NATION, DURATION, VIOLATION, HARMONIZATION: AN INTERNATIONAL COPYRIGHT PROPOSAL FOR THE UNITED STATES

DAVID NIMMER*

I

INTRODUCTION

For most of its two centuries, the United States has been a copyright island, its jurisprudence having evolved in isolation from developments elsewhere. As long as it served American interests, U.S. copyright law did not concern itself with the waves that our statutes or rulings would set in motion outside our borders, and few ripples from abroad affected U.S. copyrights. In 1955, however, the international tide began to lap against U.S. copyright shores. In 1976, Congress acknowledged what had by then become the crash of foreign waves, amending parts of the Copyright Act to reflect international standards. Finally, in 1989, the floodgates opened to a massive effort to bring the United States into the world copyright fold and to amend U.S. law for compatibility with that purpose.

Fully three years after this 1989 effort, the integration is still not complete, however. Certain backwaters exist in U.S. copyright law, as yet untouched by the standards observed throughout the rest of the world. And a perilous undertow threatens the subsistence of copyrights in various U.S. works abroad and various foreign works inside the United States. This article addresses those lingering anomalies.

The structure of this article is as follows: Part II summarizes the historical background during which the United States progressed from a copyright piracy haven to the foremost exporter of intellectual property. Part III begins the discussion of copyright duration, which is the focus of the article, and compares the durational schemes provided under U.S. law and the Berne Convention. Part IV discusses conflicts between those schemes, which give rise to the argument that the United States is in violation of its treaty obligations. Part V offers a legislative proposal concerning U.S. copyright

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* Of counsel, Irell & Manella, Los Angeles, California.

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duration to alleviate potential treaty violations with minimal disruption to exiting interests.

II

THE SETTING: OUR NATION

A. Before Adherence to the Berne Convention

Like certain far-eastern locales about which American artists and publishers indignantly complain today,[1] the United States was a copyright piracy haven from the first copyright statute of 1790 until the Chace Act of 1891.[2] During that century, foreigners were utterly without rights under U.S. copyright law, and U.S. publishers busied themselves bootlegging the works of Dickens, Trollope, and Hugo, three authors noted for their role in spearheading international copyright protection, particularly in response to the egregious U.S. example.[3]

The International Copyright Act of 1891,[4] more commonly known as the Chace Act, grudgingly began the process of according some protection to foreigners. Although this Act was passed only several years after the formation of the world's oldest and foremost multilateral copyright treaty—the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland on September 9, 1886 ("Berne Convention")—the United States nonetheless declined to ratify the Berne Convention.[5] At that time, simple economics dictated the lack of U.S. protection for foreigners—the United States did not wish to pay for the use of works by non-American authors, as no reciprocal revenue could be expected to flow back to American authors from the use of their works abroad. "In the four quarters of the globe, who reads an American book?" ran a "famous exclamation" of 1820,

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1. A decade ago, the most problematic countries were Hong Kong, Singapore and South Korea, all of which have since capitulated to Western pressure and enacted internal copyright protection. Today, the focus has shifted even further. For example, see United States Trade Representative, *1991 National Trade Estimate Report on Foreign Trade Barriers* (US Govt Printing Office, 1991) ("*1991 National Trade Estimate Report*") (general problems with copyright enforcement in Brazil at 23, Egypt at 62, Gulf Cooperation Council states at 98, India at 104, Nigeria at 170, Pakistan at 179, and Philippines at 185; with video cassette piracy in Greece and Italy at 94 and 119; with unauthorized retransmission in Israel at 118; with software piracy in Germany at 81, Italy at 118, and Turkey at 221); Charles Wallace, *The Frustrating Campaign to Stop Thai Drug Copying*, LA Times D1 col 5 (Dec 3, 1990) ("Thailand is infamous as a source of counterfeit goods ranging from fake watches to pirated audiotapes and videotapes selling for as little as $1 each . . . . Jack Valenti, chairman of the Motion Picture Export Assn. of America, called the country 'the worst offender of intellectual property rights in Asia.' ").

2. Hamish Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 Colum-VLA J L & Arts 89, 91 (1986).

3. See generally Sam Ricketson, *The Birth of the Berne Union*, 11 Colum-VLA J L & Arts 9 (1986); Sandison, 11 Colum-VLA J L & Arts 89 (cited in note 2).

4. ch 565, 26 Stat 1106.

5. Actually, the United States (along with Japan) participated as an observer at the initial 1886 conference in Berne. The U.S. delegate obliquely indicated that American participation would be forthcoming. See Ricketson, 11 Colum-VLA J L & Arts at 29-30 (cited in note 3) ("The position and attitude of the United States is one of expectancy and reserve.").

which Justice Holmes quoted apropos of the lack of revenue to this nation from the export of its intellectual property.[6]

As authorized by the Chace Act, the United States began to conclude bilateral agreements with various nations starting in 1891,[7] a process that continued through the 1950s.[8] The Chace Act provided that, so long as they complied with U.S. notice, registration, and deposit requirements, as well as the manufacturing clause that the Chace Act introduced into U.S. copyright law, foreigners whose nations provided reciprocal protection to U.S. nationals could obtain U.S. copyrights for their works. The manufacturing clause proved to be the fly in the ointment, however; under its terms, a "book, photograph, chromo, or lithograph" was eligible for U.S. copyright protection only if "printed from type set within the limits of the United States," or "from negatives or drawings on stone made within the limits of the United States."[9] Given that onerous requirement, the Chace Act hardly opened the floodgates to copyright protection for foreigners. In fact, as former Register of Copyrights Barbara Ringer commented, the Chace Act's manufacturing clause strictures "made the extension of copyright protection to foreigners illusory."[10]

This series of draconian formalities continued past the Chace Act into the general revision of U.S. copyright laws that was passed in 1909.[11] That statute, which governed until its revision in 1976, set U.S. law irreconcilably at odds with the anti-formal tenor of copyright developments throughout much of the rest of the world, and in particular throughout the Berne Union.[12] Given the Berne Convention's recognition of copyright protection even absent compliance with formalities, U.S. reliance on formalities as a condition

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6. *United Dictionary Co. v Merriam Co.*, 208 US 260, 264 (1908).

7. For instance, in 1891, the United States concluded bilateral copyright treaties with France, Switzerland, the United Kingdom, and Belgium; in 1893 with Denmark; in 1896 with Mexico and Chile; in 1892 with Germany and Italy. A complete listing of the copyright relations of the United States is set forth in Melville Nimmer & David Nimmer, 4 *Nimmer on Copyright* App 20 (Bender, 1991) ("*Nimmer 4*").

8. See Bilateral agreement of April 2, 1957 between the United States and Brazil, [1957] 8 UST 418 (1957).

9. Revised Statutes § 4956, as amended by section 3 of the Act of March 3, 1891, ch 595, 26 Stat 1107. See generally Melville Nimmer & David Nimmer, 2 *Nimmer on Copyright* §§ 7.22-7.23 at 7-208 (Bender, 1991) ("*Nimmer 2*").

10. Barbara Ringer, *The Role of the United States in International Copyright—Past, Present and Future*, 56 Georgetown L J 1050, 1057 (1968).

11. Act of March 4, 1909, 35 Stat 1075.

12. One of the primary accomplishments of the Berne Convention in 1886 that persists until this day is the formation of all the constituent states into the Berne Union, an undertaking as political as it is legal. Berne Convention Implementation Act of 1988, HR Rep No 100-609, 100th Cong, 2d Sess 12 (1988). This political unit is constituted at the very outset of the Convention. See Berne Convention (Paris text), art 1, *WIPO Guide to the Berne Convention* (World Intellectual Property Organization, 1978). The World Intellectual Property Organization in Geneva, Switzerland, acts as secretariat of the Berne Convention. See generally Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 146 (Centre for Commercial Law Studies, Queen Mary College, 1987) ("*Berne Convention Protection*").

to copyright subsistence precluded its participation in the world copyright community.[13]

Even as late as World War II, the United States remained a net importer of copyrighted goods.[14] Since then, however, it has gradually become the principal copyright exporter in the world.[15]

The watershed change in U.S. copyright orientation began in the 1950s. In 1952, a vehicle was finally devised to break the logjam between U.S. notice, registration, deposit, manufacturing, and other formal requirements and Berne's mandate of copyright protection without formalities: this vehicle was the Universal Copyright Convention ("UCC").[16] The UCC, unlike the Berne Convention, was crafted to allow copyright notice as a formal condition to copyright subsistence.[17] The treaty's provision for formalities afforded an escape from the straitjacket that formerly prohibited U.S. participation in a worldwide copyright treaty. With the UCC in existence, the United States could, at long last, join a significant[18] multilateral copyright organization, thereby strengthening global copyright protection. The United States became a charter member of the UCC by the Act of August 31, 1954, effective September 16, 1955.[19]

For three decades after this country joined the UCC, its membership sufficed to safeguard the rights of U.S. authors. UCC status ultimately

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13. It should be noted that, early in this century, the United States joined several treaties operative within the Western hemisphere. First, the United States joined the Mexico City Copyright Convention of 1902. See 35 Stat 1934 (1908). Second, the United States joined the revision to that treaty known as the Buenos Aires Copyright Convention of 1910. See 38 Stat 1785 (1910). Washington declined, however, to ratify its own eponymous later revision, the Washington Copyright Convention of 1946. Although these Pan-American Conventions have conveyed copyright relations between the United States and a host of Latin-American nations, their import has always been highly circumscribed. See Edward A. Sargoy, *UCC Protection in the United States: The Coming into Effect of the Universal Copyright Convention*, 33 NYU L Rev 811, 852-53 (1958) (Mexico City Convention is "too impracticable to be utilized"; Buenos Aires Convention has generated only two reported decisions "in over forty years"). See generally Melville Nimmer & David Nimmer, 1 *Nimmer on Copyright* § 5.05[B][2][c] at 5-39 (Bender, 1991) ("*Nimmer 1*"); Melville Nimmer & David Nimmer, 3 *Nimmer on Copyright* § 17.01[B][3] at 17-11 (Bender, 1991) ("*Nimmer 3*"); Ricketson, *Berne Convention Protection* at 842-47 (cited in note 12).

14. Hearings on S 1301 and S 1971 before the Subcommittee on Patents, Copyright and Trademarks, of the Senate Committee on the Judiciary, 100th Cong, 2d Sess 57 (1988) (statement of Representative Kastenmeier).

15. Id.

16. Universal Copyright Convention, [1955] 6 UST 2731 (1952), revised July 24, 1971, [1974] 25 UST 1341.

17. The permissible form of UCC notice is a "c" within a circle, the name of the copyright proprietor, and the year of first publication. See UCC (Paris text), art III. Note that this form of notice apes that extant under U.S. law. See Act of October 19, 1976, 17 USC § 401(b)(1) (1988) (allowing "Copyright" and "Copr." in addition to circled "c"). See generally *Nimmer 2* §§ 7.06-7.11 (cited in note 9). To the extent that a claimant affixes a valid UCC notice, all domestic formalities are waived. See UCC art III. The net effect, from the viewpoint of the United States, is that only those who utilize one of the prescribed forms of notice specified under U.S. law (and adopted by the UCC) are excused from compliance with U.S. formalities. That result hardly reflects a great liberalizing of U.S. copyright notice strictures. See *Nimmer 3* § 17.01(B)(2) at 17-10 (cited in note 13) ("The UCC, in effect, allowed the United States to continue to require the very formality that multilateral copyright treaties are designed to avert.").

18. Note the prior accession to the largely ineffective Pan-American Conventions. See note 13.

19. 68 Stat 1030.

conveyed copyright relations with eighty countries,[20] and the United States continued to enjoy bilateral relations with certain other states. And although the United States steadfastly refused to join the Berne Convention,[21] its nationals could take advantage of the broader protections of the Convention without shouldering the concomitant burdens through a device known as the "back door" to Berne.

