

THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS

Samuel Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9 (1986)

In 1886, most national copyright laws were not much more than a few decades old. The United Kingdom was, of course, an exception as it had enacted the first modern copyright statute as far back as 1709 (the "Act of Anne"). The scope of this Act was quite limited, and it was restricted to books, but during the next hundred years protection was extended in piecemeal fashion to other kinds of works, including engravings, sculptures and dramatic works. In most other European countries, however, the situation as regarded the protection of authors was similar to that which had obtained in the United Kingdom prior to 1709: there was no express recognition of authors' rights, and the only protection available was that accorded through the grant of privileges or monopolies for the printing of particular books. These privileges were usually granted by governments to publishers and printers, rather than authors. . . . A similar situation prevailed for longer in most European countries, in particular France, the German and Italian states, and Spain. Even in this country, the members of the Stationers' Company strove long and hard throughout the eighteenth century to retain their traditional privileges with respect to the printing of books. Thus, it was not until the end of that century that it was firmly established that the rights accorded under the Act of Anne were authors' rights, rather than publishers' or printers' rights. In France, on the other hand, completely new ground was broken when the ancien régime was swept away by the Revolution of 1789. The rights of man, now enshrined in the new revolutionary laws, were soon recognized to include the rights of authors in their works. A Law of 1791 therefore accorded an exclusive right of public performance to the authors of dramatic and musical works for a period lasting five years after their deaths. A second Law of 1793 granted, in respect of all works, what we would now call an "exclusive reproduction right," enduring for the life of the author. There was a conscious philosophical basis to these laws that was lacking in the Act of Anne, in that the former conceived of the rights of authors as being rooted in natural law, with the consequence that these laws were simply according formal recognition to rights that were already in existence. In the years following the French Revolution, this new conception of authors' rights spread to other continental European countries, in particular Belgium, the Netherlands and the Italian states. It also influenced the adoption of copyright laws in the various German states after the dissolution of the Holy Roman Empire brought an end to the system of imperial privileges that had formerly applied in those states. Other European countries followed suit, and by 1886 almost all the European states, including the newly unified states of Italy and Germany, had enacted their own copyright laws. Outside of Europe, the United States had had a copyright law since 1791, and laws on copyright were to be found in seven other states of Latin America. A number of other countries, such as Greece, Bulgaria and Turkey, protected authors' rights in a partial or incidental fashion through provisions in their general civil, criminal or press laws.

Many of these new laws drew on the models provided by the two French Laws of 1791 and 1793, although it should be noted that French copyright law continued to develop rapidly throughout the nineteenth century and to do so as much through the jurisprudence as through legislative enactments. Nevertheless, while the principal issues addressed by national laws were the same, the solutions adopted were often quite different. Most laws extended protection to a wide range of productions of a literary and artistic character, including works intended for public presentation, such as musical and dramatic works. But some categories of works, such as architectural, oral and choreographic works, were protected only in a few countries, and there were widely differing approaches to the protection of photographic works. Great diversity also existed in relation to the matter of duration of protection. In two Latin American countries, Guatemala and Mexico, this was perpetual, but in all other countries protection was limited in time. This was usually for a period comprising the life of the author together with a fixed period after his death. France had led the way here with a post mortem auctoris term of 50 years, but in 1879 Spain adopted a period of 80 years, and other nations had terms ranging between 5 and 50. A few other

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countries, such as the United States of America, had terms that were not fixed to the life of the author, and some, including the United Kingdom, accorded different terms of protection to different categories of works. Finally, in Italy there was a system of paying public domain, under which works were protected absolutely for a given period (the author's life or 40 years after publication), and this was followed by a further period of 40 years during which the work might be used by third parties subject to a payment of a compulsory royalty to the author.

The rights protected under these early national laws also varied considerably, although the principal ones recognized were those of reproduction and public performance. The right to make translations was recognized to differing degrees, and was often of far shorter duration than the other rights, particularly in the case of foreign authors. The scope of the reproduction right was also variously interpreted: some countries, for example, did not consider that artistic works in one dimension were infringed by the making of a reproduction in another dimension and the matter of adaptation of works was treated in widely differing ways. Again, the reproduction of musical works by mechanical devices, such as piano rolls and music boxes, was not considered as an infringement in certain countries. Most national laws recognized exceptions and limitations to the exercise of rights, for example, for educational or religious purposes, but, once again, there were great variations here. Finally, most laws required that the author comply with some kind of formality before protection would be accorded. The nature and effect of these formalities differed widely from country to country, but the chief ones were registration, the deposit of copies, and the making of declarations. In some cases, failure to comply with formalities was fatal, meaning that the work fell into the public domain; in other cases, it meant merely that the copyright owner was unable to enforce his rights until he rectified the omission. By 1886, only a few countries, including Belgium, Germany and Switzerland (but not France), had abolished formalities altogether.

