The House Statement on the Berne Convention Implementation Act of 1988

[Editor's Note: This statement is part of the House Debate. The Statement begins on PAGE H10097, Congressional Record (Daily Ed.), October 12, 1988. Page Numbers from the Congressional Record are inserted within the text at the point each page begins.]

Joint Explanatory Statement on House-Senate Compromise Incorporated in Senate Amendment to H.R. 4262 (Berne Convention Implementation Act of 1988)

[References to the House bill are to H.R. 4262, as passed by the House of Representatives on May 10, 1988; references to the Senate bill are to S. 1301 as reported by the Senate Committee on the Judiciary on May 20, 1988; and references to the Senate amendment are to the House-Senate compromise embodied in H.R. 4262, as passed by the Senate on October 5, 1988.]

Section 1. Short Title and References to Title 17, United States Code [sections 1 and 2 of the House bill].

The House and Senate provisions relating to the short title of the proposed legislation--the Berne Convention Implementation Act of 1988--are identical.

The House bill provides that whenever in the Act an amendment or repeal is expressed in terms of an amendment to or repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of Title 17, United States Code. The Senate bill does not have a comparable provision.

The Senate amendment accepts the House provision on references to Title 17, United States Code.

Sec. 2. Declarations [section 3 of the House bill].

The House and Senate bills are similar, but have two differences.

First, the House bill refers to the Berne Convention as being all acts, protocols, and revisions thereto, up to and including the revision done at Paris, France, in 1971. The Senate bill covers all acts, protocols and revisions (including future ones). The House recedes to the Senate on the question of whether the Berne Convention refers to future revisions. Both bills clearly state that the Convention is not self-executing under the Constitution and laws of the United States. This proposition applies to future revisions.

Second, the drafting of the House and Senate bills differ on language describing the effect that U.S. adherence will have on rights and interests. Both specify that no rights or interests in addition to those arising under the Act or existing law shall be recognized if created for the purpose of satisfying such obligations. The bills are identical in terms of intended effect. The Senate amendment adopts the language of the Senate bill.

Sec. 3. Construction of the Berne Convention [Section 4 of the House bill].

The House and Senate bills are similar in substance, but contains drafting differences. The Senate amendment incorporates drafting suggestions from both bills, with no changes in meaning from either bill: (a) the provisions of the Berne Convention shall only be given effect under title 17, United States Code, and shall not be enforceable in any action brought pursuant to the provisions of the Convention; and U.S. adherence to the Convention does not expand or reduce any right of an author of a work to claim authorship of the work or to object to any distortion, mutilation of, or other derogatory action in relation to the work that would prejudice the author's honor or reputation.

One of the fundamental features of both bills concerns the implementation of United States obligations under the Berne Convention and the relationship between implementation and the fact that the treaty is not self-executing under United States law. Every witness, including representatives of the Executive Branch, who testified before the House and Senate Committees confirmed that the Berne Convention, as is the case for other intellectual property treaties, is not self-executing. The House and Senate bills confirm this proposition.

In hearings and in consultations with foreign copyright law experts, it was agreed that whether the Berne Convention can be self-executing depends entirely upon the Constitutional law of each State of the Berne Union and the decisions of States in this matter are not reviewable internationally. While many experts view the Convention as not

expressly intended to be self-executing by the contracting parties, that issue is not free of doubt and practices of countries have varied.

There is no doubt, however, under the express provisions of the Senate amendment, that the Convention--including future revisions--will not be self-executing in the United States. This reflects a judgment that transcends in importance the particular concerns regarding moral rights and pre-emption which have made non-self-execution of Berne an important element of the compromises in this bill. That consideration is that Article I, Section 8 of the Constitution, by conferring expressly the power to legislate copyright protection upon the Congress, necessarily calls into serious question whether the Supremacy Clause can ever function in the copyright field. In short, for any act of the Berne Union to be effectively implemented in the United States will depend upon Congress so legislating.

Sec. 4. Subject Matter and Scope of Protection [Sections 5, 6 and 7 of the House bill].

Section 4 of the Senate amendment contains several House provisions: (1) definitions; (2) national origin; and (3) the jukebox compulsory license. It does not contain another provision found in the Senate bill relating to reproduction by libraries and archives.

