would continue to apply to such restraints.

Absent any anticompetitive ancillary restraints, collectively negotiated licensing agreements between copyright owners and jukebox operators preserve the interests of the listening public and will provide an efficient and pro-competitive means to achieve the ends of the copyright laws and the Berne Convention.

SECTION 9. NOTICE OF COPYRIGHT

Section 9 of the bill amends chapter 4 of title 17 in several areas. The intent of all these changes is to make the law with respect to the use of the copyright notice, the registration system, and the system for building the collections of the Library of Congress compatible with Berne while simultaneously doing no more to the present law than is absolutely

necessary. The amendments to sections 401 and 402 make use of the copyright notice voluntary--a work will no longer fall into the public domain at any time because it is published without notice. At the same time, if a copyright owner elects to use a notice, its form is specified in the law.

A requirement of notice of copyright on copies of published works has been a feature of United States copyright law, in one form or another, for almost two hundred years. Many user groups, particularly those that are noncommercial, have come to rely upon the information it provides. Certain commercial users have supported the copyright notice as a means of introducing works into the public domain. There is unanimity as to the necessity of eliminating the copyright notice in order to comply with Berne. Section 9 assumes that at least on a transitional basis, the informational utility of the notice as a means of conveniently distinguishing the protected from the unprotected is sufficiently great so as to warrant encouraging its use. It is entirely possible that elimination of the notice formality may not in the end curtail its use. Old habits die hard; it remains useful under the Universal Copyright Conven- tion; and, it is, in all probability, the cheapest deterrent to infringement which a copyright holder may take.

In new section 403, the Copyright Office is given the authority to promulgate regulations concerning how publishers of works consisting in whole or in part of uncopyrightable works of the United States Government shall apprise the public of those portions of the work that are in the public domain and therefore freely copiable.

The bill modifies section 404 to clarify the requirements necessary to invoke the "evidentiary weight of notice" provisions of new sections 401(d) and 402(d), as applicable.

Sections 405 and 406 of current law, which deal with omissions of and errors in the copyright notice, are amended so as to apply only to works published in the United States--with or without a copyright notice--before the effective date of the Act. Works created before the effective date of the Act but only first published after the effective date are subject to the voluntary provisions of the Act and not the mandatory provisions of prior law. This should have little functional effect, since virtually all publications in which the Library is interested now bear a copyright notice, and it seems likely that the Library's compliance activities will remain largely unchanged.

SECTION 10. DEPOSIT OF COPIES ON PHONORECORDS FOR LIBRARY OF CONGRESS

Section 10 of the bill contains a technical amendment to section 407(a) of current law, eliminating the notice requirement.

SECTION 11. COPYRIGHT REGISTRATION

Section 11 amends section 408 of current law, concerning registration, to delete reference to section 405(a), since "cure" of a publication without notice is no longer necessary, and to further delete subparagraph (c)(2)(A), since the "collective works notice" section has been eliminated.

SECTION 12. COPYRIGHT ROYALTY TRIBUNAL

Section 12 of the bill amends chapter 8 of title 17, United States Code, in two ways. Subsection (a) provides that if the Copyright Royalty Tribunal ever has to adjust jukebox compulsory license fees, it shall give great weight both to its "final" rates prior to implementation of new section 116 and to the rates contained in any new consensual licenses that are negotiated. Subsection (b) clarifies that if negotiations break down between the performing rights societies and the jukebox operators, and a petition for adjustments of rates is filed with the Copyright Royalty Tribunal, the Tribunal may meet immediately. In this circumstance, the Tribunal would then meet each subsequent tenth calendar year from its last meeting to determine royalty rates.

SECTION 13. WORKS IN THE PUBLIC DOMAIN

Section 13 clarifies that title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.

SECTION 14. EFFECTIVE DATE; EFFECT ON PENDING CASES

Section 14 provides that this Act, and any amendments made thereby, shall take effect on the day after the date on which the Berne Convention enters into force with respect to the United States. Section 14 also specifies that any cause of action arising under title 17, United States Code, before the effective date of the Act shall be governed by the provisions of such title as in effect when the cause of action arose. In other words, the Act is not retroactive.

V. IMPACT ON EXISTING LAW

Due to the significance of the Berne Convention Implementation Act of 1988, it is appropriate to delve further into its impact on current copyright law. The preceding sectional analysis, of course, discusses the legislation under the rubric of each section. The following explanation presents a more in-depth analysis of the most important subjects implicated by the proposed legislation. Discussion is divided into seven subheadings: (1) self-execution; (2) the "moral rights" of authors; (3) formalities; (4) the jukebox compulsory license; (5) architectural works; (6) retroactivity and the public domain; and (7) the effective date of the Act.

A. THE BERNE CONVENTION IS NOT SELF-EXECUTING IN THE UNITED STATES

Pursuant to the United States Constitution, treaties are the supreme law of the land.n29 As such, they supersede prior laws with which they conflict. Some treaties are self-executing: once ratified, they take effect without additional governmental action. Other treaties are not self-executing, and they take effect only after additional governmental action, such as implementing legislation passed by the Congress and signed by the President.n30 While the failure to enact necessary implementing legislation may place a country in violation of its international obligations,n31 the terms of the treaty itself generally do not supersede existing laws that conflict.n32

Whether the Berne Convention is to be self-executing in any member country depends on the constitution and laws of that country. While its text and negotiating history are relevant to whether the parties intended any self-executing effect, it is ultimately the Constitution and laws of the United States that will determine the answer to this question *in the United States.* The question has critical implications for the effect of the Convention generally, and in particular for the Committee's decision regarding its obligations under Article 6*bis* of the Convention.*See* discussion below.

1. Provisions of the Berne Convention

Article 36 of the Convention, entitled "Application of the Convention by the Provisions of Domestic Law," provides that:

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.n33

According to the *Guide to the Berne Convention,* published by the World Intellectual Property Organization, the measures necessary to ensure the Convention's application will depend on "the constitution of the country in question: in some it becomes part of the law of the land; in others, parliament must pass laws to give effect to the Convention's obligations."n34 The *Guide's* analysis of Article 36 states that during the Paris revision,

it was pointed out ...that, in countries according to the constitution of which treaties were self-executing, no separate legislation was necessary to implement those provisions of the Convention which, by their nature, were susceptible of direct application.n35

By implication, then, the *Guide* recognizes that there are countries where the Convention is *not* self-executing, and that alternatives to self-execution are appropriate.

The *Guide's* analysis of Article 2, paragraph (6) of the Convention supports this conclusion. It notes first that in some countries after ratification, "the Convention becomes part of that country's law: if therefore its wording is apt to confer rights directly, individuals may bring action based on the Convention itself to enforce them."n36 It then notes that other

countries, notably those following the British legal tradition, treat Conventions as agreements between States. Ratification does not, in itself, make any difference to individual rights enjoyed there. The obligations imposed on such countries by the Convention must be met by legislation passed before ratification takes place ...It is that legislation, and not the Convention itself, that gives Convention nationals the right to sue in their own courts ...[T]he matter is governed by each country's constitutional rules.n37

In sum, the provisions of the Convention, and the W.I.P.O. *Guide* interpreting them, do not determine whether the Convention is self-executing in countries such as the United States. They do, however, make clear that the Convention

standing along does not require self-execution, and that the answer to the question lies in the constitutions and laws of the member countries, as they choose to apply them.

2. The United States Constitution and Laws

"In Western parliamentary systems, generally, treaties are only international obligations, without effect as domestic law; it is for the parliament to translate them into law, or to enact any domestic legislation necessary to carry out the obligations."n38

The United States Constitution not only provides that treaties "shall be the supreme Law of the Land ...",n39 but it also grants the President the power to make treaties, with the advice and consent of the Senate, and so long as two-thirds of the Senate concur.n40

Standing alone, these Constitutional provisions do not determine whether the Berne Convention is necessarily self-executing in the United States. In any given instance, the issue is generally resolved by an examination of three factors: first, the intent of the parties to the treaty, drawn from the wording of the treaty and the surrounding circumstances;n41 second, wether self-execution would violate other constitutional provisions;n42 and third, whether the treaty's terms require specific action to be taken.n43

The first factor, relating to the intent of the parties, is not determinative of whether the Berne Convention is self-executing in the United States. As noted above, Berne's language leaves the decision to the member countries; they may permit self-execution or disallow it.

However, the view of the United States Department of State "carr[ies] substantial weight in these matters ...",n44 as does that of the President.n45 The State Department's representative, Under Secretary W. Allen Wallis, testified before the Subcommittee that in general, intellectual property treaties should not be considered self-executing in the United States. He noted the Ad Hoc Working Group's Final Report and concluded that in particular, the Berne Convention is not. He buttressed his conclusion with the letter of "the President ... to the Senate seeking advice and consent to accession [, which] stated that 'implementation of the Berne Convention *will require legislation"*[emphasis added]."n46 Under Secretary Wallis opined that "In the face of such clear intent, it is difficult to imagine that any legal action instituted on the grounds that Berne is self-executing would be successful."n47

Interpretations of the treaty by Congressn48 are also relevant in this context.n49 All of the bills seeking to implement the Berne Convention, including H.R. 4262, state in no uncertain terms that the Convention is *not* self-executing.n50

Pursuant to the second factor, if the treaty requires action in an area constitutionally reserved exclusively to the Congress, it is not self-executing.n51 For example, if the treaty requires money to be appropriated, it will not be considered self-executing, since under our Constitution only the Congress may appropriate money.n52 Treaties requiring that individuals be criminally penalized are also not deemed self-executing.n53 The obligations imposed by the Berne Convention fit completely into neither of these categories. However, an argument may be made that each of these categories weighs against a finding that Berne is self-executing in the United States. First, Article I, Section 8, clause 8 of the Constitution accords to both Houses of Congress the national power to create or withhold copyright protection. Second, the implementing legislation would extend criminal penalties to willful commercial infringement of works previously ineligible for protection in the United States.

The third factor, relating to whether the treaty's terms require specific action to be taken, was first set forth in the seminal case of *Foster v. Neilson,*n54 in which the United States Supreme Court examined the Florida cession treaty with Spain.n55 The Court set forth the distinction between self-executing and non-self-executing treaties.

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract--when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.n56

The Ad Hoc Working Group's Final Report concluded that "where a treaty 'expressly provide[s] for legislative action' it is not self-executing."n57 Comparing the language in Berne's Article 36 with that used in the 1883 Paris Convention for the Protection of Industrial Property, the Ad Hoc Working Group found identity of language in

important respects, and concluded that since the Paris Convention has been judicially interpreted to be non-self-executing,n58 Berne should be similarly interpreted.