The above sketch has concentrated on the contents of national copyright laws in the pre-1886 period. However, it will be clear that there is an equally important international dimension to the protection of authors' works. Literary and artistic works and musical compositions recognize no national boundaries, even where translation into another language is required for a work to be fully appreciated in a particular country. Thus it was that after the need for protection of authors by national laws had been recognized, the works of these authors still remained vulnerable to copying and exploitation abroad. These activities, commonly referred to as "piracy", had been a long-established feature of European social and cultural life, and this continued to be the case for a considerable time after the enactment of national copyright laws. The attitudes of many countries to these practices were highly anomalous: whilst prepared to protect their own authors, they did not always regard the piracy of foreign authors' works as unfair or immoral. Some countries, in fact, openly countenanced piracy as contributing to their educational and social needs and as reducing the prices of books for their citizens. The particular victims of these practices were the United Kingdom and France. During the eighteenth century English authors suffered from the activities of Irish pirates who could flood both the English and other markets with cheap reprints; after the Act of Union with Ireland in 1800, the chief threat came from the publishing houses of the United States and this continued to be a major problem for the rest of the century. French authors, in turn, suffered from the activities of pirates located in Switzerland, Germany, Holland, and in particular, Belgium. By the early nineteenth century, Brussels was a major center for the piracy of French books, and this led to considerable strains in the relations between France and Belgium. Piracy was likewise rampant between the different German and Italian states.

This widespread piracy of foreign works was the principal reason for the development of international copyright relations in the mid-nineteenth century. The arguments that raged both for and against the protection of foreign authors at this time have a surprisingly modern ring to them. On the one hand, it could be said that the activities of the pirates resulted in cheaper copies and the greater availability of the work in question. In countries hungry for knowledge and enlightenment, this could only be to the advantage of the public interest; and this, indeed, was the reason for the persistent refusal of the United States to protect foreign works throughout the nineteenth century. On the other hand, the moral and practical arguments in the author's favor were obvious: not only was he being robbed of the fruits of

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his creativity, but this would discourage him from continuing to create, with resultant loss to his own, and other, countries.

It is hard to identify the point at which a country no longer sees advantage in the piracy of foreign works, and decides to extend protection to the authors of such works. It may be that the activities of its own authors have increased, and that the latter now desire protection for their own works abroad. It may also be that, after a while, a country wishes to obtain some kind of international respectability, and to avoid the opprobrium of being labelled as a nation of pirates. Another factor may be that countries with large literary and artistic outputs bring pressure to bear on their more recalcitrant neighbors, promising various forms of trade advantage in return for copyright protection for their authors. Finally, a pirate nation may come to recognize that the rights of authors in their works are of a proprietary nature, and that they should therefore be protected internationally in the same way as other property of foreigners. All these factors were certainly applicable in the case of Belgium, which, in the mid-nineteenth century, switched suddenly from being the chief center of piracy for French works to being one of the most zealous defenders of authors' rights. The same factors applied to many other countries as they began to enter into international copyright relations with each other. . . .

In a bold move in 1852, France passed a decree extending the protection of its laws to all works published abroad, irrespective of whether the law of the country in question accorded corresponding protection to the works of French authors. This measure was consistent with the philosophical basis of French copyright law, according to which authors' rights, being natural rights of property, should not be subject to artificial restraints such as nationality and political boundaries. Nevertheless, a practical motivation also lay behind the decree. Up to this time, France had found other nations reluctant to enter agreements for the protection of French works on a reciprocal basis. She therefore hoped that the unilateral grant of protection to authors from these countries in France would "shame" them into responding in like manner. Whether or not there is a causal connection is hard to say, but the fact remains that after 1852 the blockage cleared, and France entered agreements with a large number of their nations under which each agreed to accord protection to the works of the other.

Bilateral copyright agreements of this kind had, in fact, become quite common by the middle of the century. The first country to enter such agreements was the Kingdom of Prussia which made 32 of these with the other German states in the years 1827 to 1829. The basis of these agreements was simple or formal reciprocity, under which each state undertook to accord to the works of the other state the same treatment that it accorded to its own works (the principle of "national treatment"). These early German agreements, however, were of a special character, as their purpose was to fill the gap left by the failure of the legislature of the Germanic Confederation to enact federal copyright law. Subsequent bilateral agreements between fully autonomous states tended to include more substantive provisions embodying common rules that each country undertook to apply to the works of the other, in addition to the basic principle of national treatment. The basis of these agreements thus came closer to what is called "material" or substantive reciprocity under which there is approximate parity between the level of protection accorded by each state to the works of the other. The first example of such a treaty was that between Austria and the Kingdom of Sardinia in May 1840, and France and the United Kingdom, the two leading literary countries of the period, were not far behind. By 1886, there was an intricate network of bilateral copyright conventions in force between the majority of European states, as well as with several Latin American countries. Of these, France was party to the most agreements (13), followed closely by Belgium (9), Italy and Spain (8 each), the United Kingdom (5) and Germany (5).