The "back door" to Berne worked as follows: U.S. copyright owners could publish their works concurrently in the United States and in a Berne Convention adherent, such as Canada. Through U.S. publication, the works achieved protection under the UCC. In addition, "simultaneous 'first' publication"[22] in Canada sufficed to confer protection throughout the Berne Union. Through such simultaneous publication, myriad U.S. industries claimed protection for their works in foreign courts without conceding reciprocal protection for works of Berne Convention origin within the United States.[23]

B. As a Member of the Berne Union

By the mid-1980s, losses to U.S. copyright proprietors from piracy abroad had mounted into the billions of dollars.[24] At that point, U.S. participation in the UCC seemed inadequate.[25] First, the two dozen Berne members that had not ratified the UCC and that had no bilateral copyright relationship with the United States were under no obligation to protect the copyrights of American

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20. A chart listing UCC adherents is contained in *Nimmer* 4 App 21 (cited in note 7). Most principal U.S. trading partners belong to the UCC. Since 1973 the Soviet Union—which still does not adhere to Berne—has belonged to the UCC. The foremost outsider from the world copyright community is the People's Republic of China. Although it enacted its first copyright statute in 1990, the law is so encumbered with technical requirements that "there is effectively no copyright protection in China." *1991 National Trade Estimate Report* (cited in note 1). Note the parallel between that 1990 Chinese law and the U.S. Chase Act of 1891. See Part II.A of this article.

21. In an amusing historical sidelight, the United States Senate actually ratified the Berne Convention on April 19, 1935, but then withdrew ratification two days later upon realizing that U.S. law would have to be modified to bring us into compliance with Berne, an issue that the congressional committee had neglected to consider. Sandison, 11 Colum-VLA J L & Arts at 103 (cited in note 2).

22. Under the Paris text of the Berne Convention, "[a] work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication." Berne Convention (Paris text), art 3(4). The predecessor text of the Berne Convention was to the same effect. See Berne Convention (Brussels text), art 4(3). Prior texts of the Berne Convention left "first publication" undefined; the better view regards true simultaneity as having been required thereunder, rather than permitting a grace period of thirty days, as do the later texts. See Paul E. Geller, *International Copyright: An Introduction*, in Melville B. Nimmer & Paul E. Geller, eds, *International Copyright Law and Practice* § 4(2)(b)(2) (Bender, 1991).

23. For another instance in which U.S. industry attempts to play both sides of the Berne Convention game, see Part III.A.3 of this article.

24. The Berne Convention Implementation Act of 1988, S Rep No 100-352, 100th Cong, 2d Sess 2, reprinted in 1988 USCCAN 3706.

25. See GAO Report on Intellectual Property Protection Abroad, April 1, 1987, in 1987 Copyright L Rptr, New Developments (CCH) ¶ 20,438 ("Foreign piracy of intellectual property . . . has emerged in the 1980s as one of the more important international trade issues for the United States.").

authors.[26] Even in cases where the U.S. proprietor had attempted to secure back-door Berne protection, problems of proof—or perhaps simple antipathy to U.S. reliance on Berne's back door[27] while the United States simultaneously barred entry into its borders through the front door—often forestalled relief.[28] Consider, for example, *The Sting* and *Earthquake*, two movies released simultaneously in Canada and the United States for the express purpose of gaining Berne Convention protection. In 1987, Peter Nolan of the Motion Picture Association of America testified before Congress that a U.S. motion picture studio was then bringing suit in Thailand based on an unauthorized exploitation of those films, relying on the concurrent release of the films in Canada and the United States as a simultaneous publication invoking Berne's back door.[29] Mr. Nolan later reported the subsequent ruling in Thailand: the Thai court refused to recognize the validity of the Canadian publication of those movies, based on a purported failure to comply with Canadian (albeit not Berne) publication standards.[30]

Second, U.S. efforts to bring copyright piracy havens into the international fold often foundered on the United States' own reluctance to participate in "the world's most important copyright convention,"[31] that is, the Berne Convention.[32] The United States Trade Representative expressed great dissatisfaction at his anomalous position in urging other countries to do what his own had refused: "it is often hard to convince other countries to provide strong copyright protection when we do not belong to the premier international treaty in the area of copyright."[33]

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26. HR Rep No 100-609, 100th Cong, 2d Sess 7 (1988). A chart listing Berne adherents is contained in *Nimmer 4* at App 22 (cited in note 7).

27. A mechanism exists within the Berne framework to shut the back door against entry by non-members, which could have been invoked against the United States prior to its treaty accession. See Berne Convention (Paris text), art 6(1). Although "[s]o far, diplomatic niceties have prevented any Government from making use of this facility," the United States certainly would have been the major candidate for such an exclusion. *WIPO Guide to the Berne Convention* at 40 (cited in note 12). For instance, if Canada—site of many U.S. simultaneous publications—had declared that the United States did not accord sufficient protection to Canadian works, the entire Berne Union would have been free to disregard United States back door entries via simultaneous Canadian publication. Id at 39. However, given that the United States, in fact, protected Canadian works since December 23, 1923, not under the Berne Convention but rather by virtue of a bilateral arrangement, Canada never had the incentive to invoke that provision. See David Vaver, *Canada* in Nimmer & Geller, eds, *International Copyright Law and Practice* § 6[3] (cited in note 22). Therefore, the United States escaped having the back door shut in its face, although the prospect of that indignity may have lurked in the background when the United States considered joining the Berne Union.

28. S Rep No 100-352 (cited in note 24) ("simultaneous publication is expensive and uncertain").

29. Berne Convention Implementation Act of 1987, Hearings on HR 1623 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee, 100th Cong, 1st Sess 239 (Sept 16, 1987) (statement of Peter Nolan, Motion Picture Assn of America).

30. Id at 626-27, reprinted in 1988 USCCAN 3706 (adverting to this case).

31. Copyright Amendments Act of 1990, HR Rep No 101-735, 101st Cong, 2d Sess 3 (1990). See Visual Artists Rights Act of 1990, HR Rep No 101-514, 101st Cong, 2d Sess 7 (1990).

32. HR Rep No 100-609 at 7 (cited in note 12).

33. HR 4262, 100th Cong, 2d Sess 134 Cong Rec H3082 (May 10, 1988) (letter of Clayton Yeutter in statement of Representative Kastenmeier). See HR Rep No 100-609 at 17 (cited in note 12).

The impetus for Berne adherence was thus two-fold. First, the copyright industries presented a shining exception to the dark field of America's chronic balance of payments deficit, creating a trade surplus on which Congress wished to capitalize.[34] Second, the United States joined Berne for the sake of moral leadership in the world copyright community.[35] As stated by several high officials of the United States government, Berne adherence "is simply the right thing to do . . . for a great nation"; it will "let us 'hold our heads higher' in the world of international copyright."[36]

These considerations finally moved Congress in 1988 to amend U.S. copyright law[37] to conform to the Berne Convention.[38] The amendments affected such matters as protection for architectural works,[39] the jukebox compulsory license,[40] and, most notably, curtailment of copyright formalities,[41] such as notice,[42] from serving as conditions to the exercise and enjoyment of copyrights.[43] Incident to U.S. accession,[44] Congress declared

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34. HR Rep No 100-609 at 7 (cited in note 14).

35. S Rep No 100-352 at 1 (cited in note 24).

36. Berne Convention Implementation Act of 1988, Hearings on S 1301 and S 1971 before the Subcommittee on Patents, Copyright and Trademarks, of the Senate Judiciary Committee, 100th Cong, 2d Sess 76 (1988) (statement of Commerce Secretary, C. William Verity, Jr., quoting former Register of Copyrights).

37. Berne Convention Implementation Act of 1988, Pub L No 100-568, 102 Stat 2853. The law reflects a series of compromises among the affected industries, as evidenced by the fact that it was extensively amended and refined until ultimately passed in the House of Representatives by a vote of 420 to 0, and in the Senate by a vote of 90 to 0. Ironically, after passage of the law, on the historic occasion that the Senate ultimately ratified the Berne Convention, only five senators were present. Because five members falls somewhat shy of the 67 senators required to approve a treaty, presiding Senator Paul Simon resourcefully called for a division of the house, whereby senators note their votes by standing. Because Berne adherents stood in "greater numbers" than Berne opponents, the treaty passed. See Irvin Molotsky, *Congress Approves Trademark, Copyright Bills*, LA Daily J 3 col 2 (Oct 24, 1983).

38. Between its initial promulgation in 1886 and U.S. ratification in 1989, the Berne Convention went through a number of revisions. Indeed, no single "Berne Convention" exists; rather, the treaty is embodied in a series of Acts named after the cities of their ratification: Paris Act of 1896, Berlin Act of 1908, Berne Act of 1914, Rome Act of 1928, Brussels Act of 1948, and Paris Act of 1971. Geller, *International Copyright* § 3[3][b][i] (cited in note 22). The United States joined the Paris Act of 1971; unless otherwise indicated, all references to the Berne Convention herein are to that Act. For example, see note 68 of this article.

39. Berne Convention Implementation Act of 1988, 102 Stat at § 4(a)(1)(A). See *Nimmer 1* § 2.08[D][2][a] at 2-113 (cited in note 13). See also note 46 of this article.

40. 102 Stat at § 4(a)(4). See *Nimmer 2* § 8.17[C] at 8-192.4 (cited in note 9).

41. For example, recordation of transfers, Berne Convention Implementation Act of 1988, 102 Stat at § 5; deposit, id at § 8; and registration of non-U.S. Berne Convention works, id at § 9. See *Nimmer 2* § 7.16[B][1][b] at 7-157 (cited in note 9); *Nimmer 3* § 12.08 at 12-64.25 (cited in note 13).

42. Berne Convention Implementation Act of 1988, 102 Stat at § 7. See *Nimmer 2* § 7.02[C] at 7-13 (cited in note 9). Thus, no longer are statements like the following applicable under U.S. law: "In view of the fact that the United States is not a member of what is called the Berne International Copyright Union, it is required, to secure a copyright here, that any publication in a foreign country must contain a notice of United States copyright." *Basevi v The Edward O'Toole Co., Inc.*, 26 F Supp 41, 45 (SDNY 1939).

43. The chief congressional architect of U.S. adherence to the Berne Convention has observed that "[t]he central feature of Berne is its prohibition of formalities." 134 Cong Rec H3082 (May 10, 1988) (statement of Representative Kastenmeier). In fact, although Berne forbids formalities from serving as conditions to the exercise and enjoyment of protection for Convention works, it does not forbid formalities. Berne Convention (Paris text), art 5(2). Capitalizing on that distinction, Congress retained most existing formalities in U.S. copyright law, and either carved out an exception for Berne

that U.S. copyright law, as amended, "satisf[ies] the obligation of the United States in adhering to the Berne Convention[.]"[45]

III

THE ISSUE: COPYRIGHT DURATION

Was Congress correct in its assessment? Although certain changes were made to U.S. copyright law for the sake of Berne conformity—notably, discarding mandatory copyright notice—and although subsequent legislation has furthered the process of Berne compliance in the areas of architectural works[46] and moral rights,[47] one lingering problem remains unaddressed: copyright duration. Notwithstanding that in 1976 Congress prospectively

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Convention claimants or altered their historical function as prerequisites to the exercise or enjoyment of a copyright. See, for example, *Nimmer 2* §§ 7.16[B][1][b] at 7-157, 7.02[C] at 7-12 (cited in note 9). The net effect is that U.S. copyright formalities are more complicated in the Berne era than ever before. See id (the Berne Convention Implementation Act has created a third level of analysis vis-à-vis copyright notice, preserving the antecedent two levels of analysis).