The language of Article 36, taken alone, does lead to such a conclusion. The comments in the W.I.P.O. *Guide,* however, make such a conclusion less clear since, as noted above, they provide that whether the Berne Convention is self-executing or not depends on the constitutions and laws of the member countries, and that either result is acceptable; thus, an analysis of the Constitution and laws of the United States is required. The Ad Hoc Working Group recognized this ambiguity when it stated that "the determination of whether Berne is a self-executing treaty in a given member country is a 'matter governed by [that] country's constitutional rules.' "n59

The other witnesses who testified before the Subcommittee were unanimous in declaring that Berne is not self-executing in this country.n60

3. Conclusion

The provisions of the Berne Convention itself make clear that the Convention need not be self-executing in the United States. Those provisions leave the decision about self-execution to each of the member nations.n61 Under the Constitution and laws of the United States, no conclusion appears appropriate except that the Convention is not self-executing in this country. The view of the Executive Branch weighs heavily, as does the intent of the Congress as expressed in all proposed implementing legislation. The analogy to other kinds of Conventions requiring action constitutionally reserved to the Congress adds weight to the conclusion. Finally, the unanimity of all witnesses who expressed a view on the question renders that conclusion inevitable.

B. THE "MORAL RIGHTS" OF AUTHORS

Article 6*bis* of Berne has generated one of the biggest controversies surrounding United States adherence to Berne. It provides that:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogato- ry action in relation to, the said work, which would be prejudicial to his honor or reputation.n62

Although it does not use the term, the rights Article 6*bis* sets forth are often described--somewhat inaptly--as "moral rights." Article 6*bis* assures to authors the right to claim authorship ("the right of paternity") and the right to object to certain acts affecting the integrity of the work or the reputation of the author ("the right of integrity"). While the term "moral rights" often encompasses more than these two rights,n63 only the rights of paternity and integrity are relevant in the Berne context. Under Berne, these rights are distinguished from and independent of the economic rights generally provided in copyright laws and guaranteed elsewhere in the Convention. There is no doubt that the Berne Convention requires member states to accord to works protected under the Convention the rights specified by Article 6*bis.*

The basic issue raised by Article 6*bis* is whether the current law of the United States is sufficient, or whether additional laws are needed, to satisfy its requirements. The Subcommittee on Courts, Civil Liberties and the Administration of Justice inquired extensively into this question. It was the sole focus of two days of hearings, and was discussed by nearly every other witness testifying on other days. In addition, a major portion of the Subcommittee's trip to Geneva and Paris was spent seeking insights about this question. One of the four panels of experts assembled at W.I.P.O. was devoted exclusively to moral rights, and the Subcommittee's meetings in Paris with international film producers, international film directors, and the French Ministry of Culture, focused primarily on the issue.

1. Hearings in Washington, D.C.

The witnesses testifying at the Subcommittee's hearings included some of the foremost copyright scholars and practitioners in the country. The great majority testified that the United States should adhere to Berne, and that no additional law-making was needed to satisfy the standard of Article 6*bis.*

There were two dissenting views at the hearings. On the one hand were representatives of some publishers, who opposed United States adherence to Berne, primarily because they feared that Article 6*bis* would disrupt existing business practices. On the other hand were representatives of artists, who argued that Berne requires an explicit and strong statutory recognition of moral rights.

The majority of witnesses testified that current laws in the United States, including Federal and State statutory and common law, are sufficient, and that no legislation is needed, to comply with the requirements of Article 6*bis.*n64 The Administration's opinion, expressed through the legislation introduced by Representative Moorheadn65 and through the testimony of various Administration witnesses,n66 was consistent with this majority view.

According to this view, there is a composite of laws in this country that provides the kind of protection envisioned by Article 6*bis.*n67 Federal laws include *17 U.S.C. § 106,* relating to derivative works, *17 U.S.C. § 115*(a)(2), relating to distortions of musical works used under the compulsory license respecting sound recordings; *17 U.S.C. § 203,* relating to termination of transfers and licenses, and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws include those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the rights of integrity and paternity in certain works of art.n68 Finally, some courts have recognized the equivalent of such rights.n69

Finally, these witnesses countered concerns about changes in existing business practices upon adherence to Berne by citing their own experiences in countries with moral rights protections.n70

The opponents of Berne adherence, representing some magazine publishers,n71 were concerned about its implications for the future development of the common law and state statutory recognition of the rights of paternity and integrity. They contended that the "introduction" of moral rights in the United States would upset existing business practices,n72 that "courts faced with moral rights claims will look to European an dother foreign precedents and positions to give content to the rights," that the Berne Convention is arguably self-executing, and that

even if Congressional declarations can forestall self-execution, courts faced with moral rights claims will in close cases likely look for guidance to Berne and the laws of those nations that are far more familiar with the rights mandated by the Convention. Thus, there will be substantial pressure for the courts to expand the moral right once recognized.n73

Finally, the opponents argued that, notwithstanding Congressional declarations that current law was sufficient, the simple fact of Berne adherence would create pressure on the courts to "judicially legislate" and on legislatures to strengthen protections for the rights of paternity and integrity.n74

Those arguing for stronger protection for the rights of paternity and integrity were representatives of film directors, screenwriters, and visual artists, and, appearing as an independent expert, a law professor. They contended that "artists rights is at the heart of the treaty--it gives the treaty its special character and its moral tone,"n75 and that current law is insufficient to protect those rights.n76

When the language of Article 6*bis* is compared with the evidence that has been offered to suggest that moral rights are substantially protected in the U.S., it is clear that, aside from some recently-passed statutes in four [now eight] states, moral rights are not protected in any meaningful sense.

First, they are not protected as such. [With one exception], a long line of cases has expressly rejected the concept, and even [that case] is susceptible to other interpretations.

Second, the Copyright Act, except for one very specialized area, does not recognize the distinction between moral and economic rights on which Article 6*bis* is predicated and without which its application is impracticable.

Third, the attempt to find inchoate moral rights protection in more familiar causes of action is largely wishful thinking [footnotes omitted].n77

Finally, this group of witnesses dissented from the view of the opponents to Berne adherence that increased protection of the rights of paternity and integrity would dramatically change existing business practices. They presented legislative alternatives that would, they argued, minimize such changes. To counter these concerns, they argued that the experience in countries with moral rights systems has been favorable.n78

2. W.I.P.O. Roundtable Discussions in Geneva

The international copyright experts in Geneva were virtually unanimous in their opinion that the United States should adhere to Berne, that the sufficiency of our domestic law in respect of *all* Berne obligations was a matter for the United States to determine,n79 and that our current statutory and common law is sufficient to meet the requirements of Article 6*bis.*n80 They testified that fears of legislative or judicial expansion of moral rights, based solely on adherence

to the Berne Convention, are unjustified.n81 These experts were also unanimous in agreeing that the moral rights systems in their countries, which were often much more extensive than the rights imposed by Article 6*bis,* in no way deterred the free flow of information and culture.n82 Finally, they stressed that how any state of the Berne Union chooses to define, protect, and deal with the alienability of "moral rights" had no force or effect on the discretion of any other state in this regard.n83

3. Meetings in Paris

In Paris, the Committee delegation met with international film producers, international film directors, and representatives of the French Ministry of Culture and Communications. The producers urged United States adherence to Berne, and expressed support for the United States' practice of granting final artistic control over a film to the producer, rather than the director or screenwriter. They were critical of moral rights as found in some Berne countries, contending that placing control over films in the hands of the director or screenwriter has been detrimental to the European film industry.

The directors, not surprisingly, expressed precisely the opposite view. They urged the delegation to adhere to Berne, and to enact strong moral rights legislation in that context, contending that even in countries with moral rights systems, the integrity of films has been seriously impaired. They further opined that the spirit of the Berne Convention required such legislation.

Officials of the French Ministry of Culture and Communications also urged our adherence to Berne and stated their view that, in general, current United States law appeared adequate to enable us to do so.

4. Other Commentary

The Director General of the World Intellectual Property Organization, Dr. Arpad Bogsch, has stated that:

[I]n my view, it is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation for the United States under Article 6*bis*.n84

5. Conclusion

The Committee recognizes that there is no single Federal statute relating specifically to "moral rights" of authors. Berne, however, does not so require.n85 In fact, according to Article 6*bis,* paragraph (3), the means of redress for the rights provided "shall be governed by the legislation of the country where protection is claimed."n86

The Committee also recognizes that while protection of the rights of paternity and integrity in the United States may not be as broad as it is in some Berne member states, there are other members of Berne that impose even more limited protection.n87 As the Ad Hoc Working Group concluded in its *Final Report:*

[T]here are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with 6*bis,* as it is applied by various Berne countries.n88

The Committee has been persuaded by the testimony of the majority of the witnesses before the Subcommittee, the conclusions of the international copyright experts whose advice the Subcommittee sought, and the comments of many other distinguished interested parties. Based on a comparison of its laws with those of Berne member countries, and on the current status of Federal and State protections of the rights of paternity and integrity, the Committee finds that current United States law meets the requirements of Article 6*bis.*

6. Moral Rights and Self-Execution

Article 6*bis* is closely tied to the issue of whether the Berne Convention is self-executing. Some of the witnesses testifying before the Subcommittee on Courts, Civil Liberties and the Administration of Justice expressed concern that, despite a Congressional determination that the provisions of Berne may be implemented only through appropriate domestic legislation (*see* discussion *supra*), the Article 6*bis* rights may somehow take effect.n89 These witnesses were

in a small minority. Otherwise, the Subcommittee heard virtually unanimous opinion that, because the Berne Convention is not self-executing, adherence standing alone would not cause the courts or legislatures to strengthen such protections.n90

Berne's non-self-executing nature obviates such concerns, but because they have continued to be expressed, the Committee believes that an explicit discussion of the issues of moral rights and self-execution is desirable.

The Committee states unequivocally that Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity.

To make this fact abundantly clear, the Committee has adopted language that declares in Section 3(1) that Berne is not self-executing, and in Section 3(2) that this country's obligations under Berne "may be performed only pursuant to appropriate domestic law," and that, according to Section 3(3), those obligations are satisfied by the amendments made by H.R. 4262, together with the other laws existing on the date of enactment of the implementing legislation. Furthermore, Section 3(3) declares that for the purpose of satisfying those obligations, it is only the rights and interests arising under those amendments or those existing laws that may be claimed. In other words, adherence to Berne will have no effect whatsoever on the state of moral rights protections in this country. *Since the Committee finds that existing law is sufficient to enable the United States to adhere to the Berne Convention, the implement- ing legislation is completely neutral on the issue of whether and how protection of the rights of paternity and integrity should develop in the future.* The Committee stresses that the phrase "for the purpose of satisfying such obligations" in Section 3(3) is intended to assure United States courts that adherence to Berne is not, of itself, a basis for any cause of action. Outside the context of Berne, the courts and legislatures are free to act, or to not act, on questions concerning the rights of paternity and integrity.

Section 4 of the bill reinforces Berne's non-self-executing nature by construing the Convention's relationship with domestic law. It finds in Section 4(a)(1) that Berne's provisions shall be given effect under title 17 of the United States Code (as amended by H.R. 4262) and by any other relevant provision of Federal or State statutory or common law. Section 4(a)(1) must be read in conjunction with the provisions of Section 4(b), Section (6)(2), and Section 7 of the bill. Because Berne is not self-executing, Section 4(a)(2) provides that Berne's provisions are not enforceable in the courts. No action brought pursuant to the provisions of the Convention itself will be successful; instead, an independent foundation in Federal or State statutes or the common law must exist.

