1979

The Question of Berne Entry for the United States

Richard Jacobson

Follow this and additional works at: http://scholarlycommons.law.case.edu/jil
Part of the International Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/jil/vol11/iss2/8
NOTES

The Question of Berne Entry for the United States

INTRODUCTION

According to one observer, the signing of the Copyright Act of 1976 "brought with it a combined sense of gratification and anxiety, relief and disorientation of the sort that inevitably accompanies the sudden achievement of long sought goals."\(^1\) This comment comes as no surprise, since efforts to overhaul the Act of 1909 began in 1924.\(^2\) The 1976 version has been described as a radical departure from the previous 1909 Copyright Act, containing certain fundamental changes which are "so profound that they mark a shift in direction for the very philosophy of copyright itself."\(^3\)

Among the issues raised by the revision is whether the United States ought to step up its international copyright obligations. Though the United States is a party to several multilateral agreements,\(^4\) it has chosen not to accede to the most demanding of all copyright treaties, the European inspired Berne Convention, since its inception in 1886. This note will consider the current scheme of international copyright

---

\(^1\) Ringer, First Thoughts on the Copyright Act of 1976, 22 N.Y.L.S.L.REV. 477, 478 (1977). The author of this piece, Barbara Ringer, currently serves as Register of Copyrights for the United States. In view of the very significant impact that the United States Copyright Office had in the process of copyright law revision, Ms. Ringer's views are critical to any analysis of the recently enacted statute and its legislative history. The article cited above serves as an excellent summary of the major changes which have resulted from the Copyright Act of 1976.


\(^3\) Ringer, note 1 supra.

\(^4\) Besides the Universal Copyright Convention, several multilateral conventions have been struck among the Pan-American countries. By far, the most significant of these is the Buenos Aires Convention which was ratified by the United States. For the most part, these agreements are open to accession only by American republics, and, perhaps partly for that reason, have not enjoyed the success or support which Berne has had. See McConnell, The Effect of the Universal Copyright Convention on Other International Conventions and Arrangements, 9 ASCAP COPYRIGHT L. SYMP. 52, 36-38 (1958).

International copyright law is further composed of various bilateral agreements, see id. at 38-43, and the fairly recent International Phonogram Convention, see, Abelman & Berkowitz, International Copyright Law, 22 N.Y.L.S.L.REV. 619, 644 (1977).
protection, the advantages the United States might gain by acceding to
the Berne Convention, the impact the 1976 Copyright Act has had
upon the Berne issue, and the remaining fundamental obstacles to ac-
cession.

I. INTERNATIONAL COPYRIGHT LAW AND THE UNITED STATES

A. Present International Scheme

In order to trace the development of modern international
copyright law, one must begin with the formation of the Berne
Union. Created in 1886, the Union consisted of twelve original
signatories to the Berne Convention and, according to a recent count,
its membership has expanded to sixty-five signatories. The principles
which the members adhere to are embodied in the original Berne Con-
vention, and the revisions which have taken place at Berlin in 1908,
ranks as the most successful of all the copyright treaties which
have been signed.

The Berne Convention is founded upon the notion of national
treatment. That is to say, a foreign author who has acquired copyright
protection under the treaty has available the same rights and remedies
as a domestic author would have in the state in which protection is
sought. Under Berne, copyright is secured throughout the Union if the
author is a national of a member country, and the author's work is
either in unpublished form or was first published in a country of the
Union. Furthermore, under a provision which has been somewhat
abused, authors who are not nationals can get protection if their works
are first published in a member country.

---

5 For a discussion on the state of international copyright law prior to Berne, see
1 S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY
6 Abelman & Berkowitz, supra note 4, at 647-51.
7 Berne Convention for the Protection of Literary Works, revised at Brussels on
8 See note 4 supra.
9 Berne Convention, supra note 7, art. 4.
10 Id. art. 6(1). American publishers have traditionally exploited this provision by
simultaneously publishing works in both the United States and Canada, which is a
Berne Union member. This is known as the "Backdoor to Berne." A work is con-
sidered as having been published simultaneously in several countries where there has
been publication in two or more counties within thirty days of its first publication. Id.
art. 4(3). Simultaneity will secure Berne protection if at least one of the countries of
There are, however, certain principles contained in the Berne Convention which define the nature of copyright throughout the Union. The domestic laws of a member state cannot override these principles. For instance, since the Berlin Revision of 1908, there has been a complete abandonment of all formalities pertaining to copyright protection, except those required for a country's own nationals. If the author's own country does not require it, there is no need to register, deposit copies of the work with a centralized office, or provide copyright notice on the work itself, to receive protection in a member state which does require these formalities of its own nationals.\(^{11}\) Equally significant, irrespective of any assignment of copyright, the author is guaranteed a moral right in his work. This inalienable right entitles the author to claim authorship of the work and to object to distortions, mutilations, alterations, or other acts which do damage to his honor or reputation.\(^{12}\) Furthermore, the Convention sets a minimum duration of copyright as the life of the author plus fifty years,\(^{13}\) and defines for all member states which works\(^ {13}\) and which persons\(^ {14}\) are protected.