44. In the years since Berne accession, an even newer international mechanism for safeguarding this nation's copyright interests has loomed on the horizon: the General Agreement on Tariffs and Trade ("GATT"). Although the GATT framework, in its most recent renegotiation (the Uruguay Round, named after its initiation in Punta del Este) has included Trade Related Aspects of Intellectual Property ("TRIP's") at the principal instigation of the United States, the entire edifice crumbled over the inability of the United States and European Community to see eye to eye on agricultural subsidies. See *Trade Talks*, AP News Wire 1538 (Dec 3, 1990). Indeed, emotions ran so deep on that trade issue that "[a]t one point, police used tear gas and water cannon when demonstrators tried to storm the European Parliament building." Id. Thus far, the incongruence between U.S. copyright durational features and the mandated norms of the Berne Convention, which forms the subject matter of this article, has not yet led to civil insurrection. See Part IV.A.2 and note 175 of this article.

45. Berne Convention Implementation Act of 1988, 102 Stat at § 2(3). One of the most knotty issues confronted below concerns retroactive protection for works of Berne Convention origin. Berne Convention (Paris text), art 18. See Part IV.A.3 of this article. In the early years of the Berne Convention (see note 38), both the United Kingdom and Norway adhered subject to reservations concerning the application of Article 18. Ricketson, *Berne Convention Protection* at 676-77 (cited in note 12). See Vienna Convention on the Law of Treaties, art 2(1)(d) (definition of "reservation"). In the interim, the ability of newly adhering states to join the Berne Union subject to treaty reservations has been curtailed. Ricketson, *Berne Convention Protection* at 676 (cited in note 12). In any event, the United States did not express any reservations on this or any other subject upon Berne ratification.

46. One point of discontinuity between the Berne Convention and U.S. law at the time of Berne accession lay in the former's requirement that useful architectural structures be protected, and the failure of the latter to do so. See HR Rep No 100-609 at 49-51, 117-18 (cited in note 12), citing *Nimmer 1* § 2.08[D][2][b] at 2-122 (cited in note 13). The Senate Judiciary Committee asked the Copyright Office to undertake an in-depth study by January 2, 1989, evaluating whether the level of protection for architectural works should be increased. Id at 9. That study resulted in the Architectural Works Copyright Protection Act, Pub L No 101-650, 104 Stat 5089, § 701 et seq (1990), which was enacted in order to bring "the United States in full compliance with its multilateral treaty obligations as specified in the Berne Convention. . . ." HR Rep No 101-735 (cited in note 31). See *Nimmer 1* § 2.20 at 2-226 (cited in note 13).

47. When Congress amended U.S. law for the sake of Berne compliance in 1988, it stated that it was also considering moral rights legislation "independently of Berne adherence." HR Rep No 100-609 at 40 (cited in note 12). Congress later returned to the issue, conceding that adherence to Berne "did not end the debate" about moral rights. HR Rep No 101-514 at 8 (cited in note 31). The process culminated with enactment of the Visual Artists Rights Act of 1990, Pub L No 101-650, 104 Stat 5089, §§ 601 et seq (1990). See *Nimmer 2* § 8.21[B][2] at 8-265 (cited in note 9).

adopted the Berne standard of author's life plus fifty years,[48] several variants from the standard term exist within the Berne framework and retrospectively within the United States. Although copyright duration qualifies, in the words of one commentator, as "the most important issue in international copyright relations,"[49] those variant terms were not corrected either at U.S. accession to the Berne Convention in 1989 or during the course of subsequent remedial legislation. It is regarding these variants that problems arise.[50]

A. Provisions of United States Law

For most of this century, the 1909 Act governed U.S. copyright law. That legislation, consistent with every enactment dating back to England's Statute of Anne in 1709,[51] contained two copyright terms. The initial copyright term lasted for twenty-eight years from publication[52] or other vesting of statutory copyright;[53] upon compliance with the formality of registering the work and separately renewing it in the records of the United States Copyright Office, the second term lasted for an additional twenty-eight years.[54]

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48. Actually, Congress considered adopting the life plus fifty term in the preceding 1909 Act, but ultimately rejected that approach. "It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period." To Amend and Consolidate the Acts Respecting Copyright, HR Rep No 2222, 60th Cong, 2d Sess 14 (1909). See *Fred Fisher Music Co. v M. Witmark & Sons*, 318 US 643, 653 (1943) (Congress chose two shorter terms, one original and one renewal period, rather than one longer term.).

49. Ricketson, *Berne Convention Protection* at 318 (cited in note 12). Article 7 of the Berne Convention governs copyright duration. The semi-official commentary to the Berne Convention, issued by its Geneva secretariat, labels Article 7 "one of the cornerstones of the Convention . . . ." *WIPO Guide to the Berne Convention* at 45 (cited in note 12).

50. See Part IV.A of this article.

51. 8 Anne ch 19 (In Statutes of the Realm, the statute is cited at ch 21).

52. Although the 1909 Act did not define "publication," case law later provided a definition that Congress enacted into the 1976 Act: " 'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication." 17 USC § 101 (1989). See *Nimmer 1* § 4.04 at 4-17 (cited in note 13). Note that the American definition differs from the Berne Convention definition of "publication," in that it omits the following proviso: "provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work." Berne Convention, (Paris text) art 3(3). Thus, under the American definition, publication "may be effected by sale or other distribution of a single copy." *Nimmer 1* § 4.04 at 4-21 n32 (cited in note 13). See note 83.

53. Under the 1909 Act, even some unpublished works could obtain a federal copyright by registration prior to publication. 17 USC § 12 (1976) (1909 Act). Given that the vast majority of works obtained a 1909 Act copyright by publication, rather than by registration as an unpublished work, the latter category seldom arose.

54. Registration at publication was not a condition to copyright protection. See *Nimmer 2* § 7.16[A][2][b] at 7-148 (cited in note 9). Accordingly, a work published on March 1, 1940, with proper copyright notice, but unregistered as of 1960, was not ipso facto in the public domain. However, the initial copyright term for such a work expired on March 1, 1968, and if not renewed before that date, the work fell into the public domain. In addition, in order to renew the work, the Copyright Office required that the work be registered for an initial term. Therefore, the proprietor could file, say on January 10, 1968, an application to register the work for the first time and, concurrently, an application to renew the work.

In 1976, incident to the general revision of U.S. copyright law, Congress replaced the renewal structure. For works created on or after the effective date of the 1976 Act—January 1, 1978—the term of protection is the Berne standard, that is, fifty years *post mortem auctoris* ("p.m.a." or after the author's death). As to works for hire[55] and anonymous and pseudonymous works, for which the uncertainty of date of death makes a term of fifty years p.m.a. speculative, the 1976 Act provides a term of seventy-five years from first publication or one hundred years from creation, whichever expires first.

With the shift from a dual to a unitary term, the question arose as to how pre-1978 works should be treated during the period in which the new Act was effective. Congress decided that works that had achieved statutory copyright protection prior to January 1, 1978, should continue to be governed by the 1909 Act renewal structure.[56] Therefore, all works that secured statutory protection before December 31, 1977, fall into the public domain unless renewed in the twenty-eighth year of the copyright. However, whereas previously the renewal term ran for an additional twenty-eight years, Congress in 1976 lengthened the renewal term to forty-seven years. Thus, a properly renewed pre-1978 work now enjoys a total term of protection lasting seventy-five years, rather than fifty-six years, as previously.

B. Berne Convention Requirements

The basic term of protection[57] under the Berne Convention, like that applicable in the United States, is fifty years p.m.a.[58] For anonymous and pseudonymous works, protection lasts for fifty years "after the work has been lawfully made available to the public."[59] Two points must be made about these durational provisions.[60] First, these terms are minima, which individual

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55. Works for hire occupy a special niche within U.S. copyright law. See generally *Nimmer I* § 5.03 at 5-10 (cited in note 13). See also note 86.

56. In *Stewart v Abend*, 110 S Ct 1750, 1758 (1990), for example, the parties disagreed as to whether the 1909 Act or 1976 Act governed. However, inasmuch as the 1976 Act substantially reenacted the pertinent renewal provisions of the 1909 Act, the issue is largely moot. Id.

57. This term of protection primarily safeguards economic rather than moral rights. Ricketson, *Berne Convention Protection* at 455 ff (cited in note 12). "Among the moral rights that an author retains, even after transferring his rights, are the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Berne Convention (Paris text), art 6*bis* (1). Although the Berne Convention directs that moral rights, following the author's death, should last "at least until the expiry of the economic rights," id art 6*bis*(2), an exception allows countries, whose laws upon Berne accession confer no post-mortem moral rights, to "provide that some of these rights may, after [the author's] death, cease to be maintained." Id. The discussion below focuses on duration in general, rather than on particular economic or moral rights.

58. Id art 7(1). This article treats only Berne Convention durational provisions which pose a potential conflict with U.S. law. For a complete discussion of duration of protection, see Chapter 7 of Ricketson, *Berne Convention Protection* at 318-63 (cited in note 12).

59. Berne Convention (Paris text), art 7(3). A separate provision of the Convention addresses problems of proof as to the author's identity in dealing with anonymous and pseudonymous works. Id art 15(3) (If the work is anonymous, the publisher that appears on the work will represent the author until the real author reveals himself and claims authority for the work.).

60. See *Nimmer 3* § 17.01[B][1] at 17-7 to 17-8 (cited in note 13).

member nations may voluntarily exceed.[61] In other words, to the extent that nations such as Germany[62] and Israel[63] choose to grant protection with respect to works of both domestic and foreign[64] provenance for seventy years p.m.a., they do not run afoul of treaty requirements.[65]

Second, these provisions apply to Convention works, not domestic works. Therefore, if a mythical Berne member state named Jacavia, for example, granted copyright protection for only thirty years p.m.a. rather than fifty years p.m.a.,[66] and applied that term to a protected work whose country of origin[67] was another Berne Convention nation, it would have violated the treaty.[68] Nonetheless, Jacavia could redress that inadequacy by according a full copyright term of fifty years p.m.a. solely with respect to foreign works.[69]

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61. Visual Artists Rights Act of 1990, HR Rep No 101-514 at 16 (cited in note 31). See Berne Convention (Paris text), art 7(6) (Countries may grant a term of protection in excess of that provided by the Berne Convention.). See also id art 19 ("The provisions of the Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."). Indeed, to the extent that individual nations accord more than minimum rights to their own nationals, they must grant the same rights to Convention claimants. *WIPO Guide to the Berne Convention* at 103 (cited in note 12) ("[I]f, under the national laws of member countries, Convention nationals and their successors in title can claim better copyright treatment, nothing stops them doing so.").

62. See Adolf Dietz, *Germany (Federal Republic)*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[1][a] (cited in note 22).

63. Joshua Weisman, *Israel*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[1] (cited in note 22).

64. To avoid periphrasis, the words "foreign" and "foreigner" are used throughout the balance of this article to refer to works of a foreign nation that adheres to the Berne Convention. It should be borne in mind that this definition excludes so-called "foreign" works from outside the Berne Union, for example, from the People's Republic of China.

65. Ricketson, *Berne Convention Protection* at 350 (cited in note 12). The longest term in the Berne Union is the Ivory Coast's copyright law, which accords protection for ninety-nine years p.m.a. Id at 335-36. A chart of copyright duration among Berne adherents is set forth in id at 356-63.

66. Texts of the Berne Convention prior to the Brussels Act of 1948 (see note 40) did not contain the present minimum of 50 years p.m.a. Ricketson, *Berne Convention Protection* at 333 (cited in note 12). On that basis, Japan formerly granted a term of thirty years p.m.a. Id at 328. At present, however, consonant with its Berne obligation, Japan accords a term of fifty years p.m.a. Teruo Doi, *Japan*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3(1) (cited in note 22).