Finally, Section 4(b) of the bill tracks the language of Article 6*bis,* and provides that any right of an author to paternity or integrity, whether claimed under Federal or State statutory or common law, is not expanded or reduced by Berne adherence and the satisfaction of our obligations under Berne. Adherence and the satisfaction of our obligations under Article 6*bis* are intended to have no effect on the status of these rights.

A related statutory provision, set forth in Section 6 of the bill, amends *17 U.S.C. § 104,* and describes the effect of the Berne Convention. It declares that no right or interest in a work protected under title 17 may be claimed by virtue of, or in reliance upon, the Convention's provisions or the United States adherence to the Convention. Furthermore, any rights in a work eligible for title 17 protection that derive from title 17, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the Convention's provisions or the United States adherence to the Convention. In other words, Berne's provisions themselves, and the simple fact of adherence to the Convention, will not in any way affect current law or its future development. As Section 3(2) of the bill makes clear, it is only through appropriate domestic law that our obligations under Berne may be performed. To the extent that courts, in interpreting our domestic laws, properly look to the laws of foreign countries, they may continue to do so. The fact of Berne adherence will not enable them to look to such laws to any greater or lesser degree.

Finally, H.R. 4262 amends *17 U.S.C. § 301,* relating to preemption of other laws, to create a new subsection (e), which provides that adherence to Berne, and the satisfaction of United States obligations under Berne, does not affect the scope of Federal preemption. This amendment once again reinforces the neutrality of the implementing legislation: adherence to Berne, and the satisfaction of our obligations under the Convention, will have no effect on the law of preemption under section 301.

The Committee recognizes that protection of the rights of paternity and integrity in this country has gradually been increasing. In recent years, eight states have enacted legislation to protect these rights, at least as they pertain to certain artists. The legislatures may see fit to continue this expansion. This Committee will also consider similar legislation, since the Subcommittee on Courts, Civil Liberties and the Administration of Justice has already announced hearings on

artists' rights.n91 These actions are being taken independently of Berne adherence, and our obligations thereunder, and they must continue to be independent. The law relating to the rights of paternity and integrity is intended to be the same the day before, and the day after, adherence. Courts remain free to apply common law principles, to interpret statutory provisions, and to consider the experience of foreign countries to the same extent as they would be in the absence of United States adherence to Berne.

C. FORMALITIES

As a general proposition, adherents to the Berne Convention obligate themselves not to impose certain kinds of conditions or requirements (that is, formalities) on the "enjoyment and the exercise"n92 of rights of authors outside the country of origin of the work.

The Committee received conflicting testimony about the nature of the prohibited formalities. Consistent with the conceptual decision to revise United States law only to the extent absolutely necessary to make it compatible with Berne, H.R. 4262 relies heavily on the interpretation of prohibited formalities set forth in the *Guide to the Berne Convention.* In this regard, the word "formality" must be understood in the sense of a condition necessary for a right to exist. A formality would be an administrative obligation set forth by a national law which, if not fulfilled, would lead to a loss of copyright.n93 As a consequence, those provisions of American law that constitute non-substantive or procedural formalities such as mandatory deposit for the benefit of the Library of Congress, recordation of documents of copyright transfer, registration of claim of copyright, are not amended by the proposed legislation except to conform language necessitated by changes in the law regarding mandatory notice of copyright. The copyright notice provisions have been amended to encourage, but not to require, notice.

1. Registration.

Under current law, registration is permissive except where the work is published without notice of copyright. In that case, regis- tration before publication or within five years of publication becomes mandatory in order to avoid loss of copyright.n94

Registration, however, is induced by three current methods contained in the Copyright Act: by conditioning the legal presumption of copyright validity on registration within five years of publication (section 410(c); by conditioning the grant of statutory damages and attorneys' fees on registration before the act of infringement occurs (section 412); and by requiring the copyright owner to seek registration as a prerequisite to suit for copyright infringement (section 411(a)).

There is a strong consensus that Berne requires the elimination of mandatory notice of copyright and therefore the deletion of the requirement of registration within five years of any publication without notice. H.R. 4262 makes this change.

Under a minimalist approach, it is agreed that two of the three inducements to registration--the presumption of validity and statutory damages--are compatible with Berne.n95 The former satisfies Berne because it affects the ordering of proof and the latter because it affects remedies.

Divergent views do exist on the Berne compability of the requirement that claimants seek registration before copyright infringement suits.n96 Consistent again with the minimalist approach, H.R. 4262 proceeds upon the assumption that section 411 of the Copyright Act should not be changed since it is not clearly prohibited by Article 5(2) of the Berne Convention. The requirement that registration occur as a precondition to a lawsuit is procedural in nature and does not in any sense lead to a "loss of copyright".n97

Registration as a prerequisite to suit is procedural because the suit can be maintained directly against an alleged infringer based on a denial of registration. Copyright owners can enjoy and exercise their rights within the meaning of Article 5(2) of Berne whether registration is granted or denied.

It is the view of the Committee that any doubt on this issue should be resolved in favor of retaining section 411 of the Copyright Act because the provision is in the public interest. Copyright registration promotes efficient litigation practices, to the benefit of the courts and the public as well as to the parties in the lawsuit. Registration narrows the issues that must be litigated and, since it pertains to proof of ownership, assists the courts in resolving the underlying copyright dispute. Within the Congress, the Committee plays an important role in monitoring the judicial impact of legislation. In this regard, the Judicial Conference of the United States advise the Committee that if the requirement of

registration as a prerequisite to suit were eliminated, there would likely be increased difficulty in trying copyright cases.n98

The judicial impact of the legislation is only one factor to be considered on the public interest side of the equation. There are others. Registration is an important source of acquisitions for the Library of Congress, providing an especially important method of acquiring foreign works which may not be subject to mandatory deposit under the Copyright Act.n99 In a time of fiscal restraint, the absence of this acquisition source--which is virtually cost-free to the taxpayer--would have to be replaced by either the expenditure of public monies or the establishment of increased fees by the Library, or a combination of both. Moreover, registration as a prerequisite to suit helps to ensure the existence of a central, public record of copyright claims. This publicly available depository of information is of benefit to both copyright owners and users.

The Committee is also concerned that abolition of section 411(a) would result in attempts to use the legal system to exert control over materials that Congress intends to be in the public domain. Since the *prima facie* presumption of originality in section 410(c) would continue to provide a strong incentive for registration,n100 it would arguably be those claimants who do not have a cognizable claim to copyrightability who would forego the substantial benefits of registration: examples would include utilitarian, industrial and other works that do not meet the existing standards of protection.

Once in court, such plaintiffs can exploit discovery and other procedures (or even, as is common, generate unfavorable and destructive publicity in the business world) to extract settlements and cause financial harm to legitimate competition and ultimately the public through higher prices.

In the past, some suits have been kept out of court by the necessity of filing for registration prior to institution of litigation and by the unwillingness of potential plaintiffs to bring suit under section 411(a) following a refusal to register because of the unfavorable light in which a judge might view the refusal to register and the undesirability of having the Copyright Office intervene in opposition. In a world without section 411(a), it is likely that a greater number of suits would be brought in Federal court.

It certainly is no answer to permit the Copyright Office to intervene in such suits. The Office should not be forced into devoting (as would be the case) a substantial part of its limited resources to litigation.

For all of these reasons, the Committee concluded that section 411(a)--and registration as a prerequisite to the filing of a lawsuit--should be retained.

As evidence that this decision satisfies the dictates of the Berne Convention, the Committee looked to the practices of members of the Union. And, indeed, other Berne countries maintain registration systems, in keeping with their unique national experience, and set their own inducements to encourage registration.n101 Other Berne countries clearly have procedural requirements for bringing copyright infringement actions: papers must be served and filed, documents must be produced, court costs and litigation costs must be paid.

Under the Berne Convention, the extent of protection and the means of redress are generally governed by the national law of the country where protection is claimed. The primary mechanism for discouraging discriminatory treatment of foreign copyright claimants is the principle of national treatment. Whatever restrictions or procedures are imposed on foreign nationals must also be imposed on the citizens of the country where protection is claimed. The national treatment principle has fostered a high level of protection, as well as a minimum of procedural burdnes. It does not, however, require all countries to have identical legal systems and procedural norms.

The Committee considered the contention that other countries might retaliate against the United States if we maintain the existing provisions of section 411(a) after joining Berne. In the view of the Committee, these concerns are probably not well-founded and are certainly speculative. The principle of national treatment operates to bar onerous procedural requirements, since any retaliatory registration procedures would have to be applied equally against the citizens of the retaliating country. Moreover, if another Berne country did adopt registration procedures that rendered difficult or impossible the enforcement of well-settled rights, then the United States or other Berne members could still apply moral pressure or perhaps trade leverage, if any, to pressure the country to adopt reasonable procedures. Last, if other countries implement exactly the same provisions as section 411(a), this would not be burdensome on our nationals.

2. Recordation of Documents

Similar to the requirement of registration as a prerequisite to suit, any person claiming by virtue of a transfer (that is, by assignment, exclusive license, or other conveyance of any exclusive right) to be an owner of copyright or of any exclusive right must record in the Copyright office the instrument of transfer before filing a lawsuit for infringement. Once recordation is made, suit may be brought on a cause of action that arose before recordation.

Again, under the minimalist approach of H.R. 4262 and based on the interpretation of prohibited formalities found in the W.I.P.O. *Guide,*n102 the Committee concluded that no change is necessary in section 205(d) of the Copyright Act to make American law consistent with Berne. Briefly put, recordation as a prerequisite to suit regulates standing to sue. Since the author is the original owner of copyright under section 201(a), the author would always be able to sue without recording any document. This provision satisfies the requirement of Article 15 of the Berne Convention that an author who is named on the copies of the work is entitled to sue for infringement. The provision is Berne compatible because the failure to record does not lead to loss of the copyright--it merely regulates who may sue.

3. Mandatory Deposit

The requirement of depositing a copy of the work in which copyright is claimed has been an integral part of the United States copyright system for nearly 200 years.n103 Since 1865 the Library of Congress has been the permanent beneficiary of copyright deposits, the copyright system therefore being one of the primary sources of acquisitions for the Library. Some of the collections were built almost exclusively through copyright deposits.

Before the general revision of the law in 1978, deposit was tied to registration and both were mandatory. Under existing law, the Library receives deposits both through permissive registration and through mandatory deposit in the case of works published with notice of copyright in the United States.n104

Since noncompliance with the mandatory deposit requirement does not result in forfeiture of any copyright protection, mandatory deposit is compative with Berne. However, elimination of the copyright notice as a condition of copyright requires an amendment to section 407 of the Copyright Act. Under the proposed legislation, all original works of authorship published in the United States remain subject to mandatory deposit.

Clearly, the mandatory deposit of all published works in which copyright is claimed advances the purposes of the Copyright Clause of the Constitution to promote the progress of science and the useful arts. The existing mandatory deposit requirement was recently held to pass constitutional muster.n105 The elimination of copyright notice as a factor in subjecting works to mandatory deposit has no constitutional significance. It remains true that only those works published in the United States in which copyright is claimed are subject to mandatory deposit. The only change is that the law will no longer require affirmative marking of the copies as a condition of maintaining copyright. As in the past, all original works of authorship are under copyright from their creation, and authors and owners of copyright are required to deposit copies with the Library of Congress when their works are published in the United States.