The basis of the majority of these conventions was national treatment, but, as stated above, they also contained a number of common rules which each country undertook to apply in its protection of works from the other country. There was usually a statement of the categories of works covered by the agreement, and specific provision was generally made for the protection of translation and performing rights. Restrictions in respect of particular kinds of use were also often allowed relating, for example, to education or the reproduction of newspaper articles. The scope and detail of these provisions differed considerably from one convention to another, but the most "advanced", in terms of protection of authors'

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interest, were to be found in the conventions made by France, Germany and Italy in the early 1880s. With regard to duration of protection, most of the pre-1886 conventions required material reciprocity, providing that country A was not obliged to protect the works of country B for any longer period than that accorded by state B to its own works, and in any event for no longer than country A protected its own nationals.

There were wider discrepancies with respect to formalities: under some conventions, compliance with the formalities of the country of origin of the work was sufficient to obtain protection in the other state; in other conventions, it was necessary for an author to comply with the formalities of both states. Matters were further complicated by the fact that the duration of many conventions was uncertain, in that they were linked to some wider treaty of trade or commerce between the countries in question and might suddenly fall to the ground if the latter was revoked or renegotiated. Another source of uncertainty arose from the insertion of "most favored nation" clauses in many copyright conventions. The effect of these was that the contracting parties agreed to admit each other to the benefits that might be accorded to a third state under another treaty that was made by one of them with that state. The effect of such clauses was that a copyright convention between countries A and B might be abrogated, in whole or in part, by the terms of another convention made by either country A or B with country C if this agreement contained additional measures for the protection of copyright. While these clauses did not mean any loss of protection for authors, they obviously made it difficult for an author from country A to know, at any one time, what level of protection he was entitled to in country B, and vice versa.

It will be clear that this network of bilateral agreements meant that there was little uniformity in the protection that an author might expect to receive in countries other than his own. As far as Europe was concerned, the threat posed by international piracy earlier in the century had largely disappeared by 1886, but quite a number of European states still remained reluctant to enter bilateral agreements on copyright. These included the Scandinavian countries, the Netherlands, Greece, the newly independent Balkan states, and, most importantly, the Russian and Austro-Hungarian empires. Outside Europe, much of the world's surface was then controlled by one of the chief European colonial powers. Of those states which were independent, very few had entered any international copyright agreements, and many, in fact, had no internal copyright laws. . . .

[M]oves for a more widely based and uniform kind of international copyright protection began in the middle of the nineteenth century. Several schools of thought can be seen at work here. The first favored a universal codification of copyright law under which literary and artistic works would receive equal protection in every country. This was, of course, an idealist conception, which was based firmly on the natural law view of authors' rights according to which these rights should be protected universally without artificial constraints of time, nationality or territoriality. The precise mechanisms by which this state of affairs was to be brought about was never entirely clear, but presumably it would require some kind of international arrangement under which each nation would agree to adopt a common set of provisions guaranteeing protection to authors. In contrast to this was a more pragmatic approach that recognized the need for more uniform international protection of authors' rights, but advocated more limited means for achieving this, mainly through the replacement of the numerous existing bilateral agreements with a single multilateral instrument. At the start, it was the first of these views that predominated. As early as 1839, support for a universal law of copyright was expressed by Viscount Simon speaking in the French Chamber of Peers, and two years later by Lamartine in the Chamber of Deputies. However, the first organized expression of opinion is to be found in the resolutions of a Congress on Literary and Artistic Property that met in Brussels in 1858. This had been summoned at the initiative of a miscellaneous group of Belgian authors, lawyers and public officials, and was attended by nearly 300 persons with a wide range of cultural interests. Several nations, such as Denmark, the Netherlands and Portugal, sent official delegates, but there were participants from each major European country as well as the United States. There was a general consensus among the participants on the need for uniform international copyright protection, and a number of resolutions were passed. . . .

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The resolutions of the 1858 Congress, with their strong universalist flavor, foreshadowed many of the provisions that were to be embodied in national laws and bilateral conventions over the next three decades, and, of course, in the Berne Convention itself. . . . In 1877, another international artistic congress was held at Antwerp to celebrate the tercentenary of the birth of Rubens. This passed a further set of resolutions, similar to those of the 1858 Brussels, Congress, but of particular importance was a unanimously adopted motion requesting the recently established Institute of International Law to draft a universal law on artistic works. The Institute agreed to undertake this work: a study group of different national representatives was appointed, and its terms of reference were extended to include literary works. After this initial enthusiastic response, the Institute appeared to do nothing more, and the project for a draft universal law quietly lapsed.

. . . In 1878, a major international literary congress was held in Paris at the time of the Universal Exhibition in that city. This was organized by the French *Société des gens de lettres*, and drew together some of the most distinguished authors, lawyers and public figures of the day from three continents. Presided over by no less a personage than Victor Hugo, the congress concerned itself with fundamental questions of principle concerning the protection of authors. After lengthy debates, a number of resolutions acknowledging the natural and perpetual rights of authors were passed, and a call was addressed to the French government to summon an international conference to formulate a “uniform convention for the regulation of the use of literary property.” A similar call for the constitution of a general union of states for the adoption of a uniform law for the protection of artistic property was made by an international artistic congress that was held in Paris later that year. The French government, for reasons that are unclear, failed to respond to either call for action, but a more practical development flowing from the 1878 literary congress was its decision to establish the International Literary Association. This was to be open to literary societies and to writers of all nations, and had the following objects:

1. The protection of the principles of literary property.
2. The organization of regular relations between the literary societies and writers of all nations.
3. The initiation of all enterprises possessing an international literary character.