[PAGE H10096] The Senate amendment reflects a drafting compromise on organizational format, providing one section for definitions, national origin, preemption and the jukebox compulsory license. The Senate amendment adopts the House position on the matter relating to libraries and archives. No change in the present practices of libraries is contemplated.

The House bill defines "Berne Convention" as all acts, protocols, and revisions thereto, up to and including the revision done at Paris, France, in 1971. The Senate bill similarly defines Berne Convention, but also includes future revisions. The Senate amendment defines the Berne Convention as including future revisions.

However, no future revisions of the Berne Convention can be self-executing. The amendment defines the Convention to include future revisions of the treaty because the United States, as a Berne member, may be obligated to protect works originating in countries adhering to any new revision of Berne after the United States already has joined. But, no future revision of Berne can have any effect on American copyright law. Our law is controlled by what is passed by the House of Representatives and the Senate and then signed by the President. Nothing in this definition changes that fundamental principle.

The House and Senate bills are virtually the same on the definition of a Berne Convention work. The Senate amendment replaces the word "State" with "nation". No change of meaning is intended.

In the same definitional provision, another amendment replaces the term "simultaneously published" with "simultaneously first published", clarifying that the site of first publication, not of some publication occurring more than thirty days after first publication, is determinative in some circumstances of whether a published work is a Berne Convention work.

The Senate bill, as reported, amends section 108 of the Copyright Act, relating to reproduction of works by libraries and archives. The Senate bill repeals subsection (a)(3)--which requires notice of copyright for reproduction and distribution of copyrighted works--finding that such notice requirement is no longer necessary in light of other changes in the bill regarding notice. The House has no comparable provision. The Senate amendment adopts the House approach because elimination of the mandatory notice requirement is not required to meet Berne standards. The burden is on users rather than authors and copyright holders.

The House and Senate bills are virtually identical as related to national origin. The Senate amendment accepts the House drafting.

The House and Senate bills are similar in terms of substantive treatment of the jukebox compulsory license. Both create a negotiated licensing system, with the current compulsory license used as a fall-back if negotiations fail.

The bills use different drafting approaches: the House bill creates a new section 116A of title 17, United States Code, with current section 116 left in the statute books; the Senate bill repeals section 116, establishing a new section 116 and holding old section 116 in reserve if the statutory conditions arise. The Senate amendment adopts the House approach on organizational format and drafting. From a practical standpoint, leaving old section 116 "on the books" is preferable. Potential reliance on section 116, which could well occur in future years if negotiations fail, will not necessitate a search through old statute books for its contents.

The Senate amendment basically tracks the language of the House bill and does not contain a specific antitrust exemption. In this regard, the House-Senate compromise is contingent on agreement with language in the House Report (H. Rep. No. 100-609 at 25-26) regarding the procompetitive effects of collectively negotiated licensing agreements.

Sec. 5. Recordation.

The House bill does not change the recordation provisions in the Copyright Act. The Senate bill eliminates recordation as a prerequisite to a lawsuit for copyright infringement.

The Senate amendment adopts the provisions of the Senate bill and therefore recordation will no longer be a precondition to suit. Recordation, however, will continue to be encouraged through the constructive notice provisions which remain unchanged.

Sec. 6. Preemption with Respect to Other Laws not Affected [Section 5 of the House bill].

Both bills contain amendments to section 301 of title 17, United States Code, regarding preemption with respect to other laws not being affected--that is, these laws are neither expanded or reduced--by the adherence of the United States to the Berne Convention or the satisfaction of United States obligations thereto. There is no difference of meaning in the two bills.

The Senate amendment essentially adopts the House language.

Sec. 7. Notice of Copyright [Section 8 of the House bill].

Visually perceptible copies; phonorecords of sound recordings. The House and Senate bills are similar in terms of eliminating mandatory notice of copyright as a condition for maintaining copyright for works published after the effective date of the Act. To encourage use of notice, both bills create incentives to use notice, specifying that in the case of defendants who have access to copies bearing proper notice, courts shall not give any weight to a claim of innocent infringement in mitigation of damages.

The compromise adopts provisions of secondary importance from both bills in provisions affecting (1) visually perceptible copies; and (2) phonorecords of sound recordings. The Senate amendment reflects this compromise.