67. Determination of the country of origin occupies its own capacious niche within Berne Convention jurisprudence. See Geller, *International Copyright* at §§ 3-4 (cited in note 22). Simplifying, the country of origin is considered to be the country of the author's nationality for an unpublished work, and the country of first publication for a published work. See Berne Convention (Paris text), art 5(4). For works simultaneously first published in several countries (see note 22), special rules apply. See id art 5(4)(a)-5(4)(b).

68. Nonetheless, accommodation currently exists for long-time members of the Berne Union to continue to accord less than 50 years p.m.a. Berne Convention (Paris text), art 7(7) (countries bound by Rome Act of Berne Convention may retain shorter terms permitted by Rome Act when ratifying Paris Act). See Ricketson, *Berne Convention Protection* at 335 (cited in note 12) (only Malta, Poland, and Rumania are currently eligible to take advantage of that provision). The reason for those exceptions is historical—a desire to form a more perfect (or more embracing) Berne Union without antagonizing candidate states whose laws are not perfectly congruent with Convention norms. See id at 334-36. On the various Acts of the Berne Convention, see note 38.

69. See Berne Convention (Paris text), art 5(1) ("Authors shall enjoy . . . in countries of the Union other than the country of origin . . . the rights specially granted by this Convention."). See also UCC (Paris text) art 10(4). See *Guide to the Berne Convention* at 32-34 (cited in note 12) ("In short, the protection in the country of origin of a work where the author is a national of that country is governed exclusively by the national legislation; the Convention offers no protection whatsoever.") Compare Joint Explanatory Statement on Amendment to S 1301, 100th Cong, 2d Sess 11-12, in 134 Cong Rec S14554 (Oct 5, 1988) ("Berne[, although barring formalities for Convention works,] does

Were the Jacavian government to grant protection only for thirty years p.m.a. (or less)[70] with respect to Jacavian works, the Berne Convention would not demand otherwise. As a practical matter, of course, it is so unlikely that the Jacavian Diet would choose to prejudice its own constituents and favor foreigners that such theoretical constructs have not been translated into reality.[71]

The Berne Convention commands that "the enjoyment and exercise of . . . rights shall not be subject to any formality."[72] Like the balance of the treaty, this provision applies "to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."[73] Moreover, "[i]t 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."[74] However, a newly adhering country need not grant protection anew if the subject work has fallen into that country's public domain "through the expiry of the term of protection which was previously granted."[75]

The Berne Convention provides that the term of protection for copyright is "governed by the legislation of the country where protection is claimed; however, unless the legislature of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."[76] Under this provision, called "Comparison of Terms" or the "Rule of the Shorter Term," most nations provide, consonant with Berne, that a work that has lost protection in its country of origin through expiry of term is ineligible for copyright protection abroad, even if it falls within the specified term of the

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not restrict member nations from imposing formalities on works of domestic origin."); see Stephen M. Stewart, *International Copyright and Neighbouring Rights* 106 (Butterworth, 1983). But see Howard B. Abrams, *Comments of Howard B. Abrams*, 10 Colum-VLA J L & Arts 641, 642 (1986) ("It is torturing both language and logic to read into this a license for discriminating against a nation's own citizens.").

70. In the last century, the United Kingdom, for example, accorded protection for only seven years p.m.a. or forty-two years from publication, whichever was longer. Ricketson, *Berne Convention Protection* at 325 (cited in note 12).

71. Id at 330 ("[S]tates with shorter terms would soon fall into line as they would not wish to put their nationals at a disadvantage."). See *Nimmer 3* § 17.01[B][1] at 17-19 n34 (cited in note 13) ("[U]nderstandably, there has been little concern historically that member states would attempt to disadvantage their own nationals, rather than foreigners."). But see the discussion in Part IV.B, noting how Congress has needlessly prejudiced American citizens in certain regards.

72. Berne Convention (Paris text), art 5(2).

73. Id art 18(1). The Berne Convention goes out of its way to specify that that provision "shall also apply in the case of new accessions to the Union." Id art 18(4). Article 18, known as the "Rule of Retroactivity, . . . has been in the Convention from the beginning." *WIPO Guide to the Berne Convention* at 100 (cited in note 12). Since the Berlin Act of 1908 (see note 38), the rule of retroactivity has changed very little. Ricketson, *Berne Convention Protection* at 670 (cited in note 12). For its early history, see id at 667-70.

74. Berne Convention (Paris text), art 36(2).

75. Id art 18(2).

76. Id art 7(8).

country wherein protection is sought.[77] The UCC contains a provision to a similar effect.[78]

IV

THE PROBLEM: TREATY VIOLATION

The foregoing exposition reveals a great deal of overlap between U.S. and Berne Convention copyright duration. Indeed, Congress finally abandoned the renewal structure in 1976[79] in large part to bring our nation into compliance with Berne,[80] even though it took a dozen more years before the United States finally joined the Convention.[81] Yet, notwithstanding the gross congruence between U.S. provisions and Berne Convention strictures,[82] a number of fine points[83] remain to be resolved.[84] For simplicity, the discussion below compares United States and Berne Convention treatment of

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77. For example, Robert Plaisant, *France*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[3] (cited in note 22).

78. UCC (Paris text), art IV(4)(a).

79. Congress remarked in 1976 that "[o]ne of the worst features of the present copyright law is the provision for renewal of copyright." Copyright law revision, HR Rep No 94-1476, 94th Cong, 2d Sess 134 (1976). Nonetheless, as already noted, even in 1976 Congress abandoned renewal only prospectively; pre-1978 works must still be renewed, or face copyright lapse following 28 years. See Part III.A of this article.

80. "Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations." HR Rep No 94-1476 at 135 (cited in note 79). Note that "authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill." Id at 133.

81. "It can safely be stated that Congress drafted and passed the 1976 Act with a 'weather eye' on Berne. . . . 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." Berne Convention Implementation Act of 1988, HR Rep No 100-609 at 21 (cited in note 12).

82. In the context of recent copyright amendments, one lawmaker noted the critical need for a worldwide system of laws in this arena. Judicial Improvements Act of 1990, 101st Cong, 2d Sess, in 136 Cong Rec H13316 (Oct 27, 1990) (statement of Representative Moorhead).

83. In addition to the points explored below, note that the differing definition of "publication" in American law from that mandated by the Berne Convention (see note 52) creates at least a theoretical conflict as to copyright duration. See Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 Stan L Rev 499, 516 (1967) (A single act of publication might trigger the onset of the term of copyright protection, whereas such an act would not qualify as "publication" under the Berne definition; thus, in theory, the U.S. term could expire prior to the Berne term.). Compare *Nimmer 2* § 9.01 [A][1] at 9-6 n16 (cited in note 9).

84. This article rests on the tacit assumption that the Berne Convention is executory under United States law. See *Nimmer 1* § 1.12[A] at 1-101, 1-103 (cited in note 13) (executive and legislative branches of United States government have weighed against self-execution; the matter remains for judiciary to resolve). The contrary presumption—that the Berne Convention is self-executing under U.S. law—simultaneously eliminates all points of conflict between the Berne Convention and American copyright law (which is pro tanto amended to the extent of the inconsistency) and obviates the need for this article. Nonetheless, it should be borne in mind that a proposal for harmonization that is an alternative to that set forth in this article is to construe the Berne Convention as self-executing under U.S. law.

works by one author (rather than joint works)[85] written outside an employment relationship (rather than works for hire).[86]

A. Inconsistencies Between U.S. Law and the Berne Convention

1. *Duration for Anonymous and Pseudonymous Works.* As already noted, the Berne Convention commands that the term of protection for anonymous and pseudonymous works "shall expire fifty years after the work has been lawfully made available to the public" while, by contrast, U.S. law protects such works for seventy-five years from first publication or one hundred years from creation, whichever expires first.[87] For anonymous and pseudonymous works that are published promptly[88] after creation, U.S. law therefore accords protection for twenty-five years longer than Berne requires.[89] That discrepancy is unobjectionable, given that any member of the Berne Union (such as the United States) may voluntarily exceed Convention minimum standards.[90]

The problem arises in considering U.S. treatment of foreign[91] anonymous and pseudonymous works that are not published promptly upon creation, but

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85. The complexity of the hypotheticals below would be doubled or tripled to the extent that two or three authors were treated, rather than just one per work. Moreover, the treatment of joint works is not itself a point of discontinuity between the Berne Convention and U.S. copyright law. See 17 USC § 302(b) (1989) (U.S. copyright for joint works not made for hire endures for fifty years after the "life of the last surviving author"); Berne Convention (Paris text), art 7*bis* (Berne copyright protection for joint works is "calculated from the death of the last surviving author").

86. Works for hire—into which category fall the vast bulk of motion pictures—are protected under U.S. copyright law for the same term applicable to anonymous and pseudonymous works. 17 USC § 302(c) (1989). See Part IV.A.1 of this article. Under the Berne Convention, each member state may treat cinematographic works no differently than other works or, at its option, pursuant to a special term. Berne Convention (Paris text), art 7(2). See *WIPO Guide to the Berne Convention* at 47 (cited in note 12) (this provision is "anomalous"). Thus, for example, France follows the former course, whereas Italy follows the latter. See Plaisant, *France* at § 4[1][a][ii] (cited in note 77); Mario Fabiani, *Italy* in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[2][a] (cited in note 22). Because of these wide disparities, as well as the lack of a square analogue in the laws of some other nations to the United States' work-for-hire doctrine, see Dietz, *Germany (Federal Republic)* at § 3[1][b][1] (cited in note 62), the special case of works for hire is left out of the calculus. See generally Ricketson, *Berne Convention Protection* at 346-47, 572ff (cited in note 12).

87. See Part III.A of this article.

88. As long as a Berne Convention work is published within twenty-five years of its creation, it will be protected for longer in the United States than in its country of origin, assuming that the country of origin followed the Berne minimum term. Once the span between creation and publication exceeds twenty-five years, the balance shifts, and the United States furnishes less protection than Berne commands.

89. Compare 17 USC § 302(c) (anonymous works, pseudonymous works and works for hire) and Berne Convention (Paris text), art 7(3). A parallel example is protection of photographs, which U.S. law protects for as long as other copyrightable works, but which the Berne Convention allows to be cut back to a twenty-five-year term. See Berne Convention (Paris text), art 7(4).

90. See id art 7(6).

91. As already noted, the Berne Convention applies to Convention works, not domestic works. Id art 5(e). See Part III.B of this article. Accordingly, the Berne Convention mandates the term of protection the United States must apply to an anonymous foreign work, but it does not speak to the term of protection that the United States must apply to an anonymous American work. Compare *Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 Colum-VLA J L & Arts 513, 516-17 (1986) ("*Final Report*").

instead languish unpublished for many decades.[92] Imagine a pseudonymous Swiss work that was created in 1900 and first published in 1970.[93] The Berne Convention protects this work for an additional fifty years, that is, until 2020. By contrast, U.S. law protects this work for a maximum term of 100 years following its creation,[94] or until 2000 at the latest.[95] Therefore, the work in this hypothetical would be protected by U.S. law for twenty years less than Berne commands.[96] When real life instances actually arise tracking that hypothetical, the result is to place the United States in breach[97] of its treaty commitment.[98]

2. *Duration of Copyrights for Pre-1978 Berne Convention Works*

a. *Early publication relative to date of death.* An additional disparity between the Berne Convention and U.S. copyright law arises with respect to certain pre-1978 works, all of which U.S. law protects for a maximum of seventy-five years.[99] In some instances, no conflict will arise, as the U.S. duration of seventy-five years of protection for the work of an elderly author will exceed the Berne Convention minimum of fifty years p.m.a. But in other instances, the protection accorded by the United States will be less than life of the author plus fifty years. For instance, consider a work first published in Spain in 1915, written by a Spaniard who lived until 1965. The Berne term for that work lasts until 2015; yet the United States will not protect the work past 1990. That twenty-five-year disparity[100] seemingly violates Convention

92. To the extent that, at some point in time, the identity of the author of a previously anonymous or pseudonymous work is revealed, both U.S. law and the Berne Convention replace the term of protection with the standard term of 50 years p.m.a. See 17 USC § 302(c); Berne Convention (Paris text), art 7(3).