The first president of the Association was Victor Hugo, and its initial membership was extremely wide, being drawn from nearly twenty countries. Since this time, it has played a significant and catalytic role in the majority of international copyright developments. Although it has always had a strong French orientation, its annual congresses have been held in many different cities, beginning with London in 1879. Five years after this, its membership was expanded to include artists, and its name was changed to its present title, the International Literary and Artistic Association (usually known as “ALAI” which is the abbreviation of its French title, “*L’Association littéraire et artistique internationale*”). To ALAI belongs the credit for being the initiator of the meetings and negotiations that led to the formation of the Berne Union. From the very start of its existence, it concerned itself with the legal questions relating to the international protection of authors. Strong universalist views were expressed at several of its early congresses, but at its congress in Rome in 1882 a more practical proposal for a limited multilateral convention was adopted. This was based on a cannily conceived motion prepared by Dr. Paul Schmidt of the German Publishers’ Association. It began by saying that this was not the time or place to begin discussion of a new international instrument on copyright. Widespread discussions and consultations were needed before this could be done, but, with a view to beginning this process, the motion charged the office of ALAI with the task of undertaking:

the necessary measures for initiating, in the press of all countries, as extensive and profound discussion as possible on the question of the formation of a Union of literary property, and for arranging at a date to be subsequently fixed, a conference composed of the organs and representatives of interested groups, to meet to discuss and settle a scheme for the creation of a Union of literary property.

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The meeting place chosen for the conference was Berne, in neutral Switzerland. This was fitting, as Berne had already been the venue for a number of important international meetings on various matters and the headquarters of several international organizations, such as the Universal Postal Union and the International Telegraph Union, were situated there. . . .

After three days of intensive discussions, the ALAI conference produced a compact convention of 10 articles. Its basic aim was stated to be the “constitution of a general Union for the protection of the rights of authors in their literary works and manuscripts.” The fundamental principle of protection was national treatment, which was accorded on the criterion of place of publication or performance of the work rather than the nationality of the author claiming protection. This was subject to the condition that authors claiming protection had complied with the formalities required by the law of the country where such publication or performance had taken place. Protection was also extended to manuscripts and unpublished works, and the expression “literary and artistic works” was defined as including:

books, brochures or all other writings; dramatic or dramatico-musical works, musical compositions with or without words, and musical arrangements; works of design, painting, sculpture, engraving, lithography, maps, plans, scientific sketches and in general any literary, scientific and artistic work whatsoever, which may be published by any method of printing or reproduction.

. . . Another significant provision reserved to states of the proposed Union the right to enter separately between themselves particular arrangements for the protection of literary and artistic works, as long as these arrangements did not contravene the dispositions of the Convention. A similar provision had been included in the recently concluded Paris Convention on Industrial Property, and was an implicit acknowledgement that the draft convention was very far from representing a universal codification of the law of copyright. It was therefore clear that the convention only established a minimum level of protection which member states would be free to augment through other bilateral arrangements. Finally, provision was made for the establishment of an international office of the proposed Union which was to act as a kind of clearing house for the information relating to the copyright laws of member states.

The ALAI draft was a relatively limited document, by comparison with some of the bilateral conventions then in force. In particular, it did not deal expressly with the matter of duration [on which marked division arose], with the result that the application of the principle of national treatment meant that the period of protection which could be claimed by an author in different countries would vary greatly and might often be greater than the period accorded in his country of origin. It also lacked any provisions dealing with restrictions that might be imposed on the exercise of rights, although there were many precedents for such provisions in existing bilateral conventions. Nevertheless, it is usually easier to include more detailed provisions in an agreement between two parties, and the ALAI draft was to form the basis of the final convention of 1886.

Events unfolded rapidly after the conclusion of the ALAI conference of 1883. The Swiss government now undertook formally the task of convening a diplomatic conference to settle the terms of a final agreement. In December 1883, the Swiss Federal Council addressed a circular note to the governments of “all civilized nations,” in which it outlined the need for greater uniformity in the international protection of authors’ rights. The note then went on to relate the steps that had already been taken in this direction, including the founding of ALAI in 1878 and the work of the recent Berne Conference. It then said that while there were obvious difficulties in the immediate realization of the ALAI project, it would:

certainly be a great gain to agree at present to a general understanding by which the higher principles, and, as it were, the natural right should be proclaimed, that the author of a literary or artistic work, no matter what may be his nationality, or the place of reproduction, ought to be protected everywhere equally with the natives of each state. The fundamental principle which does not interfere with any existing convention, once admitted, and with a general Union constituted on this basis, it is beyond doubt that, under the influence of the exchange of views which would be established between the states of the Union, the most objectionable

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differences which exist in international law would be, by degrees, removed, to give place to a more uniform regime which is more certain for authors and their legal representatives.