The public benefits of mandatory deposit are obvious. The entire society--including not only authors and copyright owners but students, academics, ordinary citizens, Members of Congress and their staffs--becomes the beneficiary of a strong and dynamic national library: a public institution that acquires, preserves and makes accessible to present and future generations the material expressions of our national cultural life and other cultures. The implementation of a deposit function cannot and should not be limited to "printed publications", any more than our culture and communications can be confined to the printed page.

Mandatory deposit is a very modest requirement and, once again, a very good bargain for the public. A maximum of two copies, and frequently only one copy, must be deposited for all of the United States. In the view of the Committee, this condition is well within its authority under the Copyright Clause.

4. Notice of copyright

The proposed legislation abolishes mandatory notice of copyright for works first published after the law comes into effect, thereby dispensing with a device that has been statutorily required for nearly two centuriesn106 to identify works under copyright after publication. In deference to the utility of notice, however, the legislation includes a new provision designed to stimulate voluntary notice by according evidentiary significance to its use. Current notice requirements are unchanged for works first published before the effective date of the Act. These works will fall into the public domain if published without notice, and registration is not made before or within five years of publication.

To encourage use of notice, H.R. 4262 amends current law--sections 401(d) and 402(d)--to specify that in the case of defendants who have access to copies bearing proper notice of copyright, courts shall not give any weight to a claim of innocent infringement (that is, innocent intent) in mitigation of actual or statutory damages. While innocent intent does not constitute a defense to copyright liability, the courts have taken account of the relative innocence or guilt of the defendant in assessing both actual and statutory damages.n107 As relates to statutory damages, the courts generally have exercised their discretion to award an amount between $ 250 and $ 10,000, using the relative innocence of the defendant as a major factor in setting the amount of the award. The intent of new sections 401(d) and 402(d) is to direct the courts not to consider the defendant's claim of innocence if the copyright owner has marked the copies properly with notice of copyright and the defendant has had access to the marked copies.

Newly amended sections 401(d) and 402(d) must be read together, however, in conjunction with the specific provision for remission of all statutory damages in the last sentence of section 504(c)(2). In that situation, the court has no discretion. Current law provides that all statutory damages shall be remitted where certain employees of non-profit educational institutions, libraries, archives, or public broadcasting entities prove that they are innocent infringers. The proposed legislation makes no change to the existing scheme regarding this class of innocent infringers, even if the copies to which they have access bear notice of cpyright. H.R. 4262 does change current law with respect to other classes of "innocent infringers," including those covered by the second sentence of section 504(c)(2), where the copies bear notice and the defendant had access to the marked copies.

As relates to works consisting in whole or in part of works of the United States Government, the proposed legislation amends section 403 of the Copyright Act to require a statement on the copies identifying the government material. The amendment further confers authority on the Copyright Office to issue regulations detailing the general contents and location of the identifying statement. The legislation prescribes no penalty for failure to comply, leaving the penalty to the judgment of the courts in infringment actions. At a minimum, it is intended that failure to comply with the regulations issued pursuant to section 403, if not cured by appropriate disclosure at the time of copyright registration, will constitute fraud on the Copyright Office. Even if disclosure is made at the time of registration, a reviewing court may consider that the copyright claimant has "unclean hands" unless the publicly distributed copies of the work bear an appropriate identifying statement, in accordance with the regulations to be issued by the Copyright Office.

Section 404 of current law governs the use of notice in collective works. Since notice is no longer mandatory, H.R. 4262 merely clarifies the requirements necessary to invoke the "evidentiary weight of notice" provisions of new sections 401(d) and 402(d). The provisions of section 404 with respect to works first published before the effective date of the Act are maintained, since current law clearly applies to works first published before the Act goes into effect.

5. Renewal Registration

Current section 304(a) of the Copyright Act requires registration with the Copyright Office during the last year of the first term of copyright in order to enjoy the second term of copyright in works under copyright before January 1, 1978 (the effective date of the Copyright Revision Act of 1976).When Congress engaged in the historic revision of the copyright laws in 1976, the subjects of duration of copyright and the renewal of copyright were thoroughly examined and debated. Congress decided to establish a new system of duration of copyright for works first copyrighted under the revised law, but retained the renewal provision for pre-existing copyrights. The House Committee on the Judiciary explained in its Report that the renewal system would be phased out by the year 2005 rather than eliminated immediately because a "great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests."n108

In revisiting this issue more than a decade later, the Committee reaches the same conclusion: it would be unfair and immensely confusing to attempt to cut off renewal expectancies. Moreover, constitutional questions could be raised about deprivation of property without due process of law or unlawful impairment of existing contracts. So, H.R. 4262 elects to take a safer course and lets the renewal provisions terminate as previously scheduled in the year 2005.

D. JUKEBOX COMPULSORY LICENSE

The Berne Convention in Article 11(1) requires that authors of dramatic, dramatico-musical, and musical works shall enjoy the exclusive rights of authorizing: (1) the public performance by any means or process; and (2) the communication to the public of performance of their works. This text was adopted at Stockholm in 1967 and is included in the 1971 Paris Act. Before 1967, Article 13, which allows a compulsory license for the making of records of musical

works, could have been interpreted to permit a compulsory license for nonbroadcast performances of recorded music. Under the 1971 Paris Act, the scope of the Article 13 compulsory license is confined to the act of recording, that is, reproductions. Article 11(1) therefore governs the obligations with respect to *performance* of recorded works, and apparently does not permit compulsory licensing of non-broadcast performances.

Current American copyright law--section 116 of title 17, United States Code--allows the compulsory licensing of the performance of nondramatic musical works by playing the record embodying the music on a coin-operated phonorecord (jukebox). The Committee heard from experts, a vast majority of whom agreed that the existing jukebox compulsory license is incompatible with Berne.n109 The Committee considered but rejected the solution of complete elimination of the jukebox compulsory license. Instead, the Committee fashioned a new section 116A that encourages the representatives of authors and jukebox operators to negotiate licenses or submit to arbitration.n110 If negotiations fial, the compulsory license provisions in effect on the day before the amendment takes effect--that is, section 116--would operate.

As evidence that new section 116A is compatible with Berne, the Committee looked to the law in effect in other Berne countries and found systems in place for government review or regulation of rates and licensing terms offered by performing rights societies.n111

In 1985, with congressional participation by Chairman Kastenmeier and Senator Mathias, the three performing rights societies (ASCAP, BMI and SESAC) and the trade association representing jukebox operators (AMOA) reached a voluntary agreement under which they cooperate to facilitate compliance with the jukebox compulsory license; the performing rights societies in turn agreed to give rebates of license fees, depending on the level of compliance.n112 The Committee believes that this experience in voluntary cooperation augurs well for the future. The Committee need not take a position on the merits or efficacy of the 1985 agreement, other than noting with satisfaction the progress that the various parties have made in working together to solve their problems.

H.R. 4262 proceeds on the presumption that the parties affected by the jukebox license will, as they have done in the past, negotiate in good faith and work diligently to reach voluntary licensing agreements that may or may not resemble the 1984 settlement.

As a last resort, if voluntary negotiations fail pursuant to new section 116A, the Copyright Royalty Tribunal is empowered to conduct a proceeding one year after the effective date of the amended law to review the number of songs licensed voluntarily during that period as compared with the number of songs performed under the compulsory license in the last year that current section 116 was in effect. If the Tribunal finds and certifies that the number of songs voluntarily licensed is substantially smaller than the number previously covered by the old compulsory license, then the Tribunal will publish a notice that section 116 is available and compulsory licenses can be obtained by complying with section 116. H.R. 4262 provides, however, that any voluntary licenses will supercede nonvoluntary licenses.

In order to make the certification, the Tribunal will presumably either initiate statistical surveys or accept, in whole or in part, evidence of such surveys offered by the interested parties relating to the number of songs likely performed on jukeboxes in the last year of section 116. With respect to the number of songs licensed on a voluntary basis, the Tribunal will most likely accept the estimates of the interested parties it finds most credible. Since the overwhelming bulk of the music is licensed by two societies (ASCAP and BMI), if a voluntary agreement is made involving either or both societies or the larger of the two in terms of repertoire, the Tribunal can very likely find that the number of voluntary agreement songs is not substantially smaller than nonvoluntary agreement songs.

Except when the Tribunal certifies that the compulsory license is available, the Tribunal has no authority to adjust the statutory royalty rates. If the compulsory license is certified to be available, then the normal schedule for review of rates established by section 804(a)(2)(C) applies, that is, in 1990 and every tenth year. If no petition for rate review is filed in 1990 because of the negotiations pursuant to section 116A but the compulsory license becomes available thereafter, then a petition may be filed in the year that section 116 becomes effective and in each subsequent tenth year.

The Committee believes that this minimalist approach to be in conformity with the dictates of the Berne Convention. As a general principle, Berne stands for the proposition that copyright law should preserve and protect national and cultural distinctions that make up the world's cultural heritage. In the United States, for the past one hundred years, the jukebox has been a very popular means of bringing musical expression to the American people. The jukebox, being an important part of our cultural heritage, need not conflict with either the cultural goals of the Berne Convention or artistic expressions of American songwriters.

E. ARCHITECTURAL WORKS

Article 2(1) of the Berne Convention requires protection for three categories of works related to architecture:

(a) "works of ... architecture";

(b) "illustrations ... plans [and] sketches ... relative to ... architecture; and

(c) "three dimensional works relative to ... architecture".n113 "Works of architecture" have been protected in some form under Berne since 1908, with the concept of three-dimensional works being added in 1967.n114

Under the 1976 Copyright Act, a work of architecture is generally embodied in a "useful article." As such, it may be protected as a "pictorial, graphic, and sculptural work" only if, and only to the extent that, its design "incorporates pictorial, graphic, or sculptural features" that can be identified separately from, and are capable of existing independently of, utilitarian aspects of the useful article."n115

Thus, while adornments or embellishments to a building may be eligible for U.S. copyright protection, the function or aspects of buildings are not.n116

The 1976 Act makes clear that architectural plans and drawings are protected by copyright, since, in this regard, they are no different from other drawings.n117

While there is substantial debate about whether the copyright laws prevent the use by someone other than the copyright holder of a copyrighted plan in the construction of a building, there is no doubt that the unauthorized copying of a plan or drawing of an architectural nature is considered a copyright infringement.n118

H.R. 1623, the original bill introduced by Representative Kastenmeier, followed the advice of the Copyright Office, the Administration, and the Ad Hoc Working Group. It proposed to amend the Copyright Act to explicitly provide for protection of buildings and structures, albeit with extensive exceptions and limitations.n119 Unfortunately none of the witnesses who testified in the early hearings nor any of the experts consulted by the Subcommittee at the WIPO Roundtable Discussions, directly addressed issue of architectural works.