93. For the sake of properly calibrating the country of origin in this hypothetical (see note 67), it should be assumed that the author was a lifelong Swiss (and not a dual national), that first publication occurred solely in Switzerland, and that no foreign publication took place within thirty days of Swiss publication.

94. U.S. law protects anonymous and pseudonymous works that are published promptly after creation for 75 years following creation. 17 USC § 302(c). This term of protection is twenty-five years *longer* than Berne requires. See Berne Convention (Paris text), art 7(3). There is no problem with the United States voluntarily exceeding the Berne minimum. See id art 7(6).

95. 17 USC § 302(c).

96. See *Final Report*, 10 Colum-VLA J L & Arts 513, 581-85 (cited in note 91) (discussing aforementioned hypothetical in more detail).

97. The breach here appears categorical, unlike more ambiguous cases treated below. See note 102. For example, the facts of the hypothetical could be advanced a century, to a Swiss work created in 2000 and first published in 2070; the twenty-year gap will apply to this work as well, notwithstanding that it was created *after* U.S. accession to the Berne Convention.

98. This potential breach is not open-ended. It would not extend, for instance, to a hypothetical anonymous Swiss work created in 1800 and first published in 1970, for the Berne Convention does not mandate protection of "anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years." Berne Convention (Paris text), art 7(3).

99. See 17 USC § 304 (1988).

100. Of course, the twenty-five-year figure hinges on the facts of the instant hypothetical. In other instances, the disparity could be more or less than twenty-five years. For instance, to the extent that a foreign author dies within twenty-five years of first publication, there is no inconsistency between the Berne Convention and an even longer United States term. See Part IV.A.1 of this article. The later the foreign author dies after a pre-1978 publication, the greater the potential split between U.S. and Convention term. Abstracting from those criteria, the Berne Convention "favors"

minimum standards.[101] Inasmuch as the United States, upon accession to the Berne Convention, is obligated to apply Berne standards even to pre-existing works still protected by copyright,[102] the disparity presumptively[103] breaches the United States' treaty commitment.[104] Thus, if on United States accession to Berne on March 1, 1989, the work were still protected in Spain,[105] the United States would be obligated to accord the work a full Convention term, which would last until 2015.[106]

Can a contrary argument be crafted based on the fact that this class of works is limited to copyright duration of works created prior to U.S. adherence to the Berne Convention? Such an argument could be based on a subsequent clause of the treaty that allows member states to "determine, each insofar as it is concerned, the conditions of application of this principle [of retroactivity]."[107] This argument would posit that pre-1978 Berne works could be disadvantaged incidental to the transition of the United States from a non-Berne adherent to a member of the Berne Union.[108] It could be argued, moreover, that the political benefits of U.S. membership in the Berne Union outweigh fidelity to technical minutiae of this narrow category.[109] Nonetheless, it strains credulity to maintain that a newly-adhering nation, such as the United States, could be permitted under Berne to "determine . . . the conditions of application of [the duration] principle" by effectively setting the whole category of protection for works under discussion at naught.[110] When the Berne Convention wishes to grant member states the discretion not to provide a certain level of protection altogether, it so states in terms far

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authors who are "young" (that is, authors who live long after the initial publication of their works) whereas the 1909 Act of United States favors "old" authors. See *WIPO Guide to the Berne Convention* at 46 (cited in note 12) ("Most countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered, [that is,] three generations. Clearly the justice of the period varies; it depends always on the length of the author's life and the difference between cases in which he is cut off in his youth or becomes a centenarian cannot be avoided.").

101. See Berne Convention (Paris text), art 7(1) ("The term of protection granted by this Convention shall be the life of the author and fifty years after his death.").

102. Note that, unlike the previous case of anonymous and pseudonymous works that present a problem on an ongoing basis even as to newly created works (see note 97), the case here is limited to pre-1978 works, that is, works created more than a decade before U.S. adherence to the Berne Convention.

103. This conclusion seems mandated by Article 18 of the treaty, which commands application of the Convention to "all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through expiry of the term of protection." Berne Convention (Paris text), art 18(1).

104. *Final Report*, 10 Colum-VLA J L & Arts at 583 (cited in note 91).

105. Presumably, the work will not have lapsed into the Spanish public domain by 1989, given that Spain protects works for sixty years p.m.a. Milagros Del Corral, *Spain*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[1][a] (cited in note 22). However, the Berne Convention requires the United States to recognize protection for the work solely for fifty years p.m.a. Berne Convention (Paris Text), art 7(1).

106. Id.

107. Id art 18(3).

108. Compare *Final Report*, 10 Colum-VLA J L & Arts at 587-95 (cited in note 91).

109. See note 68.

110. See Berne Convention (Paris text), art 36(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."). See text at note 152.

more explicit than an oblique reference to "the conditions of application . . . ."[111] The better reading therefore rejects that contrary argument.

b. *Renewal.* The renewal registration requirement applies to works in statutory copyright before January 1, 1978. As to claimants under the Berne Convention, their rights under U.S. law began only upon U.S. accession to Berne on March 1, 1989, long after the renewal registration requirement ceased to apply to newly created works. Accordingly, for all works first published during the Berne era (on or after March 1, 1989), U.S. copyright law imposes no need to register for renewal on either United States or foreign claimants. By contrast, pre-1978 works from Berne nations that are still protected in the United States as of March 1, 1989,[112] even if previously published, are governed by the Berne Convention after that date,[113] because the Convention applies to "all works which, at the moment of its coming into force, have not yet fallen into the public domain . . . ."[114]

Imagine a work first published in India in 1970 by an Indian national who died in 1980, which is still protected in India at present. In 1998, the initial U.S. copyright term for that work will be up for renewal. As the law stands today,[115] the work will fall into the U.S. public domain if not renewed in that year. The question is whether that requirement of renewal registration passes Berne muster.

The Berne Convention commands that "[t]he enjoyment and the exercise of . . . rights shall not be subject to any formality."[116] Given the assumption (to be tested in a moment) that renewal registration is such a formality on which copyright subsistence during the renewal term depends, it follows that such a registration requirement must be eliminated following March 1, 1989, for works originating from the Berne Union. The above Indian work is protected in its country of origin until 2030;[117] but despite the fact that it was

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111. For example, Berne Convention (Paris text), art 2*bis*(1) ("It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, protection for political and legal speeches."). On the subject of copyright duration, see Berne Convention (Paris text), art 7(4) ("It shall be a matter for legislation in the countries of the Union to determine the term of protection for photographic works" and works of applied art, subject to 25-year minimum.).

112. For example, an Italian author can claim U.S. copyright for a work published in 1977 or earlier not qua Berne national, but by virtue of a different status, for example as a UCC national (given that Italy joined the UCC in 1957). As of 1989 and thereafter, however, the Italian work can claim protection in the United States both via Berne and the UCC.

113. See Berne Convention (Paris text), art 18(1). This provision explicitly applies to states newly acceding to the Union. Id art 18(4). Further, the United States cannot simply disclaim that feature, as "ratification or accession shall automatically entail acceptance of all the provisions . . . of this Convention." Id art 30(1).

114. Berne Convention (Paris text), art 18(1). See also id art 18(2).

115. But compare note 198.

116. Berne Convention (Paris text), art 5(2). Interestingly, the UCC is to the contrary. By an express provision of the UCC, the exemption from formalities is not applicable to those required for obtaining renewal of copyright. UCC (Paris text), art III(5). See *International Film Exchange, Ltd. v Corinth Films, Inc.*, 621 F Supp 631 (SDNY 1985) (copyright in Italian movie *The Bicycle Thief* lost for failure to observe minutiae of U.S. renewal formalities).

117. S. Ramaiah, *India*, in Nimmer & Geller, eds, *International Copyright Law and Practice* § 3[1] (cited in note 22).

protected in the United States upon Berne ratification, the U.S. copyright term lasts only until 1998, unless the "formality of renewal" is accomplished at that time. Yet under the Berne Convention, the United States cannot impose any formality as a condition to continued protection of the work, which must endure until 2030.[118]

Is the assumption warranted that renewal registration is a formality barred by Berne? The commentators support that view,[119] as does the United States Copyright Office in a pre-Berne accession study about changes required to U.S. copyright law for sake of Berne adherence.[120] The staff of the Copyright Office proposed amending the 1976 Act[121] to exclude from the renewal formality Berne Convention works whose country of origin[122] is not[123] the United States[124] and that secured U.S. copyright protection at publication.[125] It appears, therefore, that the required 1998 renewal for the hypothetical Indian work is suspect.[126]

3. *Resurrection from Public Domain?* The Berne Convention nominally requires newly adhering states (such as the United States) to accord some

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118. Article 18(1) of the Berne Convention (Paris text) requires the United States to apply Berne protection to the subject work. And Article 18(4) makes that provision applicable "also . . . to cases in which protection is extended by the application of Article 7 . . . ." Berne Convention (Paris text), art 18(4). Given that Article 7 extends protection for that work from 1998 to 2030, this is an instance in which Article 18(4) connotes additional protection. That result confounds the expectation of one observer that Article 18(4) has been rendered otiose. Ricketson, *Berne Convention Protection* at 676 (cited in note 12).

119. See *Final Report*, 10 Colum-VLA J L & Arts 581-85 (cited in note 91). The semi-official Guide defines the term as follows:

> The word "formality" must be understood in the sense of a condition which is necessary for the right to exist—administrative obligations laid down by national laws, which, if not fulfilled, lead to loss of copyright. Examples are: the deposit of a copy of a work; its registration with some public or official body; the payment of registration fees, or one or more of these.

WIPO Guide to the Berne Convention at 33 (cited in note 12). Renewal registration meets all the criteria set forth there. A work first published in the United States in 1970 needed solely to bear a valid copyright notice for protection to subsist until 1998. 17 USC § 10 (1909 Act). By contrast, U.S. national law imposes loss of copyright after 1998 unless the proprietor registers the work with an official body (the U.S. Copyright Office), which requires deposit of copies (of the best edition of the work) and payment of fees ($20), and for the proprietor to renew the work with that body, requiring payment of a separate fee. See 17 USCA §§ 407-409 (West 1977 & Supp 1991). Renewal is therefore a paradigmatic formality under the Guide's definition. See note 54.

120. U.S. Copyright Office Staff, *Implementing Legislation to Permit U.S. Adherence to the Berne Convention: A Draft Discussion Bill & Commentary*, 10 Colum-VLA J L & Arts 621, 634 (1986).

121. 17 USCA § 304(a)(1) (West 1977 & Supp 1991).

122. See note 67.

123. The argument does not go so far as to apply to works whose country of origin is the United States. See Berne Convention (Paris text), art 5(3) ("Protection in the country of origin is governed by domestic law."). As previously noted, the Berne Convention does not apply within the United States to domestic works. See Part III.B of this article.