The Federal Council ended its note by stating that, if this was favorably received, its intention was to summon a diplomatic conference for the following year in order to examine the common dispositions which each state, either in their internal laws or in international law, could currently adopt.

Eleven states responded favorably to the Swiss circular note, declaring themselves ready to attend a diplomatic conference. These were Germany, Argentina, Columbia, France, the United Kingdom (after some frantic correspondence between the Foreign Office and Board of Trade), Guatemala, Italy, Luxembourg, Salvador, Sweden and Norway. Another six nations which did not respond were nonetheless to attend the conference when it was held: Austria-Hungary, Belgium, Costa Rica, Haiti, Paraguay and the Netherlands. Negative responses came from another five states, which stated as their reason either the current state of their copyright laws or their lack of literary development. These were Greece, Denmark, Saint Dominica, Nicaragua, and Mexico. Two other states, Bulgaria and the United States, gave no commitment as to their participation in the conference. Nevertheless, the latter country made a general declaration to the effect that while it accepted, in principle, the proposition of the Federal Council in favor of international protection, it saw immense practical obstacles to achieving this, particularly the threat posed to local manufacturing interests involved in the production of copyright works.

Following these favorable responses, the Federal Council issued invitations for a diplomatic conference to be held in Berne on 8 September 1884. Taking a pragmatic approach, the Council stated that it was to be only a preliminary meeting which would not take decisions of a binding nature, but would simply prepare general dispositions for the consideration of the government represented at the conference. With this in mind, the Council prepared a further draft convention. This was based on the ALAI draft, but made a number of significant drafting changes, as well as additions of an organizational and machinery kind in relation to such matters as accessions, denunciations and ratifications. . . .

A period of both diplomatic and domestic maneuvering followed the 1884 Conference. . . . The ne[xt] conference met in Berne in September 1885 with 26 delegates from 16 countries: Germany, Argentina, Belgium, Spain, France, the United Kingdom, Haiti, Honduras, Italy, Paraguay, the Netherlands, Norway and Sweden, Switzerland and Tunisia. Notable additions were, of course, Italy, Spain and the United States. The last-mentioned country, however, made it clear that it was attending only in the capacity of an observer and, that favorable as it was to the idea of the proposed Union in principle, there were strong domestic reasons why accession would prove very difficult, at least at this time. Among the absentees from the Conference, most notable were Austria-Hungary and the Russian Empire. The reason for Austria-Hungary's absence is not clear, but as far as the Russian Empire is concerned it is worth noting that this country had long been wary of entering into bilateral copyright arrangements. Indeed, in 1885, it denounced the only two conventions to which it was party, those with France and Belgium, on the ground that these had been imposed on it.

The 1885 Conference saw the French delegation resume its leading role, following its temporary eclipse by the German delegation in the preceding year. Thus, the French made a series of proposals to strengthen the Convention, including the complete assimilation of translation rights, the addition of photographs to the list of works protected, and the reduction of restrictions on reproduction rights. Nevertheless, the overall result of the conference was that the 1884 draft was not significantly extended, and in some respects was actually cut back. The choice before the conference was summed up in the opening paragraphs of the report of the general commission: whether to have a convention embodying a considerable degree of uniformity from which countries not so advanced in copyright would of necessity be excluded, or to have a less rigorous convention to which as many countries as possible would be able to adhere. The 1885 Conference chose the second of these approaches, although it must be noted that a significant minority of delegations, headed by France, preferred the first.

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Many of the changes adopted in the 1885 draft were simply of a drafting kind or were made with a view to clarification of the 1884 draft, for example, in relation to the application of the principle of national treatment and the determination of the country of origin of a work. The provision concerning translation rights was simplified, and now accorded authors an absolute right of translation for 10 years after the first publication of the original work in a country of the Union. However, this was only a minimum requirement and individual states were left free to grant longer periods of protection or even to assimilate translation rights completely. The provisions relating to restrictions on reproduction rights were also amended; in particular, the regulation of lawful borrowings from works for educational and scientific purposes and for inclusion in anthologies was left as a matter for the domestic legislation of contracting states or for bilateral arrangements. Adaptations were also brought back within the scope of the Convention as forms of indirect appropriations that should be treated as infringements, if unauthorized, but no real guidance as to the meaning of the term was given. Musical arrangements were given as one instance, and the report of the general commission stated that the conference accepted that dramatizations were another. However, the matter was ultimately left for determination by the relevant national tribunal. Other changes to the body of the draft convention included a provision dealing with the application of the convention to colonial possessions, and a new requirement that changes to the convention should be made only with the unanimous consent of all Union countries. Further changes were also made to the Closing Protocol. It was now provided that countries which treated photographs as artistic works would admit them to the benefits of the convention—a windfall for authors of photographs from Union countries which did not treat them in this way. A similar provision was also made for choreographic works: those countries of the Union which implicitly included such works amongst dramatico-musical works would admit them to the benefits of the Convention. Finally, the “principles recommended for an ulterior unification” were deleted, on the basis that these had no place in a convention which should contain only binding obligations.