During the last day of hearings, both former Register of Copyrights Barbara Ringer and Professor Paul Goldstein testified that the requirements of Berne may not require the explicit treatment of architectural works in the manner contemplated in H.R. 1623.n120 The witness from the American Institute of Architects (AIA) supported the provisions of H.R. 1623, but subsequently the AIA indicated that it would be preferable to make the construction of a building from copyrighted plans an act of copyright infringement.n121

As a result of the uncertainty that surrounded the architectural works language of H.R. 1623, the Subcommittee decided to scale back the extent of the amendments made to title 17. Thus, the bill reported by the Subcommittee only ratified the decision already made by the Congress in the 1976 Copyright Act that architectural plans are protected under the copyright laws. Although it is not an infringement merely to construct a building based on copyrighted architectural plans, it is an infringment to reproduce the plans themselves without permission of the copyright owner.

Under current law, the structural or functional aspects of buildings are not subject to copyright protection. *17 U.S.C. 101* (definition of "pictorial, graphic, and sculptural work" and "useful article") and 113.

The Committee concluded that existing United States law is compatible with the requirements of Berne. In addition to a degree of protection under copyright against copying of plans and separable artistic works, additional causes of action for misappropriation may be available under state contract and unfair competition theories.

The bill leaves, untouched, two fundamental principles of copyright law: (1) that the design of a useful article is copyrightable only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the useful article; and, (2) that copyright in a pictorial, graphic, or sculptural work, protraying a useful article as such does not extend to the reproduction of the useful article itself.

Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. This test of separability and independence from the utilitarian aspects of the useful article does not depend upon the nature of the design--that is, even if the appearance of the useful article is determined by aesthetic, as opposed to functional considerations, only those pictorial, sculptural or graphic elements, if any, that can be identified separately from the shape of the useful article are copyrightable. Even if the three-dimensional design contains a separate and independent artistic feature (for example, a floral relief design

on flatware or a gargoyle on a building), copyright protection would not cover the over-all configuration of the useful article as such.

In the case of architectural works, in addition to protection for separable artistic sculpture or decorative ornamentation, purely non-functional or monumental structures may be subject to copyright.

The Committee has not amended section 113 of the Copyright Act and intends no change in the settled principle that copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the reproduction or manufacture of the useful article itself.

F. RETROACTIVITY AND THE PUBLIC DOMAIN

The Committee examined with particular attention whether Article 18 of the Berne Convention requires retroactive protection of works originating in Berne Union countries which may have fallen into the public domain in the United States due to failure to comply with prior statutory formalities.n121a Protection anew of Berne origin works whose term of protection in the United States had expired is clearly not required.

Further, there is considerable debate over whether any recognition of the "principle" of Article 18(1) of the Convention is absolutely required in light of the sweeping discretion accorded states by Article 18(3).

The overall approach of the Committee to limit implementing amendments only to areas clearly in conflict with the text of the Convention has led the Committee to avoid precipitious lawmaking in this delicate and important aspect of national copyright policy. The importance of maintaining intact the United States public domain of literary and artistic materials--from the points of view of commercial predictability and fundamental fairness--argues strongly for legislative caution. The question of whether and, if so, how Congress might provide retroactive protection to works now in our public domain raises difficult questions, possibly with constitutional dimensions. These questions do not have to be addressed now and can be raised if and when presented in the context of specific facts.

The Committee is conscious that an overly broad grant of protection may stifle the creation of new works by unnecessarily restricting the doamin of freely available material. It is in the context of this balancing of interests--providing significant control to authors in the creation of new works while keeping freely available other material which authors and the public should be able to use without restriction--that the concept of the public domain plays an important role.

During the Roundtable Discussions a number of foreign experts expressed the view that some degree of retroactive protection for works in the public domain for reasons other than expiration of term was desirable at least as a matter of the "spirit" of Article 18. They further pointed out--quite correctly--that U.S. negotiators have asked Pacific Basin countries for retroactive protection and that U.S. copyright proprietors would certainly benefit from retroactive protection of our works in Berne states such as Turkey and Egypt.n122

The Committee takes these points seriously; however, we remain persuaded that any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial and consumer considerations is possible. This Act continues in effect, the balance that Congress carefully crafted in the 1976 Copyright Revision. The public domain is neither expanded nor reduced.

G. EFFECTIVE DATE OF THE ACT

As has already been made clear in connection with the non-self-execution of the Berne Convention, implementation of the obligations of the Convention is to be based solely upon domestic law; the Convention is not to be a source of private rights.

Under Article 29 of the Convention, one of two possibilities for coming into force of the Convention for the United States exist: either the Convention enters automatically into force thirty days following notification by the Director General of the W.I.P.O. to the Berne Union of receipt of the United States instrument of accession; or, the instrument of accession deposited by the United States may specify a subsequent date in which case that date would be controlling. This Act elects the former option and in section 13 it is provided that the Act will come into force one day after the entry into force of the Convention for the United States.

The purpose in selecting as the effective date of these amendments a date subsequent to the date of coming into force of the Berne Convention for the United States is to assure that no possibility exists for invalidating the provisions of the Copyright Act on the basis of arguably contrary stipulation in the Berne Convention.

VI. OVERSIGHT FINDINGS

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

VII. STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement has been received on the legislation from the House Committee on Government Operations.

VIII. NEW BUDGET AUTHORITY

In regard to clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives, the bill creates no new budget authority on increased tax expenditures for the Federal judiciary.

IX. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee feels that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

X. COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the committee agrees with the cost estimate of the Congressional Budget Office.

XI. STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate on H.R. 4262, prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 5, 1988.

Hon. PETER W. RODINO, JR.,

Chairman, Committee on the Judiciary., U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 4262, the Berne Convention Implementation Act of 1988, as ordered reported by the House Committee on the Judiciary, April 28, 1988. We expect that enactment of the bill would result in additional cost to the federal government of about $ 400,000 in fiscal year 1989 and $ 150,000 each year thereafter.

The Berne Convention, which has been signed by 76 countries, sets minimum copyright standards aimed at giving copyrighted works international protection. H.R. 42652 would make certain changes to existing U.S. copyright law to conform to codes established under the convention. These changes would be required because several Berne provisions conflict with current U.S. copyright law. Specifically, the bill makes several changes that would (1) give guidance to the courts about how to construe U.S. adherence to the convention, (2) define the subject matter and scope of copyrights under Berne, and (3) define the type of notice, filing, or registration that is required for a work to be protected against unauthorized use.

The change in scope of U.S. copyright law would require an initiative on the part of the Copyright Office, a branch of the Library of Congress, to educate both present and potential copyright owners of the changes to existing law. The Copyright Office has indicated that in order to disseminate this new public information they would meet with affected parties, prepare (and subsequently mail) informational pamphlets, and hire several additional information officers. Based on information from the Copyright Office, CBO estimates that the cost of this public information initiative, along

with some additional printing costs, would cost the federal government about $ 400,000 in fiscal year 1989, decreasing to about $ 150,000 each year thereafter.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES L. BLUM,
Acting Director.

XII. COMMITTEE VOTE

On April 28, 1988, the Committee--with a quorum of Members being present--favorably reported H.R. 4262 by voice vote, no objections being heard.

XIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

* * * * *

CHAPTER 1--SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.

101. Definitions.

102. Subject matter of copyright: In general.

103.Subject matter of copyright: Compilations and derivative works.

104. Subject matter of copyright: National origin.

105. Subject matter of copyright: United States Government works.

106. Exclusive rights in copyrighted works.

107. Limitations on exclusive rights: Fair use.

108. Limitations on exclusive rights: Reproduction by libraries and archives.

109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.

110. Limitations on exclusive rights: Exemption of certain performances and displays.

111. Limitations on exclusive rights: Secondary transmissions.

112. Limitations on exclusive rights: Ephemeral recordings.

113. Scope of exclusive rights in pictorial, graphic, and sculptural works.

114. Scope of exclusive rights in sound recordings.

115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.

[116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players.]

116. *Scope of exclusive rights in nondramatic musical works: Compulsory licenses for public performances by means of coin-operated phonorecord players.*

116A. *Negotiated licenses for public performances by means of coin-operated phonorecord players.*

117. Scope of exclusive rights: Use in conjunction with computers and similar information systems.1

118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting.

§ 101 Definitions

As used in this title, the following terms and their variant forms mean the following:

An "Anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto, up to and including the revision done at Paris, France, in 1971.

A work is a "Berne Convention work" if--

(1) in the case of an unpublished work, one or more of the authors is a national of a state adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a state adhering to the Berne Convention on the date of first publication;

(2) the work was first published in a state adhering to the Berne Convention, or was simultaneously published in a state adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

(3) in the case of audiovisual work--

(A) if one or more of the authors is a legal entity, that author has its headquarters in a state adhering to the Berne Convention; or

(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a state adhering to the Berne Convention; or

(4) in the case of a pictorial, graphic, or sculptural work, such work is incorproated in a building or other structure located in a state adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a state adhering to the Berne Convention is considered to be a national of that state. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.

* * * * *

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, [technical drawings, diagrams, and models] *diagrams, models, and technical drawings, including architectural plans.* Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

* * * * *

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.--The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.--The works specified by sections 102 and 103, when published, are subject to protection under this title if--

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, whenever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work is a Berne Convention work; or

[(4)] *(5)* the work comes within the scope of a Preesidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domicilaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

(c) EFFECT OF BERNE CONVENTION.--No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisons of the Berne Convention or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention or the adherence of the United States thereto.

* * * * *

§ 116. Scope of exclusive rights in nondramatic musical works: [Public] *Compulsory licenses for public* performances by means of coin-operated phonorecord players

(a) LIMITATION ON EXCLUSIVE RIGHT.--In the case of a nondramatic musical work embodied in a phonorecord, *the performance of which is subject to this section as provided in section 116A,* the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) the proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless--

(A) such proprietor is the operator of the phonorecord player; or

(B) such proprietor refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by

the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

* * * * *

(e) DEFINITIONS.--As used in this section *and section 116A,* the following terms and their variant forms mean the following:

(1) A "coin-operated phonorecord player" is a machine or device that--

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

* * * * *

§ 116A. Negotiated licenses for public performances by means of coin-operated phonorecord players

(a) APPLICABILITY OF SECTION.--This section applies to any nondramatic musical work embodied in a phonorecord.

(b) LIMITATION ON EXCLUSIVE RIGHT IF LICENSES NOT NEGOTIATED.--

(1) APPLICABILITY.--In the case of a work to which this section applies, the exclusive right under clause 4 of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited by section 116 to the extent provided in this section.

(2) DETERMINATION BY COPYRIGHT ROYALTY TRIBUNAL.--The Copyright Royalty Tribunal, at the end of the 1-year period beginning on the effective date of the Berne Convention Implementation Act of 1988, and periodically thereafter to the extent necessary to carry out subsection (f), shall determine whether or not negotiated licenses authorized by subsection (c) are in effect so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending on the effective date of that Act. If the Copyright determines that such negotiated licenses are not so in effect, the Tribunal shall, upon making the determination, publish the determination in the Federal Register. Upon such publication, section 116 shall apply with respect to musical works that are not the subject of such negotiated licenses.

(c) NEGOTIATED LICENSES.--

(1) AUTHORITY FOR NEGOTIATIONS.--Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

(2) ARBITARTION.--Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Copyright Royalty Tribunal of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

(d) LICENSE AGREEMENTS SUPERIOR TO CRT DETERMINATIONS.--License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in

accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Tribunal.