Publications incorporating United States Government works. The Senate amendment incorporates the provisions of the Senate bill relating to notice and publications incorporating United States Government works, providing that the section 403 notice is subject to the same voluntary incentives that apply to all other published works. It is expected that the Copyright Office will provide guidance as to the content and position of the statement contemplated by this section.

Omission of notice. the House and Senate bills are essentially the same. The current mandatory notice requirement is eliminated and replaced with an incentive for voluntary notice. The Senate bill specifies that this section does not apply to works publicly distributed without notice by authority of the copyright owner before the effective date of the Act. The Senate amendment adopts a provision from the House bill, to clarify that the presence of voluntary notice affects only the ability of the defendant to seek mitigation of damages and not the ability of a library, archives, or public broadcasting defendant to seek remission of damages under a reasonable belief that "fair use" is present.

Sec. 8. Deposit of Copies or Phonorecords for Library of Congress [Section 9 of the House bill].

The House and Senate bills are virtually identical and the Senate amendment reflects this agreement

Sec. 9. Copyright Registration [Section 10 of the House bill].

The House and Senate bills differ on this important issue. The House bill maintains current law regarding copyright registration as a prerequisite to lawsuit. The Senate bill eliminates registration as a prerequisite to a lawsuit. The House found this registration requirement compatible with Berne under the minimalist approach taken in this legislation. The Senate Committee on the Judiciary, while recognizing that its conclusion is not free from doubt, decided on the record before it that existing section 411(a) of title 17, United States Code, is a prohibited formality under Berne and therefore eliminated the requirement.

Both the House and Senate approaches recognize that any possible incompatibility is limited to a certain class of works: those whose country of origin is a Berne member country other than the United States. The House and Senate agreed on a compromise that would exempt such "foreign origin" works from the requirement of section 411(a).

The compromise involves a new definition of "country of origin" in section 101 of title 17, United States Code, to exempt the relevant foreign works; and a conforming amendment to section 411(a) of title 17, United States Code, to exempt the relevant foreign origin works from the ongoing registration requirement.

The House would have preferred to make no change in section 411, for the reasons given in the House Report (H. Rep. No. 100-609 at 40-43). The Senate bill eliminated the requirement of registration as a prerequisite to suit for all works, domestic and foreign. Such total elimination of the registration requirement for all works is clearly not necessary to make American law compatible with Berne, as the Senate Judiciary Committee recognized in its report (S. Rep. No. 100-352 at 13). Since the Senate amendment changes 411 only to the extent necessary to make it compatible with Berne even under the strictest interpretation, a compromise between the House and Senate bills was possible.

The amendment to section 411 constitutes an exception to the general principle of our law that registration should be attempted and granted or denied by the Copyright Office before suit for copyright infringement can be maintained. It is the plaintiff's responsibility to plead and prove that his or her case comes within the exception for works originating in a foreign country adhering to Berne. Unless a work is shown to be a work whose country of origin is not the United States, and therefore exempted from the requirements of section 411(a), then the work's country of origin is the United States and section 411(a) must be satisfied. As the factors establishing the non-United States origin of the work (whether situs of publication or nationality of the author or authors) are likely to be peculiarly within the knowledge of the copyright claimant, and since the exemption for works of non-United States origin is an exception to the general rule imposing a registration prerequisite, it is the obligation of the claimant in a work not submitted for registration to demonstrate the applicability of the exception.

Both the House and Senate bills leave unaffected the provisions of existing law granting prima facie evidentiary statutory damages and attorneys' fees upon timely registration of claims to copyright in order to assure a strong, accurate, and effective public record and deposit of works for the **[PAGE H10097]** benefit of the Library of Congress. Furthermore, these provisions are designed to relieve the evidentiary burdens placed on Federal judges who must adjudicate copyright controversies.

The two-tier solution is a reasonable compromise for American authors and their attorneys because of their familiarity with the American justice system and Copyright Office procedures. There is no real discrimination against American authors because foreign authors must also register in order to obtain the important benefits of the presumption of validity and statutory damages. In essence, all authors are treated equally.

The courthouse door is not barred to American authors because they maintain the right to litigate even upon a denial of registration.

In conclusion, the compromise should not be considered as the first step towards elimination of registration for all authors. To the contrary, it reaffirms the importance of registration--to the public, the Library of Congress, the judiciary, and the copyright community--and its ongoing validity.

Sec. 10. Copyright Infringement and Remedies.