Of the 16 nations represented at the 1885 Conference, 12 signed the final *procès-verbal* which requested the Swiss Federal Council to take such steps as would be necessary to summon another diplomatic conference in a year’s time so as to transform the draft convention into a formal diplomatic instrument. It was also agreed that the draft text would not be open to any further significant amendment: in other words, it was now open to states to take it or leave it. . . .

When the final conference met in Berne on 6 September 1886, 12 countries were represented: Germany, Belgium, Spain, the United States, France, the United Kingdom, Haiti, Italy, Japan, Liberia, Switzerland and Tunisia. Of these, only Japan and the United States were present as observers: the remainder all signed the final instrument. Japan, in fact, was to join only 12 years later, becoming the first Asian country to do so. As for the United States, the following declaration made by their delegate, Boyd Winchester, held out the promise of accession, if the circumstances should become appropriate:

Whilst not prepared to join the proposed Convention as a full Signatory, the United States does not thereby wish to be understood as opposing the measure in any way, but on the contrary, desires to reserve without prejudice the privilege of future accession to the Convention, should it become expedient and practicable to do so. . . .The position and attitude of the United States is one of expectancy and reserve.

Of the 10 countries that signed the new Convention in Berne in September 1886, all but one (Liberia) ratified it, with the result that it came into force on 5 December 1887. Of the many other countries that had attended one or both of the two drafting conferences, several came close to signing, but were prevented from doing so because of the state of their internal laws. Examples of such countries were Sweden and Norway, both of which joined the Union within a decade. The Netherlands was a similar case, as was Austria-Hungary. As for the various Latin-American countries which had attended, it seemed that they did not see any advantage in membership of a Union which was so clearly Eurocentric: in any case, these states were shortly to establish their own multilateral convention.

Despite its relatively limited membership, the geographical sweep of the new Union was quite considerable when account is taken of the colonial possessions of its members. Nonetheless, it was far

from universal and was also far from the universal codification of copyright that had been desired by the visionaries at Brussels in 1858 and at Paris in 1878. But the fact that such a Union had been achieved within 30 years of the meeting of the Brussels Congress was still a considerable achievement. Since this time, the Berne Convention has increased vastly in its membership and has made significant strides forward in the international protection of authors.

House Report of the Berne Convention Implementation Act of 1988, H.R. REP. NO. 100-609 (1988)

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

Successive Revisions of the Berne Convention

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

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

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

d. *1967 Stockholm Act.* For the first time, the implicit right of reproduction was expressly established in the Convention and special rules governing exceptions to that right were also included. Significant new rules relating to reconciling different national rules of authorship and ownership of 2 motion pictures, defining the "nationality" of films for Convention purposes, were added at this revision. Protection was extended to include authors having habitual residence in a Union country, regardless of their citizenship. Finally, this revision established a "Protocol Regarding Developing Countries," which would have allowed developing countries broadly to limit rights of translation and reproduction. The 1967 Stockholm Act has not and will not come into force. It has effectively been superseded by the 1971 Paris Act.

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

Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331 (2003)

[Although the Berne Convention was established in 1886, the United States did not join the Convention until 1989. To understand better why the United States was reluctant to join the Convention, let us travel back to the time] shortly after the United States declared independence. At that time, most of the books sold in the country were imported, and newspapers and periodicals carried much of the local literary output in serialized form. Although the press was regulated, copyright laws were virtually nonexistent. Rather, printers and publishers protected their markets by securing agreements among themselves. These agreements were further protected by physical and communication barriers among the colonies.

As communication and transportation improved and the demand for literature increased, local publishers became concerned about the lack of protection for works published outside their home states and the inconsistent copyright protection across the country. Led by Noah Webster, the author of the first American dictionary, publishers began to lobby the federal and state legislatures to enact copyright legislation.

The first state to enact such legislation was Connecticut, which passed An Act for the Encouragement of Literature and Genius in January 1783. Modeled after the English Statute of Anne, the Connecticut statute granted U.S. authors and their heirs and assigns “the sole liberty of printing, publishing and vending” any new books, pamphlets, maps, or charts within the State of Connecticut for two renewable terms of fourteen years. Taking the cue from Connecticut, Massachusetts and Maryland soon enacted their own copyright legislation. The Connecticut statute eventually served as a model for Georgia and New York, whereas New Hampshire and Rhode Island copied the Massachusetts statute.

In May 1783, the Continental Congress passed a resolution recommending the various states to secure to U.S. authors or publishers, as well as their executors, administrators, and assigns, copyright protection in books for a minimum term of fourteen years and to grant a minimum renewal term of fourteen years to authors, if then living, or their heirs and assigns. In response to this recommendation, New Jersey, New Hampshire, Rhode Island, Pennsylvania, South Carolina, Virginia, North Carolina, Georgia, and New York passed legislation to protect literary property. Concerned about the divergent protection offered by other states, more than half of the state copyright statutes contained reciprocity clauses that limited copyright protection to authors from states offering similar protection. By the time the Constitutional Convention was held in 1787, all but Delaware had passed copyright legislation.