(e) NEGOTIATION SCHEDULE.--Not later than 60 days after the effective date of the Berne Convention Implementation Act of 1988, if the Chairman of the Copyright Royalty Tribunal has not received notice, from copyright owners and operators of coin-operated phonorecord players referred to in subsection (c)(1), of the date and location of the first meeting between such copyright owners and such operators to commence negotiations authorized by subsection (c), the Chairman shall announce the date and location of such meeting. Such meeting may not be held more than 90 days after the effective date of the Act.

(f) COPYRIGHT ROYALTY TRIBUNAL TO SUSPEND VARIOUS ACTIVITIES.--The Copyright Royalty Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of the Berne Convention Implementation Act of 1988, the negotiated license adopted by the parties under this section do not provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending on the effective date of that Act.

(g) TRANSITIONSPROVISIONS: RENTENTION OF COPYRIGHT ROYALTY TRIBUNAL JURISDICTION.--Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license under section 116, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, which is in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, shall remain in force. If a negotiated license authorized by this sections comes into force so as to supersede previous determinations of the Copyright Royalty Tribunal, as provided in subsection (d), but thereafter is terminated or expires and is not replaced by another licensing agreement, then section 116 shall be effective with respect to musical works that were the subject of the terminated or expired license.

* * * * *

CHAPTER 3--DURATION OF COPYRIGHT

Sec.

301. Preemption with respect to other laws.

302. Duration of copyright: Works created on or after January 1, 1978.

303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978.

304. Duration of copyright: Subsisting Copyrights.

305. Duration of copyright: Terminal date.

§ 301. Preemption with respect to other laws

(a) * * *

* * * * *

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of the obligations of the United States thereunder.

* * * * *

CHAPTER 4--COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sec.

401. Notice of copyright: Visually perceptible copies.

402. Notice of copyright: Phonorecords of sound recordings.

403. Notice of copyright: Publications incorporating United States Government works.

404. Notice of copyright: Contributions to collective works.

[405. Notice of copyright: Omission of notice.

[406. Notice of copyright: Error in name or date.]

405. Notice of copyright: Omission of notice on certain copies and phonorecords.

406. Notice of copyright: Error in name or date on certain copies and phonorecords.

407. Deposit of copies or phonorecords for Library of Congress.

408. Copyright registration in general.

409. Application for copyright registration.

410. Registration of claim and issuance of certificate.

411. Registration as prerequisite to infringement suit.

412. Registration as prerequisite to certain remedies for infringement.

§ 401. Notice of copyright: Visually perceptible copies

(a) GENERAL REQUIREMENT.--Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section [shall] *may* be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) FORM OF NOTICE.--[The notice appearing on the copies] *If a notice appears on the copies, it* shall consist of the following three elements:

(1) the symbol (c) the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) The year of first publication of the work; in the case of compilations, or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

* * * * *

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

§ 402. NOTICE OF COPYRIGHT: PHONORECORDS OF SOUND RECORDINGS

(a) GENERAL REQUIREMENT.--Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section [shall] *may* be placed on all publicly distributed phonorecords of the sound recording.

(b) FORM OF NOTICE.--[The notice appearing on the phonorecords] *If a notice appears on the phonorecords, it* shall consist of the following three elements:

(1) the symbol P (the letter P in a circle); and

(2) the year of first publication of the sound recording; and

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in con- junction with the notice, the producer's name shall be considered a part of the notice.

* * * * *

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

§ 403. Notice of copyright: Publications incorporating United States Government works

Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, [the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title] *such copies or phonorecords shall prominently display a statement identifying those portions of the copies or phonorecords that constitute a work of the United States Government, in accordance with regulations issued by the Copyright Office.*

§ 404. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient [to satisfy the requirements of sections 401 through 403] *to invoke the provisions of section 401(d) or 402(d), as applicable* with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) [Where] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where* the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

§ 405. Notice of copyright: Omission of notice *on certain copies and phonorecords*

(a) EFFECT OF OMMISSION ON COPYRIGHT.--[The] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the* omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if--

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.--Any person who innocently infringes a coppyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted *before the*

effective date of the Berne Convention Implementation Act of 1988, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition or permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

* * * * *

§ 406.Notice of copyright: Error in name or date *on certain copies and phonorecords*

(a) ERROR IN NAME.--

[Where] *With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where* the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownerhsip of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license form the person named therein, unless before the undertaking was begun--

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from transfers or licenses purportedly made under the copyright by the person named in the notice.

(b) ERROR in DATE.--When the year date in the notice on copies or phonorecords distributed *before the effective date of the Berne Convention Implementation Act of 1988* by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) OMISSION OF NAME OR DATE.--Where copies or Ahonorecords publicly distributed *before the effective date of the Berne Convention Implementation Act of 1988* by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405 *as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988.*

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published [with notice of copyright] in the United States shall deposit, within three months after the date of such publication--

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

* * * * *

§ 408. Copyright registration in general

(a) REGISTRATION PERMISSIVE.--At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. [Subject to the provisions of section 405(a) such] *such registration is not a condition of copyright protection.*

* * * * *

(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT.--

(1) * * *

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, [under all of the following conditions--] *under the following conditions:*

[(A) if each of the works as first published bore a separate copyright notice, and the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner was the same in each notice; and]

[(B)] *(A)* if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

[(C)] *(B)* if the application identifies each work separately, including the periodical containing it and its date of first publication.

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CHAPTER 8--COPYRIGHT ROYALTY TRIBUNAL

* * * * *

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be--

(1) to make determination concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives;

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

* * * * *

In determining, under paragraph (1)(B), whether a return to a copyright owner under section 116 is fair, substantial deference shall be given to--

(I) the rates in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, and

(II) the rates contained in any license negotiated under section 116A(c).

* * * * *

§ 804. Institution and conclusion of proceedings

(a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2)(A) and (D)--

(1) on January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and

(2) during the calendar years specified in the following schedule, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Tribunal determines that the petitioner has a significant interest, the chairman shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with notice of commencement of proceedings under this chapter.

(A) In proceedings under section 801(b)(2)(A) and (D), such petition may be filed during 1985 and in each subsequent fifth calendar year.

(B) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1987 and in each subsequent tenth calendar year.

[(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 116, such petition may be filed in 1990 and in each subsequent tenth calendar year.]

(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 116--

(i) such petition may be filed in 1990 and in each subsequent tenth calendar year, or

(ii) if no petition is filed in 1990 on account of the applicability of negotiated licenses under section 116A, and thereafter section 116 becomes effective with respect to musical works under subsection (b)(2) or (g) of section 116A, then a petition under this paragraph may be filed in the year in which section 116 becomes so effective and in each subsequent tenth calendar year.

If clause (ii) becomes applicable, then clause (i) shall thereafter no longer be effective.

* * * * *

FOOTNOTES:

[n1] Footnote 1. Hereinafter the Berne Convention for the Protection of Literary and Artistic Works will be referred to as the "Berne Convention." When necessary, a particular Act of the Berne Convention is identified. Where a particular article is cited, the reference is to the Paris Act of 1971, unless some other Act is mentioned.

[n2] Footnote 2. 133 CONG. REC. 1293, 1294 (daily ed. March 16, 1987). H.R. 1623 is cosponsored by Mr. Moorhead, Mr. Boucher, Mr. Bryant and Mr. Bustamante.

[n3] Footnote 3. *See* Letter from Hon. Malcolm Baldrige to Hon. Jim Wright (dated July 6, 1987).

[n4] Footnote 4. *See* 133 CONG. REC. E2897 (daily ed. July 15, 1987).

[n5] Footnote 5. *See* Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, *reprinted in* 10 COLUM.-VLA J. LAW & ARTS 1 (1986) [hereinafter referred to as Ad Hoc Working Group Final Report].

[n6] Footnote 6. *See* Hearings on U.S. Adherence to the Berne Convention Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. (1985-86) [hereinafter referred to as Senate Hearings, 99th Congress].

[n7] Footnote 7. *See* S. 2904, 99th Cong., 2d Sess. (1986); 132 CONG. REC. S14508 (daily ed. Oct. 1, 1986).

[n8] Footnote 8. Two bills are pending in the United States Senate: S. 1301 (Senator Leahy) and S. 1971 (Senator Hatch, on behalf of the Administration). Two days of hearings were held by the Judiciary Committee Subcommittee on Patents, Trademarks and Copyrights: the first day was held on February 18, 1988, and the second on March 3, 1988. On April 13, 1988, the Subcommittee marked-up S. 1301 and reported it favorably, as amended, to the full Committee. On April 14, 1988, the Committee reported favorably S. 1301 unanimously by voice vote.

[n9] Footnote 9. *See* Hearings on Berne Convention Implementation Act of 1987,Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st & 2d Sess. (1987-88) [hereinafter referred to as House Hearings].

[n10] Footnote 10. A transcript of the W.I.P.O. consultations was prepared and is available as an appendix to the hearing record produced by the Subcommittee on Courts, Civil Liberties and the Administration of Justice, *supra* note 9. *See* Roundtable Discussions on United States Adherence to the Berne Convention (November 25-26, 1987) [hereinafter referred to as Roundtable Discussions].

[n11] Footnote 11. S. LADAS, 3 THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 75:19381

[n12] Footnote 12. For further information about the history of the Berne Convention, *see* statement of Ralph Oman, Register of Copyrights, House Hearings, *supra* note 9, June 17, 1987.

[n13] Footnote 13. The W.I.P.O. also administers The International Union for the Protection of Industrial Property. Patents for inventions and marks for goods and services are the most important subject matters of industrial property. In addition, the W.I.P.O. is currently engaged in the drafting of an international treaty for the protection of integrated circuits (semiconductor chip products).

[n14] Footnote 14. Berne Convention Art. 24.

[n15] Footnote 15. *Id.* at Art. 24(5).

[n16] Footnote 16. *See* statement of Allen Wallis, House Hearings, *supra* note 9, July 23, 1987.

[n17] Footnote 17. *See* statement os Shahid Alikhan, Director of the Developing Countries (Copyright) Division, of the W.I.P.O., Roundtable Discussions *supra* note 10, November 25, 1987.

[n18] Footnote 17a. *See* statement of Ambassador Clayton Yeutter, United States Trade Representative, House Hearings, *supra* note 9, July 23, 1987.

[n19] Footnote 18. *See* statement of the Honorable Malcolm Baldrige, Secretary of Commerce, *id.*

[n20] Footnote 19. The ability of the Berne Convention to respond to new technologies of authorship and use, while maintaining an effective separation of copyright and industrial property protection, was noted by several experts at the Geneva consultations. *See* statements of J-L Comte, Director-General of the Swiss Federation Office of Intellectual Property; Dr. Roland Grossenbacher, Deputy Director General (stressing the centrality of an "aesthetic surplus" for protection of technologically based authorship); and Jukka Liedes, Special Advisor, Copyright Affairs, Ministry of Education, Helsinki, Finland (stressing the need for complementary copyright and related protection for the widest range of technologic creativity), Roundtable Discussions, *supra* note 10, November 26, 1987.