In order to promote voluntary registration, the Senate bill doubles statutory penalties (which were last set in the Copyright Reform Act of 1976). The House bill has no comparable provision.

The Senate amendment adopts the provisions of the Senate bill. This compromise on statutory damages is related to the compromise, discussed above, on creation of a two-tier solution to the registration issue. Standing alone, there is nothing in the Berne Convention that would have mandated any changes in statutory damages.

The new statutory damages will only apply to registrations made on or after the effective date of the Act.

Sec. 11. Copyright Royalty Tribunal [Section 11 of the House bill].

The provisions in both bills relating to the Copyright Royalty Tribunal are necessitated by changes to the jukebox compulsory license. *See* section 8 of the House bill and section 4(2) of the Senate bill. Both bills set forth procedures to be followed by the Tribunal if negotiations for the new voluntary license fail.

In this regard, there are three differences between the bills.

Deference given to previous rates. In determining whether a rate is fair, under the House approach the Tribunal must give "substantial deference" to previous rates. Under the Senate bill, the Tribunal must give "appropriate weight". The Senate amendment opts for the approach of the Senate bill.

The authority of the Tribunal to establish interim royalty rates. The House bill is silent on whether the CRT can set an interim rate while it engages in a new ratemaking process. The Senate bill specifies that the CRT can establish an interim rate. The Senate amendment sets forth a compromise on this difference, specifying that the CRT can set an interim royalty rate which continues in effect the current rate.

The authority of the Tribunal to establish retroactive royalty rates. The House bill does not confer authority on the CRT to establish retroactive rates. The Senate bill confers such authority. The Senate amendment does not authorize the CRT to engage in retroactive decision-making.

Sec. 12. Works in the Public Domain [Section 12 of the House Bill].

The House and Senate bills are indentical. As noted in the House Report (H. Rep. No. 100-609 at 51-52), the public domain is neither expanded nor reduced by the Act.

Sec. 13. Effective date; Effective on Pending Cases [Section 13 of the House Bill].

The bills are essentially the same with one difference. The House bill provides that the Act takes effect on the day after the date on which the Berne Convention enters into force with respect to the United States. The Senate bill provides that the Act takes effect on the same day that the Convention enters into force. The Senate amendment makes a drafting change to specify that the Act will take effect on the "date on which" the Berne Convention enters into force with respect to the United States.

The amendment clarifies that the changes made to American law by the Act take effect simultaneously with the official action that requires the United States to meet its Berne obligations. The executive branch is urged to seriously consider specifying in the instrument of accession with the Director General of the W.I.P.O. not only a date certain but also a precise hour for the coming into force of the Convention for the United States in accordance with Articles 29(2)(b) of the Convention. Pursuant to Article 29, the date of entry into force of a new member country is three months after the Director General of the W.I.P.O. notifies other member countries of its accession, unless some later date is indicated. This procedure would avoid any gap between the time that American law is amended and the time that Berne enters into force for the United States. Establishing a date certain in advance would provide certainty in the law. Moreover, clarity and predictability among authors and users, both domestic and foreign, would commend such an approach.

In determining whether to amend and how to amend American copyright law, the goal of the Berne Convention Implementation Act of 1988 is to place American law in compliance with the provisions of the Berne Convention. As noted in the House Report (H. Rep. No. 100-609 at 20), "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." The House bill remained true to this "minimalist" approach. The Senate bill basically agreed with this approach, but proceeded upon a more expansive theory of Berne requirements in the areas of registration and recordation.

By reconciling differences between the House bill and the Senate bill, and therefore in drafting the compromise embodied in the Senate amendment, the strict minimalism in the House bill was admittedly weakened. Specifically, the compromise provisions on registration and recordation go further than that required by the minimalist approach. They were politically necessary to ensure passage of a bill by both Houses of Congress, but were not necessitated by the Berne Convention.

These compromise provisions therefore should not and cannot be considered as a congressional finding that they are minimally mandated by the provisions of the Berne Convention. The view of the House of Representatives continues to be that expressed in the House legislative history. The Convention does not require changes to cur- rent law regarding registration and recordation. Nothing in the compromise signifies that any future amendments in these areas to return them in the direction of current law--although not expected at this time--would be deemed as Berne incompatible.

ROBERT W. KASTENMEIER.

CARLOS MOORHEAD.