Unlike the Articles of Confederation, which did not offer any protection to literary and artistic property, the United States Constitution included a copyright clause, which provides: “Congress shall have Power . . . to promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” Derived from proposals introduced by James Madison and Charles Pinckney, this clause was adopted in its final form without any debate. As the brief and ambiguous passage in *The Federalist* suggests, copyright was a “comparatively insignificant” issue in the public debate over the ratification of the proposed constitution.

Pursuant to this newfound enumerated power, Congress enacted the first copyright statute, the Copyright Act of 1790 (“1790 Act”), which secured to authors, publishers, or their legal representatives two fourteen-year terms of copyright protection in books, pamphlets, maps, and charts. Notorious for its discrimination against foreign authors, the Act limited copyright protection to “a citizen or citizens of these United States, or resident therein.” Section 5 of the Act stated explicitly:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

Although many commentators criticized the early development of U.S. copyright law for its intention to meet the needs of a less developed country while exploiting the works of developed countries,

the 1790 Act was not created solely for this purpose. Rather, the lack of copyright protection to foreign authors was commonplace in the late eighteenth and early nineteenth centuries. At that time, many countries “did not . . . regard the piracy of foreign authors’ works as unfair or immoral. Some countries, in fact, openly countenanced piracy as contributing to their educational and social needs and as reducing the prices of books for their citizens.”

Because the Americans and the British speak the same language, the lack of copyright protection to foreign authors in the 1790 Act was particularly damaging to English authors. Even worse, English literature flourished in the post-revolutionary period and was extensively read throughout the United States. Between 1800 and 1860, almost half of the bestsellers in the United States were pirated, mostly from English novels. Compared to a legitimate English edition, an American pirated edition cost approximately one-tenth of the total cost.

In the beginning, some English authors were able to secure from American publishers courtesy copyright, an unwritten custom of self-restraint whereby each major publishing house refrained from publishing editions of a foreign work that was the subject of a publishing agreement another publishing house had reached with the author. This system not only “protected the first American publisher of a foreign work from the unfettered copying of his edition, [but also] gave the author the opportunity of earning some remuneration, even if he were unable to prevent the American publication of his work in the first place.” By virtue of courtesy copyright, some English authors, such as Charles Dickens and Anthony Trollope, “received large sums in respect of the American sales of their works, although they did not enjoy protection under United States copyright law.”

However, courtesy copyright was of limited use outside the United States, and it became increasingly ineffective as competition in the United States became fierce and publication was no longer limited to major publishing houses. Among the English authors who were greatly concerned about the lack of copyright protection in the United States were Charles Dickens, Anthony Trollope, and the famous duo of Gilbert and Sullivan.

In 1842, Lord Palmerston, the British prime minister, attempted to initiate high-level contacts with the American government in an effort to induce the United States to agree to a copyright treaty. His effort failed. In that same year, Charles Dickens traveled to the United States to plead for the protection of British works. Frustrated by his American experience, Charles Dickens recounted his unsuccessful trip:

I spoke, as you know, of international copyright, at Boston; and I spoke of it again at Hartford. My friends were paralysed with wonder at such audacious daring. The notion that I, a man alone by himself, in America, should venture to suggest to the Americans that there was one point on which they were neither just to their own countrymen nor to us, actually struck the boldest dumb! It is nothing that of all men living I am the greatest loser by it. It is nothing that I have to claim to speak and be heard. The wonder is that a breathing man can be found with temerity enough to suggest to the Americans the possibility of their having done wrong. I wish you could have seen the faces that I saw, down both sides of the table at Hartford, when I began to talk about Scott. I wish you could have heard how I gave it out. My blood so boiled as I thought of the monstrous injustice that I felt as if I were twelve feet high when I thrust it down their throats.

Unlike Charles Dickens, who “strongly declared his conviction that nothing would induce an American to give up the power he possesses of pirating British literature,” Anthony Trollope was more optimistic and did not blame the American people. Rather, Trollope placed the blame squarely on “the book-selling leviathans, and . . . those politicians whom the leviathans [were] able to attach to their interests.”

In 1837, Senator Henry Clay submitted a report recommending the enactment of international copyright legislation that sought to “extend U.S. copyright protection to British and French authors under rigorous conditions.” The report included an address and petition by several prominent British authors, which maintained that British authors were “exposed to injury in their reputation and property” and that their works were “liable to be mutilated and altered, at the pleasure of [American] booksellers, or of any

other persons who may have an interest in reducing the price of the works, or in conciliating the supposed principles or prejudice of purchasers in [the United States].” The petition also appealed to the national interests of American authors and noted the lack of incentives for American publishers to afford to local authors a fair remuneration for their labors when these publishers could obtain foreign works “by unjust appropriation, instead of by equitable purchase.”