[n21] Footnote 20. *See* section 301 of the Trade Act of 1974 *(19 U.S.C. § 2411).*

[n22] Footnote 21. *See* statement of Gyorgy Boytha, Director General of the Bureau for the Protection of Author's Rights Budapest, Hungary, Roundtable Discussions, *supra* note 10, November 25, 1987.

[n23] Footnote 22. Berne Convention Art. 1.

[n24] Footnote 23. Statement of Paul L. Goldstein, Professor, Stanford University School of Law, House Hearings, *Supra* note 9, February 10, 1988.

[n25] Footnote 24. *See* 133 Cong. Rec. (daily ed. March 16, 1987) (remarks of Representative Kastenmeier).

[n26] Footnote 25. U.S. CONST. art. I. § 8, cl. 8.

[n27] Footnote 26. Statement of L. Ray Paterson, Professor, University of Georgia School of Law, House Hearings, *supra* note 9, June 17, 1987, *see also* statement of August W. Steinhilber for the Educators' Ad Hoc Committee on Copyright Laws, *id.* February 10, 1988.

[n28] Footnote 27. H.R. REP. NO.2222, 60th Cong., 2d Sess. 7 (1909). Similar language occurs in the Senate Report. *See* S. REP. No. 1108, 60th Cong., 2d Sess. 7 (1909).

[n29] Footnote 28. *Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984).*

[n30] Footnote 29. U.S. CONST. ART. VI, cl. 2.

[n31] Footnote 30. RESTATEMENT (REVISED) Of Foreign Relations Law Of The United States, Tent. Draft No. 6 (April 12, 1985) (hereinafter cited as RESTATEMENT (REVISED)) § 131(3).

[n32] Footnote 31. RESTATEMENT (REVISED) Vol. 1, Introductory Note at 50.

[n33] Footnote 32. RESTATEMENT (REVISED) § 135, Comment e.

[n34] Footnote 33. Berne Convention Art. 36.

[n35] Footnote 34. W.I.P.O. *Guide to the Berne Convention for the Protection of Literary Works* (Paris Act 1971) [hereinafter cited as W.I.P.O. *Guide*] § 36.2 at 141. *See* statements of Meyer Gabay, Commissioner of Civil Service, Israel; and Margaret Moller, Ministerial Counsellor, Ministry of Justice, Federal Republic of Germany, Roundtable Discussions, *supra* note 10, November 25, 1987.

[n36] Footnote 35. W.I.P.O. *Guide, supra* note 34, § 36.5 at 141.

[n37] Footnote 36. *Id.* § 2.20 at 21.

[n38] Footnote 37. *Id.* § 2.21 at 21.

[n39] Footnote 38. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION at 156 (1972); RESTATEMENT (REVISED) § 131, Comment h.

[n40] Footnote 39. U.S. CONST. art. VI, cl. 2.

[n41] Footnote 40. U.S. CONST. art. II, section 2, cl. 2.

[n42] Footnote 41. RESTATEMENT (REVISED) § 131(4); *U.S. v. Postal, 589 F.2d 862, 877 (5th Cir. 1979);* 1 D. O'CONELLL, INTERNATIONAL LAW 271 (1965); memorandum by Assistant Legal Adviser for Economic Affairs Metzger (1951), cited in 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 302, 309 (1970).

[n43] Footnote 42. RESTATEMENT (REVISED) § 131(4).

[n44] Footnote 43. *Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).*

[n45] Footnote 44. *U.S. v. Postal, 589 F.2d 862, 883 (5th Cir. 1979).*

[n46] Footnote 45. RESTATEMENT (REVISED) § 131, Comment h; Ad Hoc Working Group Final Report at 601.

[n47] Footnote 46. Statement of W. Allen Wallis, Under Secretary for Economic Affairs, United States Department of State, House Hearings, *supra* note 9, July 23, 1987.

[n48] Footnote 47. *Id.*

[n49] Footnote 48. RESTATEMENT (REVISED) § 131, Comment h.

[n50] Footnote 49. *Id.;* Ad Hoc Working Group Final Report, *supra* note 5, at 601.

[n51] Footnote 50. *See, e.g.,* 133 Cong. Rec. H1293-6 (daily ed. March 16, 1987) (statement of Representative Kastenmeier). *See also* H.R. 2962 (Representative Moorhead); S. 1301 (Senator Leahy) and S. 1971 (Senator Hatch).

[n52] Footnote 51. RESTATEMENT (REVISED) § 131, Comment i. *See generally,* LIBRARY OF CONGRESS, STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS, TREATIES & OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, 98th Cong., 2d Sess. (S. Print 98-205) (1984).

[n53] Footnote 52. *Id.; U.S. v. Postal, 589 F.2d 862, 877 (5th Cir. 1979).*

[n54] Footnote 53. RESTATEMENT (REVISED) § 131, Comment i.; *U.S. v. Postal, 589 F.2d 862, 877 (5th Cir. 1979) Hopson v. Kreps, 622 F.2d 1375, 1381 (9th Cir. 1975).*

[n55] Footnote 54. *27 U.S. (2 Pet.) 253 (1829).*

[n56] Footnote 55. The Court held the treaty to be non-self-executing, but in *United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833),* the Court, based on additional information, found that it was self-executing.

[n57] Footnote 56. *Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).*

[n58] Footnote 57. Ad Hoc Working Group Final Report, *supra* note 5, at 600, quoting from *U.S. v. Postal, 589 F.2d 862, 877 (5th Cir. 1979).*

[n59] Footnote 58. *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1987).* Similarly, the House Judiciary Committee found that the Patent Cooperation Treaty, which incorporates the Paris Convention's language, is not self-executing. H. REP. No. 99-807, 99th Cong., 2d Sess. 14 (1986).

[n60] Footnote 59. Ad Hoc Working Group Final Report, *supra* note 5, at 601, quoting from the W.I.P.O. *Guide, supra* note 34, at 21.

[n61] Footnote 60. *See, e.g.,* statement of Kenneth W. Dam, Vice President, IBM Corporation, House Hearings, *supra* note 9, September 16, 1987; statement of Barbara Ringer, *id.,* February 10, 1988; statement of Morton David Goldberg, for the Information Industry Association, *id.;* statement of Peter F. Nolan, for the Motion Picture Association of America, *id.,* September 16, 1987. *See also,* statement of the National Committee for the Berne Convention, September 10, 1987.

[n62] Footnote 61. Statement of Dr. Robert Dittrich (Ministerial Counsellor, Federal Ministry of Justice, Austria), Roundtable Discussions, *supra* note 10, November 25, 1987.

[n63] Footnote 62. Berne Convention Art. 6*bis.*

[n64] Footnote 63. 2 M. *NIMMER ON COPYRIGHT § 8.21 (1987)*; W.I.P.O., Glossary of Terms of the Law of Copyright and Neighboring Rights.

[n65] Footnote 64. *See, e.g.,* statement of Barbara Ringer, House Hearings, *supra* note 9, February 10, 1988: "[C]urrent U.S. legislation and jurisprudence, especially the common law, are fully sufficient to meet our obligations under Berne without the need for federal statutory provisions on the so-called 'moral right' "; statement of John M. Kernochan, Nash Professor of Law, Columbia University, March 1, 1988.

[n66] Footnote 65. H.R. 2962, 100th Cong., 1st Sess., 133 Cong. Rec. E2897-8 (daily ed. July 15, 1987) (statement of Representative Moorhead).

[n67] Footnote 66. For example, in transmitting the proposed legislation to Speaker Jim Wright, Secretary of Commerce Malcolm Baldrige stated: "[The bill] does not explicitly refer to an author's rights to be named as author and to preserve the integrity of the work that are commonly referred to as moral rights. Rather, it proceeds on the principle that the totality of our law, including the common law of torts, provides protection at a level sufficient to comply with the convention's requirements."

Letter from the Honorable Malcolm Baldrige, United States Secretary of Commerce, to the Honorable Jim Wright, Speaker, United States House of Representatives, July 6, 1987. *See also,* statement of the Honorable Malcolm Baldrige, House Hearings, *supra* note 9, July 23, 1987; statement of the Honorable Allen Wallis, Under Secretary for Economic Affairs, United States Department of State, *id.;* statemnt of the Honorable Clayton Yeutter, United States Trade Representative, *id.*

[n68] Footnote 67. *See, e.g.,* statement of Paul Goldstein, Professor, Stanford University School of Law, House Hearings, *supra* note 9, February 10, 1988; statement of Barbara Ringer, *id.;* Ad Hoc Working Group Final Report,

supra note 5, at 547; statement of Kenneth Dam, Vice President, IBM Corporation, House Hearings, *supra* note 9, September 16, 1987; statement of Morton David Goldberg, for the Information Industry Association, *id.* February 10, 1988; statement of Peter F. Nolan, for the Motion Picture Association of America, *id,* September 16, 1987; statement of the National Committee for the Berne Convention, September 10, 1987.

More than 20 years ago, Professor Melville Nimmer wrote that "it might well be concluded" that the totality of then-current law was sufficient to meet at least a "narrowly construe[d]" definition of our obligations under Article 6*bis.* Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 STAN. L. REV. 499, 525 (1967).* As discussed in the text, the law has changed dramatically since then (perhaps the prime example being the State "moral rights" statutes), adding even more weight to this conclusion.

[n69] Footnote 68. *CAL. CIV. CODE § 987* (West Supp. 1988); *LA. REV. STAT. ANN. § § 51:2151-51:2156* (West 1987); ME. REV. STAT. AN. tit. 27, § 303 (Supp. 1987-1988); *MASS. GEN. LAWS ANN. ch. 231, § 85S* (West Supp. 1988); *N.J. STAT. ANN. § § 2A:24A-1* to 2A:24A-8 (West 1987); *N.Y. ARTS & CULT. AFF. LAW § § 14.51-14.59* (McKinney 1984); *PA. STAT. ANN. tit. 73, § § 2101-2110* (Purdon Supp. 1987); *R.I. GEN. LAWS § § 5-62-2* to 5-62-6 (1987).

[n70] Footnote 69. *See, e.g., Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).*

[n71] Footnote 70. *See, e.g.,* statement of Kenneth Dam, Vice President, IBM Corporation, House Hearings, *surpa* note 9, September 16, 1987; testimony of Paul Goldstein, Professor, Stanford University School of Law, *id.,* February 10, 1988.

[n72] Footnote 71. Other publishers disavowed this opposition. Letter to the Honorable Robert W. Kastenmeier, Chairman, House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, from Addison-Wesley Publishing Co., Bantam Doubleday Dell Publishing Group, Elsevier Science Publishing Co., General Publishing Group Macmillan Publishing Co., Harcourt Brace Jovanovich, Hudson Hills Press, John Wiley & Sons, Princeton University Press, Simon & Schuster, and Springer-Velag, New York, September 29, 1987.

[n73] Footnote 72. Statement of John Mack Carter, for the Magazine PuUblishers Association, House Hearings, *supra* note 9, September 16, 1987; statmeent of David Ladd, for the Coalition To Preserve the American Copyright Tradition, *id.*

[n74] Footnote 73. Statement of David Ladd, for the Coalition To Preserve the American Copyright Tradition, House Hearings, *supra* note 9, September 16, 1987.