124. See *Nimmer 2* § 7.16[B][1] at 7-157 (cited in note 9).

125. U.S. Copyright Office Staff, 10 Colum-VLA J L & Arts at 634 (cited in note 120).

126. The counterargument is that pre-1978 Berne works may be disadvantaged as a transitional matter ancillary to U.S. accession to the Berne Convention. See *Final Report*, 10 Colum-VLA J L & Arts at 587-95 (cited in note 91) (noting that Article 18(3) allows each country to determine "the conditions of application of this principle"). See note 45. That proposition is weak, for the reasons previously set forth. See text at notes 110-111.

measure[127] of retroactive protection to works that are still protected in their countries of origin, even if those works have fallen in the newly adhering state's (that is, the U.S.) public domain.[128] Notwithstanding that treaty requirement, the United States has explicitly declared that it is not according retroactive protection.[129] Moreover, the converse proposition abroad—namely, resurrection of U.S. copyrights in Berne nations that do not currently recognize them—was cited by Berne proponents as a primary reason for U.S. adherence to the Convention.[130] Thus, as some U.S. supporters of the Convention frankly conceded, the United States joined the Berne Convention by playing both sides of the game.[131]

On the surface, therefore, it seems that the United States' refusal to resurrect certain works from the American public domain runs afoul of our treaty obligations. To cite an example, consider works by the recent Nobel prize winner, Egyptian author Naguib Mahfouz: *The Thief and the Dogs*[132] and *Wedding Song*.[133] Given that the United States did not secure copyright relations[134] with Egypt[135] until Berne accession in 1989,[136] and further

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127. The view of the commentators falls into three classes—(1) actual practice of Berne Convention adherents allows outright abrogation of the retroactivity principle; (2) a reasonable application of Article 18(1) requires protection for at least some pre-existing works; and (3) lack of compliance with Article 18(1) may be excused to the extent needed to safeguard those who detrimentally relied on the public domain status of particular works. *Final Report*, 10 Colum-VLA J L & Arts at 593 (cited in note 91).

128. Berne Convention (Paris text), arts 18(1), 18(4).

129. Berne Convention Implementation Act of 1988 (cited in note 37). See *Nimmer I* § 1.05[A][2] at 1-36.3 (cited in note 13).

130. Hearings on HR 1623 at 238 (cited in note 29) (statement of Peter Nolan of the Motion Picture Association of America, September 16, 1987). See H Rep No 100-609 at 51 (cited in note 12) ("U.S. negotiators have asked Pacific Basin countries for retroactive protection.").

131. "It also is possible—and permissible under Berne—for us to negotiate retroactive protection in [Berne] countries without granting retroactive protection here to Berne works." Hearings on HR 1623 at 281 (cited in note 29) (statement of National Committee for the Berne Convention, Why the United States Should Join the Berne Copyright Convention (July 2, 1987)) (supported by broad coalition including ADAPSO, ASCAP, IBM, MPAA, U.S. Catholic Congress).

132. American U Cairo Press, 1961.

133. American U Cairo Press, 1981.

134. The preeminent commentator on the Berne Convention recommended, prior to U.S. accession, that the best way to address this problem would be for "the USA or USSR . . . to enter bilateral agreements concerning the way in which article 18(1) is to be applied." Ricketson, *Berne Convention Protection* at 674 (cited in note 12). Unfortunately, however, the United States joined the Berne Union without entering into any such compacts with Egypt or any other nation.

135. Arguably, the same proposition would not pertain with respect to a state with which the United States had pre-existent copyright relations, via either a bilateral treaty or the UCC. See Berne Convention (Paris text), art 18(3). For example, Sri Lanka joined the UCC in 1984. Therefore, a work by a Ceylonese first published in 1980 in Sri Lanka has never enjoyed a U.S. copyright (except as an unpublished work, discussed in the text below). Upon Sri Lanka joining the UCC in 1984, the United States was not required to protect that 1980 work. UCC (Paris text), art VII. Given that the Berne Convention contains an exception for works governed by "any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union," Berne Convention (Paris text), art 18(3), the resurrection argument may be inapplicable to the 1980 Sri Lanka work. See *Final Report*, 10 Colum-VLA J L & Arts at 592-93 (cited in note 91).

136. Like the United States, Egypt adheres to the Paris Act of the Berne Convention. See note 38. Egypt initially joined the Berne Convention in 1977. Accordingly, although arguably *The Thief and the Dogs* falls outside Convention protection, given its first publication in 1961 before Egyptian ratification, that argument is inapplicable to *Wedding Song*, which was first published in 1981, when Egypt already adhered to the Berne Convention.

assuming that first publication of Mahfouz's works occurred solely in Egypt,[137] then those works entered the U.S. public domain upon publication in 1961 and 1981 respectively.[138] Even after 1989, although the works are presumably still protected in Egypt,[139] the United States continues to deny them copyright protection.[140]

The United States implementation of the Berne Convention without public domain resurrection could be defended on the basis of the provision noted above, which provides that a newly adhering country need not grant protection anew if the subject work has fallen into the public domain of the country where protection is claimed "through the expiry of the term of protection which was previously granted."[141] Given that the United States

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137. Again, the hypothetical in the text is best framed if Mahfouz is regarded as a lifelong Egyptian national, if the subject works are regarded as having been first published solely in Egypt, and further if no foreign publication occurred within thirty days of that first publication in Egypt.

138. The instant example deals with lack of U.S. copyright because of ineligible nationality. A separate category to which the resurrection issue must be posed is works by foreign nationals which have forfeited American copyright protection due to failure to comply with U.S. formalities. See, for example, *International Film Exchange*, 621 F Supp 631 (SDNY 1985) (Italian movie injected into public domain because of failure to renew in name of proper party). Prior to the elimination of copyright formalities as a condition to United States copyright subsistence via the Berne Convention Implementation Act in 1989, all these stumbling blocks existed to doom the American copyrights of the unwary, including those belonging to foreign proprietors. See note 43. Though unfortunate for the proprietors whose works are thereby implicated, these issues probably raise no serious issue of treaty compliance.

139. Egypt accords the Berne norm of fifty years p.m.a. Arab Republic of Egypt, Copyright Law of June 24, 1954, as amended June 17, 1975, art 20, reprinted in *Copyright Laws and Treaties of the World* (UN and Bureau of Natl Affairs, 1990). It would therefore appear that the subject works are still protected under Egyptian law.

140. Berne Convention Implementation Act of 1988, 102 Stat at § 12 (cited in note 39). See *Nimmer 1* § 1.05[A][2] at 1-36.3 (cited in note 13). Of course, a work first published in 1990 in Egypt would secure U.S. copyright protection by virtue of its Berne Convention status. 17 USC § 104(b)(4) (1988 & Supp 1989). Accordingly, this area of concern applies only to works predating U.S. ratification of the Berne Convention on March 1, 1989, unlike the ongoing concern vis-à-vis anonymous and pseudonymous works. See text at note 97.

141. See Part III.B of this article. This provision governs foreign works which gained protection under U.S. law, but later forfeited it due to formal defects. See note 45. For those works, some protection was afforded under U.S. law, but that protection was thereafter forfeited from failure to comply with formalities. For example, consider a hypothetical Congolese work published with proper copyright notice in 1963, and thereafter republished without notice in 1968. The latter unnoticed publication caused copyright forfeiture in the United States. See *Nimmer 2* § 7.14[A][1] at 7-133 (cited in note 9). But inasmuch as this work from the Congo enjoyed U.S. copyright protection for five years, subsequent expiration of the U.S. term does not require resurrection of the copyright. Berne Convention (Paris text), art 18(2).

However, what of a foreigner's initial unnoticed publication abroad? (The scenario of a foreigner engaging in initial unnoticed publication within the United States is discounted as overly fanciful.) Imagine works published in Hungary in 1950, 1960, and 1980 without any copyright notice. The 1980 work was governed at publication by the 1976 Act, which required a copyright notice for U.S. protection to attach. *Hasbro Bradley, Inc. v Sparkle Toys, Inc.*, 780 F2d 189 (2d Cir 1985) (toy published by a Japanese company in Japan must bear a copyright notice complying with 1976 U.S. Copyright Act, notwithstanding that Japan requires no copyright notice to secure protection for its works and that, in any event, toys are not copyrightable works in Japan). But absence of such notice did not doom the copyright until lapse of five years without registration in the U.S. Copyright Office. See *Nimmer 2* § 7.13[B] at 7-118 (cited in note 9). Therefore, expiry of that work for which a term of protection was previously granted also poses no problem under Berne.

The 1950 work was governed at publication by the 1909 Act, whose extraterritorial notice requirements for initial publications have never been definitively resolved. The most persuasive dictum holds that U.S. law did not require any such notice. *Heim v Universal Pictures Co.*, 154 F2d 480,

protects all unpublished works created anywhere in the world, there was presumably at least a brief moment in 1961 in which *The Thief and the Dogs* was created and not yet published, during which interval the work was protected in the United States; and by the same token, *Wedding Song* must have enjoyed at least several days' copyright protection within the United States in 1981.[142] Now, this argument concludes, those terms have expired and need not be resurrected.[143]

The foregoing argument, albeit technical, cannot simply be dismissed.[144] Nonetheless, even its proponents concede that at least the "spirit"[145] of the Convention required the United States, upon accession, to resurrect from the public domain at a minimum works of Berne provenance still protected in their countries of origin and not commercially exploited in the United States.[146] Mahfouz's works may indeed have so qualified. For prior to winning the Nobel Prize, Mahfouz's was not a household name in the United States; let us imagine first that Mahfouz will live until 2000[147] and second that before U.S. accession to the Berne Convention on March 1, 1989, the only entity exploiting his works in the United States was Aliph Publishing Limited, which had printed 50,000 unsold copies of *Wedding Song*. Because it would be unfair to Aliph precipitously to deprive it of its right to disseminate materials on which it had reasonably expended funds in the past, an argument could be made that Aliph should be allowed to distribute existing printed copies, or to

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486 (2d Cir 1946). See also *United Dictionary Co. v G. & C. Merriam Co.*, 208 U.S. 260, 264 (1908) (Congress unlikely to require personal action beyond sphere of its control). Therefore, the 1950 work gained initial statutory protection in the United States; if that protection later expired, again no Berne problem would be posed.

Finally, there is the 1960 work, which was governed at publication by the 1909 Act as amended by congressional implementation of the Universal Copyright Convention. See Theodore R. Kupferman & Mathew Foner, *Universal Copyright Convention Analyzed* (Fed Leg Pubs, 1955). Copyright Office regulations interpret that unnoticed publication to have injected the work into the public domain. 37 CFR § 202.2(a)(3) (1990). This writer disagrees with that interpretation for reasons set forth elsewhere. See *Nimmer 2* § 7.12[D][2][a] at 7-102 (cited in note 9). Accepting this writer's position, the 1960 work also obtained initial statutory protection in the United States, which again solves any Berne conflict.

142. Depending on how long Mahfouz reworked his *oeuvre* from manuscript to publication, the gap could have run from days to decades. As noted above, the facts here are hypothetical for the sake of illustration, not descriptive of actual litigation.

143. *Final Report*, 10 Colum-VLA J L & Arts at 588-95 (cited in note 91).

144. Indeed, to the extent that a constitutional impediment bars Congress from resurrecting public domain works, refuge to that type of argumentation is inevitable. See note 183.

145. See HR Rep No 100-609 at 51 (cited in note 12) ("[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."); *Final Report*, 10 Colum-VLA J L & Arts 513, 592 (cited in note 91) (conceding that "some have informally suggested that the history of the Berne Convention and the at least implicit focus of international agreements on the protection of published works do not support this theory").

146. HR Rep No 100-609 at 51 (cited in note 12). The relevant balance to be struck here is between local (that is, American) industries that have arisen in reliance on given works being in the public domain within its territory (that is, the United States) and foreign authors whom the Convention is designed to protect. See HR Rep No 101-735, 101st Cong, 2d Sess 8 (1990) (concern not to displace entrenched interests in amending copyright statute). This phenomenon demonstrates once again the delicate political balance out of which the Berne Union is crafted. See note 68.