In addition, the petition warned that the lack of effective protection for foreign authors may confuse the American public “as to whether the books presented to them as the works of British authors . . . are the actual and complete productions of the writers whose names they bear.” The petition concluded with an emotional reminder about Walter Scott, who was extensively read in the United States and might have been able to survive from “the burden of debts and destructive toils” had he received remuneration from the American public for his creative endeavors. Despite Senator Clay’s efforts, Congress had yet to grant protection to foreign authors.

In the meantime, American literature began to flourish, and stakeholders began to emerge in the United States. At that time, many American authors, such as James Fenimore Cooper, Ralph Waldo Emerson, Nathaniel Hawthorne, Washington Irving, Henry Wadsworth Longfellow, Herman Melville, Edgar Allan Poe, Harriet Beecher Stowe, Henry David Thoreau, and Walt Whitman, had attracted readership in England and other European countries. Because most copyright laws were made conditional upon reciprocity in other countries, American authors continued to be denied their rights under foreign law just as foreign authors were denied rights under U.S. law.

Moreover, the lack of copyright protection had created a lot of cheap imports that competed unfairly and directly against works written by indigenous authors. American authors and a growing number of publishers became very concerned about the situation and sought to obtain “a more level playing field for their editions of American works.” Some openly discussed how Congress had failed to serve the interests of the American people by keeping foreign works cheap. As Mark Twain wrote in *Century Magazine* in 1886:

The statistics of any public library will show that of every hundred books read by our people, about seventy are novels—and nine-tenths of them foreign ones. They fill the imagination with an unhealthy fascination with foreign life, with its dukes and earls and kings, its fuss and feathers, its graceful immoralities, its sugar-coated injustices and oppressions; and this fascination breeds a more or less pronounced dissatisfaction with our country and form of government, and contempt for our republican commonplaces and simplicities; it also breeds a longing for something “better” which presently crops out in the diseased shams and imitations of the ideal foreign spectacle: Hence the “dude.”

[Meanwhile], conditions upon which the rights of authors were based began to change in Europe. [A network of bilateral copyright and commercial treaties began to emerge, and growing international efforts eventually led to the establishment of the Berne Convention.]

The original Berne Convention was, by modern standards, “a modest beginning.” Nonetheless, it created “the first truly multilateral copyright treaty in history . . . [and] established some important basic principles.” First, the Convention created a “Union for the protection of authors over their literary and artistic works,” which has an independent existence regardless of its membership and remains “open to all states without restrictions, as long as they were prepared to comply with the obligations embodied therein.” Second, in lieu of reciprocity, the Convention adopted the principle of national treatment, which requires member states to grant to foreigners the same rights as they grant to their own nationals. Third, the Convention provided merely minimum protection for translation and public performance rights. By doing so, it provided member states freedom to augment protection through other bilateral arrangements while leaving room for further expansion of these minimum rights in subsequent revisions.

Contemporaneously with the development of the Berne Union, countries in the American continent were exploring the possibility of creating Pan-American copyright conventions in a similar fashion to what European countries did in Berne. Backed by strong pressure from American authors and a

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growing number of publishers, Congress actively considered proposals to provide reciprocal copyright protection to foreign authors within the United States. In 1891, Congress finally enacted the International Copyright Act of March 3, 1891, which was commonly referred to as the Chace Act. Under this Act, foreign authors received copyright protection when the President proclaimed that their home country provided American citizens with “the benefit of copyright on substantially the same basis as its own citizens” or that such a country was a party to an international agreement that provided reciprocal copyright protection to its members and to which “the United States may, at its pleasure, become a party.”

Concerned about the threat from foreign, particularly British, publishers, the American publishing industry demanded a compromise. Under the Chace Act, authors could only secure copyright by registering the work before publication and by depositing two copies of the work on or before the date of publication anywhere. As far as “books, photograph, chromo or lithograph” were concerned, the Act included a manufacturing clause, requiring the two deposit copies be “printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom.” Such a requirement “granted the foreign authors the rights that they demanded, while still denying foreign publishers any rights.” Because of the manufacturing clause, many commentators found the Chace Act “illusory.”

Since the introduction of the Chace Act, Congress has made major revisions to the 1909 and 1976 Copyright Acts and has since abolished the manufacturing clause and made the copyright notice optional. At the international level, the United States has joined the Mexico City Convention of 1902, the Buenos Aires Convention of 1910, the Universal Copyright Convention, and the Berne Convention and has ratified the 1996 WIPO Internet Treaties. In addition, as a member of the World Trade Organization (“WTO”), the United States abides by the Agreement on Trade-Related Aspects of Intellectual Property Rights and is subject to the WTO dispute settlement procedure.

Today, the United States is no longer the notorious pirate it was in the eighteenth and nineteenth centuries. Rather, it has become the champion of literary and artistic property and one of the predominant powers advocating strong intellectual property protection around the world. Not only was it responsible for putting intellectual property on the international trade agenda, but it also applies continual and constant pressure to induce foreign countries, in particular less developed countries, to reform their intellectual property regimes. Within a hundred years, the United States has been transformed from the most notorious pirate to the most dreadful police.