[n75] Footnote 74. *Id.*

[n76] Footnote 75. Statement of Sydney Pollack, for the Director's Guild of America, House Hearings, *supra* note 9, September 30, 1987.

[n77] Footnote 76. *See, e.g.,* statement of Edward Damich, Professor, George Mason University School of Law, House Hearings, *supra* note 9, September 30, 1987; statement of Sydney Pollack, for the Director's Guild of America, *id.;* statement of Frank Pierson, for the Writers' Guild of America, *id.;* statement of William Smith, *id.*

[n78] Footnote 77. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention,* 10 COLUM.--VLA J. OF LAW & THE ARTS. 655, 661-662 (1986).

[n79] Footnote 78. *See, e.g.,* statement of Edward Damich, Professor of Law, George Mason University School of Law, House Hearings, *supra* note 9, September 30, 1987; statement of Sydney Pollack, for the Director's Guild of America, *id.;* statement of Frank Pierson, for the Writers' Guild of America, *id.*

[n80] Footnote 79. *See, e.g.,* testimony of Dirk Verkade, Professor of Law, Catholic University, Nijmegen, the Netherlands, Roundtable Discussions, *supra* note 10, November 25, 1987.

[n81] Footnote 80. *See, e.g.,* testimony of Dirk Verkade, Professor of Law, Catholic University, Nijmegen, the Netherlands, Roundtable Discussions, *supra* note 10, November 25, 1987; testimony of Milagros del Corral, Secretary General, Spanish Federation of Publishers Associations, Madrid, Spain, *id.*

[n82] Footnote 81. "[T]he opponents of the Berne Convention on the basis of this moral right issue fear that United States courts might be impressed by the European philosophy as it has been taken down into statutory or case law. But

that is up to you yourself to decide whatever you want to take from that source and it has nothing to do with the text of the Berne Convention."

Testimony of Gunnar Karnell, Head of the Law Department, Stockholm School of Economics, Stockholm, Sweden, Roundtable Discussions, *supra* note 10, November 25, 1987.

[n83] Footnote 82. *See, e.g.,* testimony of Margret Moller, Ministerial Counsellor, Federal Ministry of Justice, Bonn, Germany, Roundtable Discussions, *supra* note 10, November 25, 1987; testimony of Dirk Verkade, Professor of Law, Catholic University, Nijmegen, the Netherlands, *id.;* testimony of Milagros del Corral, Secretary General, Spanish Federation of Publishers Association, Madrid, Spain, *id.*

[n84] Footnote 83. *See, e.g.,* testimony of Gunnar Karnell, Head of the Law Department, Stockholm School of Economics, Stockholm, Sweden, Roundtable Discussions, *supra* note 10, November 25, 1987.

[n85] Footnote 84. Letter from Dr. Arpad Bogsch, Director General, World Intellectual Property Organization, to Irwin Karp, Esq., June 16, 1987.

[n86] Footnote 85. Ad Hoc Working Group Final Report, *supra* note 5, at 548-9.

[n87] Footnote 86. The term "legislation" as used in the Berne Convention includes the common law. REPORT ON THE WORK OF MAIN COMMITTEE I, Para. 15, in RECORDS OF THE INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM (1967) 1134 (W.I.P.O. 1971).

[n88] Footnote 87. The W.I.P.O. *Guide* notes that the right of integrity "is very elastic and leaves for a good deal of latitude to the courts." W.I.P.O. *Guide, supra* note 34, at 42. According to the Ad Hoc Working Group, Australia, Ireland, Liechtenstein, and South Africa "do not grant the right to claim authorship" and "Berne-member legislation [on the right of integrity] is elastic--stretching from total absence of statutory protection of integrity to detailed provisions in countries such as Germany." Ad Hoc Working Group Final Report, *supra* note 5, at 550, 554.

[n89] Footnote 88. Ad Hoc Working Group Final Report, *supra* note 5, at 555.

[n90] Footnote 89. Statement of David Ladd, for the Coalition to Preserve the American Copyright Tradition, House Hearings, *supra* note 9, September 16, 1987.

[n91] Footnote 90. *See, e.g.,* statement of the National Committee for the Berne Convention, July 2, 1987; statement of Kenneth Dam, Vice President, IBM Corporation, House Hearings, *supra* note 9, September 16, 1987; statement of Peter Nolan, for the Motion Picture Association of America, *id.;* Ad Hoc Working Group Final Report, *supra* note 5, at 556.

[n92] Footnote 91. The Senate Judiciary Committee has held hearings in both the 99th and 100th Congresses on legislation introduced by Senator Edward Kennedy to protect the rights of integrity and paternity of visual artists, and to create a resale royalty right for these artists. *See, e.g., Visual Artists Rights Amendment of 1986: Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary,* 99th Cong., 2d Sess (1986). H.R. 3221, introduced in the House by Representative Edward Markey, would create the same rights, and has been referred to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

[n93] Footnote 92. Berne Convention Art. 5(2).

[n94] Footnote 93. W.I.P.O. *Guide, supra* note 34, at 33.

[n95] Footnote 94. In two circumstances failure to affix notice is not tied to registration: first, where notice has been omitted from a "relatively small number of copies;" and second, where notice "is omitted in violation of an express written requirement by the copyright owner that it be affixed." *See 17 U.S.C. § § 405*(a)(1) and (3).

[n96] Footnote 95. *See* Ad Hoc Working Group Final Report, *supra* note 5, at 565.

[n97] Footnote 96. *Compare* statements of Morton David Goldberg, for the Information Industry Association, and Barbara Ringer, House Hearings, *supra* note 9, February 10, 1988. *See also* Ad Hoc Working Group Final Report, *supra* note 5, at 565; and statements of Dr. Robert Dittrich, Ministerial Counselor, Federal Ministry of Justice, Vienna, Austria, and Victor Tarnofsky, Assistant Comptroller of the Industrial Property and Copyright Department, London, United Kingdom, Roundtable Discussions, *supra* note 10, November 26, 1987.

[n98] Footnote 97. The W.I.P.O. *Guide, supra* note 34, at 33, identifies "loss of copyright" as the standard to be used in determining whether a prohibited formality exists.

[n99] Footnote 98. *See* letter from L. Ralph Mecham, Director, Administrative Office of U.S. Courts, to Hon. Robert W. Kastenmeier, April 11, 1988.

[n100] Footnote 99. *See 17 U.S.C. § 407.*

[n101] Footnote 100. Nor should the strong incentives of attorneys' fees and statutory damages provided in *17 U.S.C. 412* be overlooked.

[n102] Footnote 101. *See* Ad Hoc Working Group Final Report, *supra* note 5, at 575.

[n103] Footnote 102. *See* W.I.P.O. *Guide, supra* note 34, at 33.

[n104] Footnote 103. Act of 1790, 1 Stat. 124 (1790).

[n105] Footnote 104. *See 17 U.S.C. § 407.*

[n106] Footnote 105. *Ladd v. Law & Technology Press, 762 F.2d 809 (9th Cir. 1985), cert. denied 54 U.S.L.W. 3582 (1987).*

[n107] Footnote 106. *See* Act of 1790, 1 Stat. 124 (1790).

[n108] Footnote 107. *See Ruskin v. Sunrise Management, Inc., 506 F. Supp. 1284 (D. Colo. 1981); Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939); Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 188 F. Supp. 235 (S.D.N.Y. 1960).*

[n109] Footnote 108. H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 139 (1984).

[n110] Footnote 109. *See* Ad Hoc Working Group Final Report, *supra* note 5 at 533; statements of Gloria Messinger for ASCAP, Robbin Ahrold for BMI, Inc.; House Hearings, *supra* note 9, February 9, 1988; statement of Paul Goldstein, Professor, Stanford University School of Law, *but see* statement of Dr. Arpad Bogsch, Senate Hearings, *supra* note 6, at 10.

[n111] Footnote 110. The House hearing record is largely devoid of arguments that the Berne Convention necessitates the total elimination of the compulsory license. In fact, the American performing rights societies themselves argued that the minimalist approach contained in the proposed legislation satisfies Berne. As observed by Gloria Messinger (on behalf of ASCAP), "America's national interest in joining Berne outweighs the narrow interest of any party, whether creator or user. That interest demands every reasonable accommodation between competing groups." In a similar vein, a representative of BMI (Robbin Ahrold) stated: "Given the long history of attempts by the jukebox industry and the performing rights organizations to forge a mutually-acceptable solution to licensing, the outright repeal of section 116, while it may be desirable, is just not practicable. We believe, therefore, that the approach taken by the Chairman's bill is the most feasible way that the problem can be addressed and still accommodate the concerns of both parties." *See* House Hearings, *supra* note 9, February 9, 1988.

[n112] Footnote 111. *See, e.g.,* the laws of Canada, West Germany, and the United Kingdom.

[n113] Footnote 112. For more information on the negotiated agreement, *see* statements of Wally Bohrer for AMOA, Gloria Messinger for ASCAP, and Robbin Ahrold for BMI, Inc., House Hearings, *supra* note 9, February 9, 1988.

[n114] Footnote 113. Berne Convention Art. 2(1).

[n115] Footnote 114. Ad Hoc Working Group Final Report *supra* note 5 at 605.

[n116] Footnote 115. *17 U.S.C. § 101: 17 U.S.C. § 113*(b) and (c) provides further limitations.

[n117] Footnote 116. *See* Ad Hoc Working Group Final Report, *supra* note 5 at 608.

[n118] Footnote 117. H. REP. No. 94-1476 at 55 (1976); M. NIMMER, *NIMMER ON COPYRIGHT, § 2.08[D] (1986)*.

[n119] Footnote 118. NIMMER, *id.; See also Demetriades v. Kaufman,* 88 Civ. 0848 (S.D.N.Y. March 8, 1988) (Injunction issued against further copying of architectural plans but not against the construction of the building depicted

in the plans). *See generally* Shipley, *Copyright Protection for Architectural Works,* 37 S. CAR. L. REV. 393 (1986); Note, *Innovation and Imitation; Artistic Advance and the Legal Protection of Architectual Works, 70 CORN. L. REV. 81 (1981);* Comment. *The Protection of Architectural Plans as Intellectual Property, 6 Loy. L. A. L. REV. 97 (1973).*

[n120] Footnote 119. H.R. 1623 § § 5 and 9, 100th Cong., 1st Sess. (1987).

[n121] Footnote 120. Statements of Barbara Ringer and Paul Goldstein, House Hearings, *supra* note 9, February 10, 1988.

[n122] Footnote 121. Letter from B. Cheryl Terio, Director, Government Affairs, American Institute of Architects to Hon. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, March 7, 1988; Letter from Professor David Shipley, University of South Carolina, to B. Cheryl Terio, AIA, March 17, 1988; Letter from B. Cheryl Terio, AIA, to Lewis I. Flacks, Policy Planning Advisor, United States Copyright Office, March 28, 1988.

[n123] Footnote 121a. *See* Ad Hoc Working Group Final Report, *supra* note 5, at 635.

[n124] Footnote 122. *See* Statement of Werner Rumphorst, Legal Director, European Broadcasting Union, Roundtable Discussions, *supra* note 10, November 26, 1987.