147. The date is chosen for ease of computation; this writer wishes Mr. Mahfouz very long life.

recoup its expenses plus some profit, or even to make all use of the subject works for a limited period of time, perhaps[148] ten years.[149] It is difficult to maintain that Aliph should be allowed to reprint 2,000,000 copies of *Wedding Song* in 1995, to commence motion picture production of *Wedding Song* in 2005, to start exploiting *The Thief and the Dogs* and other pre-1989 Mahfouz works in 2015, and to market a comprehensive Mahfouz laser disk compendium (based on pre-1989 works) in 2025. And it would be astonishing to learn that Hamza Publishers Limited, to be formed in 2001 and which, of course, will never have placed any reliance on Mahfouz's works being in the pubic domain prior to March 1, 1989, could undertake a saturation exploitation campaign of all Mahfouz's pre-1989 works commencing in 2035 and ending in 2045,[150] for the Egyptian copyright term subsists until 2050, and the United States nominally pledged to honor that term in its treaty adherence in 1989. Yet that last result—in which entities not yet formed are free to exploit Mahfouz's works forever without any copyright protection—is the actual state of affairs that Congress has legislated. Although it is indefensible as a transitional manner of easing into Berne membership,[151] as already noted, it can be defended through the technical argument regarding unpublished works set forth above; yet we would rest on less ambiguous argumentation[152] had Congress chosen to attempt at least token resurrection of some Berne Convention works.[153]

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148. This figure is drawn out of thin air, as all specific proposals for set time limits were rejected at early Berne revision conferences. Ricketson, *Berne Convention Protection* at 675 (cited in note 12).

149. As the World Intellectual Property Organization argues: "[T]hought must be given to those who have, quite properly, taken steps to exploit these works and who would be financially embarrassed, to say the least, if the authors suddenly acquired exclusive rights to control what they had been freely doing (publishing, performing, adapting, etc.)." *WIPO Guide to the Berne Convention* at 101 (cited in note 12).

> The provisions should also be of limited duration: although the word is not used, they are transitional in nature, and their essential purpose should be to ensure that third parties who have previously acted in the absence of legal restraint should not be penalised once these restraints have come into operation. On the other hand, this does not authorise these persons to continue their usage indefinitely: a situation must eventually be reached when the work is protected in relation to all persons.

Ricketson, *Berne Convention Protection* at 675 (cited in note 12).

150. "[T]o exclude retroactivity altogether will work harshly against the foreign author, and deprive the new convention of much of its *raison d'être*". Ricketson, *Berne Convention Protection* at 666 (cited in note 12). Because of this balance, the accommodation to local industries should be, at most, "temporary in nature" rather than perpetual as under U.S. law. Id.

151. "There is no basis on which the principle of retroactivity can be completely denied . . . . Thus, it would not be permitted to deny retroactivity altogether in relation to a particular class or classes of works." Id at 675 (cited in note 12).

152. Jurisprudence under the Berne Convention is such that, apart from the discussion concerning anonymous and pseudonymous works (see Part IV.A.1 of this article), an ambiguity could be claimed in each of the above purported inconsistencies. See text accompanying note 45. Yet that amorphousness does not undermine the viability of the thesis set forth herein. As noted below, a primary goal in U.S. adherence to the Berne Convention is the general perception of compliance, not the existence of a hypertechnical basis on which lawyers can posit an argument. See Part V.

153. Compare *Final Report*, 10 Colum-VLA J L & Arts at 587-95 (cited in note 91) (weighing Convention argument for public domain resurrection).

B. Inconsistencies Between United States Law and Congressional Goals

The preceding section examines aspects of copyright duration in which U.S. law is overly stingy to foreign copyright proprietors, in nominal[154] contravention of Berne minima. In addition, other aspects of copyright duration exist in which the United States is either more generous to foreigners than Berne requires[155] or is needlessly stingy to U.S. claimants. In the abstract, such rules are not problematic, given the Berne principles that (1) each nation is free to accord more protection than Convention minimum standards[156] and (2) each nation may deny Berne Convention protections to its own nationals.[157] Therefore, the public policy discussion that follows implicates concerns fundamentally different from the juridical focus of the previous section. Yet we shall see that prejudice both to foreigners and to Americans must be considered in evaluating the success of this country's Berne adherence.

1. *Non-Implementation of Comparison of Terms.* We have already taken note of the Rule of the Shorter Term.[158] To use a concrete example, consider a work written by an American author who died in 1950 and that was first published solely in the United States in 1910. To evaluate the term of protection for that work in France, the first principle is that copyright in France endures for fifty years p.m.a., meaning that copyright would continue until 2000. However, because France applies the Rule of the Shorter Term, it will not protect this work longer than its copyright term in its country of origin, that is, the United States.[159] Given that U.S. copyright protection for a work published in 1910 subsisted at the maximum (that is, assuming compliance with such formalities as notice, registration, and renewal) for seventy-five years, the work has been in the U.S. public domain since 1985.[160] Solely on that basis, it is also now in the public domain in France.

Now consider a work first published in France in 1930, written by a French citizen who died in 1935. Assuming compliance with U.S. formalities, the copyright in that work will subsist until 2005.[161] In France, by contrast, the

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154. See note 152.

155. The mere fact that the United States accords more to Berne Convention claimants than the bare minimum that the treaty requires should not be taken as an invitation to reform. Within the international copyright sphere, many national differences tend to cause differential results, with beneficial as well as detrimental results to Americans in particular instances. Germany, for instance, recognizes a royalty for library rentals and for sale of blank tape, neither of which finds a counterpart under U.S. copyright law. The practical result is that when Philip Roth's *Portnoy's Complaint* is borrowed from a Stuttgart library, and when videotapes are sold in Bremen, where a high percentage of the taping concerns U.S. television shows and movies, a royalty is collected which should find its way back to U.S. copyright proprietors. Conversely, when Günter Grass's *Der Butt* is borrowed from a Des Moines library, or when videotapes are sold in Los Angeles, some of which will be used to tape *Das Boot* or *Wings of Desire*, no monies are thereby generated for Germans.

156. Berne Convention (Paris text), art 7(6). See also id art 19. See Part III.B of this article.

157. As noted in Part III.B, the treaty protects Convention claimants, not domestic claimants.

158. See Part III.B of this article.

159. Plaisant, *France* at § 3[3] (cited in note 77).

160. 17 USC § 304(a) (1989).

161. Id.

work entered the public domain in 1985.[162] What is the impact of that provision within the United States? Recall that the Berne Convention provides a term of protection for copyright that is "governed by the legislation of the country where protection is claimed; however, unless the legislature of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."[163] The United States remains a country whose "legislature . . . otherwise provides"; no distinction is drawn for copyright duration purposes[164] under U.S. law between American and foreign works.[165] Once qualified for protection, a foreign work continues to enjoy U.S. copyright for the full U.S. term, even if the copyright lapses in its country of origin.[166] Therefore, the U.S. copyright term will last twenty years past expiration of the French term.

Accordingly, having failed to avail itself of the Rule of the Shorter Term amidst a world copyright community that largely does so avail itself,[167] the United States has the worst of both worlds—U.S.-originated works often fall into the public domain abroad sooner, whereas Berne-originated works often fall into the U.S. public domain later. Congress' concerns about United States balance of trade is thus doubly exacerbated.

2. *Expiration After Seventy-Five Years.* We have already noted the arguable lack of United States compliance with the Berne Convention through failure to protect certain pre-1978 works for the Berne-prescribed term of fifty years

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162. Plaisant, *France* at § 3[1][a] (cited in note 77).

163. Berne Convention (Paris text), art 7(8). See Part III.B of this article.

164. For other purposes—namely, whether or not registration is a prerequisite to an infringement action—U.S. law does draw a distinction between U.S. works and works of foreign origin. See *Nimmer 2* § 7.16[B][1][b] at 7-157 (cited in note 9). Compare Berne Convention (Paris text), art 5(3).

165. 17 USC §§ 302-305 (1989). The United States accomplishes non-execution of comparison of terms through a means slightly different from the Berne Convention expectation. Whereas the Convention contemplates a baseline condition of comparison of terms being applicable unless explicitly negated, U.S. law is drafted to reflect a baseline condition of no comparison of terms, which is not disturbed by any specific provision geared at comparison of terms. See 17 USC § 104 (qualification for copyright protection); §§ 302-304 (duration for qualified works) (1989). The divergent treatments perhaps reflect the Berne Convention's expectation that the treaty be self-executing, juxtaposed against Congress' decision not to execute the treaty directly. See note 84.

If the Berne Convention is deemed to be self-executing under U.S. law, what difference results? Imagine the heirs of a Peruvian author suing for copyright infringement in the United States, during the continued pendency of the U.S. copyright but following the Peruvian copyright expiration. In that instance, the defendant could be placed in the unlikely position of arguing that the Berne Convention is self-executing under U.S. law, that the baseline expectation is accordingly to apply comparison of terms in this country, that no explicit provision of U.S. law "otherwise provides," and on that basis to conclude that the subject work is in the U.S. public domain. That scenario is sufficiently implausible as to provide little prospect for realization.

166. See *Nimmer 2* § 9.01[D] at 9-24 (cited in note 9).

167. Most principal U.S. trading partners follow the Rule of the Shorter Term. See *Nimmer 3* § 17.10[A] at 17-54 (cited in note 13). See also section 3 of the national chapters in Nimmer & Geller, eds, *International Copyright Law and Practice* (cited in note 22). Other prominent exceptions to the Rule of the Shorter Term are Canada and the United Kingdom. See Vaver, *Canada* §§ 3[3][a] (cited in note 27); William R. Cornish, *United Kingdom* in Nimmer & Geller, eds, *International Copyright Law and Practice*, § 3[3] (cited in note 22).

p.m.a. That is, the 1915 Spanish work invoked above has a twenty-five-year shortfall in its U.S. copyright duration.[168]

Of greater concern to the U.S. pocketbook is the 1910 American-authored work detailed above.[169] That work ideally would be protected until 2000 in France; yet fifteen years of protection is lost in that country simply because the United States cuts short the term of works for its own citizens. By extending the term of protection for U.S. works within the United States, Congress could extend the ownership interests of Americans outside U.S. borders as well.[170]

V

THE SOLUTION: A PROPOSAL FOR HARMONIZATION

We have now seen three instances in which the United States is arguably impermissibly stingy in the protection it accords to Berne Convention claimants.[171] Given that one of the two prime motivations for U.S. accession to the Berne Convention was to allow the United States to hold its head high in the international copyright community,[172] those instances are troublesome.[173] In order to reap the benefits that flow from appearing to be moral, the United States must undertake activities that will be perceived as moral.[174] Thus, our own goal in Berne adherence is undermined if, although technically in compliance with a casuistic reading of the Berne Convention, our good faith will be questioned by the world community.[175]

In addition, we have seen two instances in which the United States is disadvantaging its own citizens, either (1) by according foreign copyrights for longer than necessary,[176] thus requiring a payment by user industries in the United States that is not required of user industries abroad for exploitation of the same work, and (2) by cutting short the term of U.S. copyrights abroad as

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168. See Part IV.A.2.a of this article.

169. See Part IV.B.1 of this article.

170. This example shows an exception to the general principle that copyright exerts no extraterritorial impact. See *Nimmer 3* § 17.02 at 17-19 (cited in note 13).

171. See Parts IV.A.1, IV.A.2, IV.A.3 of this article.

172. See Part II.B of this article.

173. When the current U.S. administration evaluated the compliance of various nations with copyright requirements, it criticized those nations which accord an inadequate term. See *1991 National Trade Estimate Report* at 42, 129 (cited in note 1) (Chile accords only thirty years p.m.a. rather than the required 50 years p.m.a.; Japan protects sound recordings as a "neighboring right" for only thirty years).

174. See Report on the Berne Convention Implementation Act of 1988, H Rep No 100-609 at 19 (cited in note 12) ("The United States should not be perceived as imposing a double standard on the rest of the world."). See note 152.

175. What if the United States is deemed to be out of compliance with the Berne Convention? Another country of the Berne Union, if aggrieved over a perceived failure to implement the Convention in the United States, may bring the matter to the International Court of Justice. Berne Convention (Paris text), art 33(1). Although the Berne Convention permits a country to specify in its instrument of accession that it declines to submit to jurisdiction of the World Court, the United States did not avail itself of that "out." See Department of State, Bureau of Economics Business Office, Public Notice 1086, 53 Fed Reg 48748 (Nov 22, 1988). Therefore, the instant proposals could forestall an embarrassing suit in The Hague.

176. See Part IV.B.1 of this article.

well as at home,[177] thus depriving U.S. proprietors of royalties that they could otherwise earn from foreign users. Both these phenomena decrease the U.S. balance of payments, thus subverting the other prime Congressional motivation for adhering to the Berne Convention[178].

The solution to these problems is to amend U.S. law. Although the legislative process can be cumbersome,[179] with respect to amendments for the sake of Berne Convention compliance, there is cause for hope. Congress self-consciously took a "leap before you look" approach in adhering to the treaty and passing the Berne Convention Implementation Act of 1988; in the time since, Congress has already acted more than once to fine-tune U.S. copyright law in light of Berne standards.[180] Based on the analysis set forth above, copyright duration should be added to the agenda, with some very real prospects for practical success.[181]

On one issue, however, a candid admission must be made that there is no easy solution: resurrection of public domain works. Congress considered this matter in the course of deliberating the Berne Convention Implementation Act of 1988, and consciously rejected an approach whereby any works of Berne Convention provenance would be reclaimed out of the U.S. public domain, for both political[182] and constitutional[183] reasons.[184] From a pragmatic standpoint, that issue is best left out of the present calculus.

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177. Id at subsection 2.

178. See Part II.B of this article.

179. As already noted, the Berne Convention Implementation Act was refined until acceptable to a unanimous Senate and House. See note 37. Even with that crushing steamroller readied, however, Congress still only tiptoed forward:

> 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 [Berne Convention Implementation] Act.

HR Rep No 100-609 at 20 (cited in note 12) (emphasis added).

180. On architectural works, see note 46. On moral rights, see note 47. Both the architectural works and moral rights amendments were packaged together for enactment as part of the Judicial Improvements Act of 1990; yet another portion of that omnibus law consisted of the Computer Software Rental Amendments Act of 1990, Pub L No 101-650, 104 Stat 5134 §§ 801 et seq. Congress tailored that amendment as well to avoid "possible conflict with our country's obligations under the Berne Convention." Report on Copyright Amendment Act of 1990, HR Rep No 101-735 at 10 (cited in note 31). See *Nimmer 2* § 8.12[B][8] at 8-151 (cited in note 9).

181. With respect to public domain resurrection—a subject that is one focus of this article, see Part IV.A.3 of this article—the legislative history states: "[W]e remain persuaded that any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of [c]onstitutional, commercial and consumer considerations is possible." HR Rep No 100-609 at 52 (cited in note 12).

182. See HR Rep No 100-609 at 51 (cited in note 12), adverting to burdens placed on "commercial predictability and fundamental fairness" if works are yanked from the public domain, particularly if exploitation has commenced with respect to those works.

183. Id. ("difficult questions, possibly with constitutional dimensions"); id at 52 ("[c]onstitutional, commercial and consumer considerations"); *Final Report*, 10 Colum-VLA J L & Arts at 591 (cited in note 91). The argument runs that Congress may legislate copyright protection pursuant to the Copyright Clause, which by its terms may extend only "for limited times." A grant of more time after lapse of the "limited time" to which the Constitution refers exceeds Congress' power. US Const, Art II, § 2, cl 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). See *Graham v John Deere Co.*, 383 US 1, 5 (1966)

The remaining items set forth above can be redressed by a Copyright Duration Amendment of 1992, consisting simply of the following[185] four provisions:

(a) The United States adopts the Rule of the Shorter Term;

(b) The United States extends the copyrights in all pre-1978 works (apart from works for hire[186]) that otherwise would endure[187] for seventy-five years until the later to occur of seventy-five years or fifty years p.m.a.;

(c) With respect to anonymous and pseudonymous works [of Berne Convention origin] [which were protected under American copyright law as of March 1, 1989],[188] notwithstanding any other provision of law, United States copyright shall not lapse earlier than fifty years after the work has been lawfully made available to the public; and

(d) All works subject to renewal on or after the effective date of the Copyright Duration Amendment of 1991 [or alternatively, on or

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("Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain."). See also S Rep No 473, 94th Cong, 1st Sess 159 (1975) ("[T]here can be no protection for any work that has fallen into the public domain . . ."). See generally *Nimmer I* § 1.05 at 1-6.2 (cited in note 13).

If the foregoing authorities are accepted, Congress cannot reclaim works out of the public domain. Nonetheless, the draft legislation prepared by the staff of the Copyright Office at the request of Senator Mathias would have recaptured public domain works under specified circumstances. Copyright Office Staff, 10 Colum-VLA J L & Arts at 625-28 (cited in note 120). Implicitly, the Copyright Office thus believed such recapture to be constitutional. In addition, Congress has authorized the President to issue copyright proclamations, which at times result in retroactive protection being accorded to works of foreign nationals. See *Nimmer I* § 1.05[A][2] n10 at 1-36.4 (cited in note 13).

These two strains can be harmonized by invoking congressional power apart from the Copyright Clause. Congress can regulate international commerce, and facilitate the entry of treaties with other sovereign states. US Const Art I, § 8, cl 3 (commerce clause); US Const Art II, § 2, cl 2 (president may enter treaties with "advice and consent" of the Senate). See *Authors League of America, Inc. v Oman*, 790 F2d 220 (2d Cir 1986) (upholding Manufacturing Clause of Copyright Act under Commerce Clause). See also *Nimmer I* § 1.09 at 1-60 (cited in note 13). The matters addressed in this article rest on the need to fulfill this nation's treaty obligations under the Berne Convention, with an eye to the effect that the copyright industries convey on our foreign trade. See Part II.B of this article. Therefore, those constitutional provisions may justify public domain resurrection even if its status under the Copyright Clause *simpliciter* be conceded suspect.

184. HR Rep No 100-609 at 27, 51-52 (cited in note 13); S Rep No 100-352 at 48 (cited in note 24). Although Congress left the door open to possible revisitation of the issue (see note 181), the inherently political nature of the trade-offs incident to public domain resurrection necessitate significant fact finding from affected parties before a workable legislative solution can be crafted. See text at notes 146-150.

185. The language that follows is intended as a summary, rather than as a precise drafting of the wording for Congress to implement.

186. As noted previously, works for hire occupy an anomalous status under the Berne Convention, and are therefore left out of the instant proposal. See note 86. Moreover, because the term for works for hire under U.S. law has never been calibrated by the author's lifetime, more study is needed before adopting the instant proposal with respect to that category of copyrightable compositions.

187. To the extent that a work entered the public domain in 1985 because of a notice defect, for example, it is not proposed herein to resurrect the copyright.

188. Each of these two bracketed phrases is optional. See the discussion in the text below.

after March 1, 1989][189] shall be renewed automatically, without the need to register the renewal with the Register of Copyrights.

These four simple changes redress all the problems discussed above, except the politically knotty matter of public domain resurrection.[190] Provision (a), by enacting the Rule of the Shorter Term, furthers Congress' balance of payment motivation[191] by stemming outflow of money from U.S. users to foreign copyright proprietors.[192] The next two provisions extend copyright terms under narrowly tailored circumstances.[193] Provision (b) redresses the presumptively inadequate U.S. term now afforded to pre-1978 Berne Convention works that were published many years prior to the author's death,[194] and further alleviates the needless curtailment of duration abroad for pre-1978 U.S. works.[195] Provision (c) redresses the currently inadequate protection under U.S. law for certain anonymous and pseudonymous works.[196] Finally, provision (d) provides a salutary departure from onerous formal requirements that impermissibly burden Berne claimants.[197]

In contrast to the considerable benefits that would flow from the above proposals, the corresponding costs to U.S. users and creators—who, after all, are the constituents to whom Congress must account—promise to be minimal. On that basis, it may be hoped that these proposals will not excite heated opposition. Provision (a) is solely of benefit to U.S. users and imposes

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189. The starting point for this provision should optimally commence with U.S. adherence to the Berne Convention, that is, on March 1, 1989. Such a legislative provision would, however, result in the recapture from the public domain of works whose renewal was due during 1989, 1990, or 1991, but not effectuated during those years. Given the Congressional antipathy to copyright resurrection (see note 183), the alternative is to make this provision prospective only. Although less than ideal, that compromise is far better than the status quo. See Part IV.A.3 of this article. As previously noted, political compromises are not unknown in the Berne sphere. See note 68.

190. See Part IV.A.3 of this article.

191. See Part II.B of this article.

192. See Part IV.B.1 of this article.

193. By analogy to the argument that Congress lacks the power, under the Constitution, to resurrect works in the public domain (see note 183), one could maintain that extension of a previously accorded copyright term exceeds Congress' authority under the Copyright Clause. See *Nimmer 1* § 1.05[A][1] at 1-36 (cited in note 13). For with respect to preexisting works, neither resurrecting a copyright nor extending a term serves "To promote the Progress of Science and useful Arts." US Const, Art II, § 2, cl 8. Nonetheless, we have already seen that constitutional bases apart from the Copyright Clause validate the proposal contained herein. See note 183.

194. See Part IV.A.2.a of this article.

195. Id at subsection B.2.

196. Id at subsection A.1. As noted at note 88, depending on date of publication, certain anonymous and pseudonymous Berne Convention works are advantaged under U.S. law. The instant proposal does not affect those advantaged works; instead, it redresses the inadequate term accorded under U.S. law to other such works.

To the extent Congress wishes to "balance" extension of term for some works against a possible diminution for others, it could choose to abandon the special U.S. term for anonymous and pseudonymous works, and adopt the Berne norm. The result would be to accord less protection to anonymous and pseudonymous works—both of United States and of Berne Convention origin—which are published promptly following creation, and more protection to those which are published many decades after creation.

Finally, an amendment to U.S. law should track the Berne proviso that protection will not endure when "it is reasonable to presume that [the work's] author has been dead for fifty years." Berne Convention (Paris text), art 7(3). See note 98.

197. See Part IV.A.2.b of this article.

no cost on American authors. Provision (b) exerts limited impact, and places only a small restraint on U.S. user groups; and that restraint is no greater than the concomitant advantage to American authors of pre-1978 works. Provision (c) is highly circumscribed, and is even further reduced in scope if either or both of the optional bracketed materials are included—it will only apply to probably a tiny class of works, given that the number of anonymous and pseudonymous works of Berne Convention origin is presumably small to begin with, and the further limitation to works that remained unpublished for fifty years reduces this category almost to the vanishing point. Therefore, provision (c) conveys large symbolic benefits at almost no practical cost.

Finally, provision (d) is actually a subset of a larger proposal currently pending before Congress to eliminate the formality of renewal registration altogether as a condition to continued copyright subsistence.[198] That larger proposal benefits both the domestic and international spheres; as long as Congress wishes to solve the formality problem for Berne Convention claimants, there is no reason why Congress cannot go further and also relieve U.S. claimants of this burdensome technicality.

VI

CONCLUSION

A gap exists in U.S. copyright law which can be closed by the legislation suggested above. These proposals would help America's balance of payments deficit, which Congress desired in adhering to the Berne Convention. They would increase the moral luster of the United States in international copyright affairs, which Congress further desired in adhering to the Berne Convention. In the final analysis, they are "simply the right thing for a great nation to do."

198. See S 756 and HR 1612, 102d Cong, 1st Sess (March 21, 1991), reproduced in Copyright L Rptr (CCH) ¶ 20,626 (March 21, 1991).