Since the inception of the Berne Union, the debates have continued in the United States on the question of entry into the Berne Union. After World War II, it became apparent that resolution of the problem did not lie in more forceful lobbying efforts advocating accession. Rather, another convention was envisioned—to assure accession by the United States and other American countries which had not become members of the Berne Union.\(^ {16}\) The task was given to UNESCO, which saw as its purpose the creation of a "worldwide modus vivendi" which would "assure the free flow of information, of ideas and of works."\(^ {17}\) UNESCO's efforts ultimately led to the creation of the Universal Copyright Convention (UCC).

Though the principle of national treatment is also followed in the UCC, the treaty differs from Berne in several respects. There is a

---

A. Hanson, Omnibus Copyright Revision 11 (1973).

11 Berne Convention, supra note 7, art. 4(1),(2).
12 Id. art. 6bis(1).
13 Id. art. 7(1).
14 Id. art 2.
15 Id. arts. 4, 5, 6.
17 Id. at 88.
minimum copyright duration of life of the author plus twenty-five years. If the state in which protection is sought provides for a longer term, then that term is controlling. In another vein, the UCC has no retroactive effect following ratification. This is to be contrasted with Berne whose effect attaches to all works which have not yet fallen into the public domain at the time of ratification. Consequently, by way of the Berne Convention, a work which has had domestic copyright protection will obtain protection within the Union upon ratification by the author's sovereign. The UCC provides for no such result.

A number of other distinctions are worth noting. The UCC has not abandoned the need for formality of copyright notice, as has Berne. To obtain UCC protection a work (1) must comply with all notice requirements imposed by the country in which the work is published; and (2) irrespective of domestic laws, must give minimum notice in a conspicuous place on the work as follows; the symbol ©, name of the copyright owner, and year of first publication on all copies published with authorization of the copyright owner. The UCC and Berne also differ, to a small extent, in the types of works protected. Whereas Berne covers choreographic works and audible performances not recorded, copyright attaches to the same under the UCC only if the state in which rights are being claimed provides for such within its domestic law. The final distinctions which should be noted pertain to the issues of moral right and the respective provisions for translation rights. There is no provision for moral right under the UCC.

18 The Universal Copyright Convention, Sept. 8, 1952, 216 U.N.T.S. 132, art. IV(2) [hereinafter cited as UCC].
19 Id. art. IV(1).
20 Id. art. VII.
21 Berne Convention, supra note 7, art. 18.
22 UCC, supra note 18, art. III(a).
23 Id. art. III(1).
24 Berne Convention, supra note 7, art. 2.
25 Published works enjoy UCC copyright protection through article II(1). They receive the same protection afforded other published works in the state in which rights are being claimed. Publication is defined as the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise perceived. UCC, supra note 18, art. VI. Choreographic works and audible performances would therefore fall within the category of unpublished works. Pursuant to the UCC, unpublished works are afforded the same rights given other unpublished works in the state in which protection is sought. Since unpublished works are typically given less copyright shielding, the distinction becomes significant.
As mentioned above, the motivating force behind the UCC was to widen the then existing scope of protection. Commentators are always quick to point out that there was never any intention of creating competition for membership between the two treaties. But the UCC drafters did anticipate that Berne members might be inclined to drop out of the Union and seek refuge under the more relaxed requirements of the UCC. Hence, article XVII was incorporated, withholding UCC rights from an author of any country which has revoked its acceptance of the Berne Convention and yet sought to remain or become a party to the UCC.

B. The Interest of the United States in Joining the Berne Union

Since the Berne Union includes members who do not adhere to the UCC, there would be an expansion of copyright protection abroad for domestic authors. Though the "backdoor" approach has been used in the past to obtain these benefits, Berne permits a way for member states to challenge this method of securing copyright. Moreover, this procedure has been criticized as an undignified means of securing protection; a world power such as the United States loses respect among other nations of the world when it requires its own nationals to resort to this method to avoid reciprocity for the benefits conferred.

Accession would also mean protection for a greater scope of works in countries which adhere to both the UCC and Berne. Because of the differing policies on retroactivity between the two conventions, a portion of earlier works not given protection under the UCC would be accorded recognition by Berne.

Furthermore, with passage of the Copyright Act of 1976 and its higher level of protection, e.g., duration of term, the United States has an interest in promoting an equivalent standard among other nations. This interest would be served by demonstrating to the rest of the world that the United States is willing to comply with the more rigorous requirements of Berne. This is, perhaps, the most compelling argu-

---

27 Id. at 52.
28 See Abelman & Berkowitz, note 4 supra, for a comparison between UCC and Berne membership.
29 See note 10 supra, and accompanying text. Also see Bodenhausen, U.S. Copyright Protection and the Berne Convention, 15 BULL. COPYRIGHT SOCY 215, 218 (1966).
30 Id. at 218-19.
31 Id. at 219.
32 Id. at 219-20.
ment for acceding to the Berne Convention. As it stands now, international copyright law is a complicated patchwork of various agreements and conventions. The United States, with its abundant output of copyrighted material, has an interest in seeing the law streamlined to the greatest extent possible. The UCC and other copyright conventions should be seen as interim points in the development of a coherent and fair international copyright scheme which is most fundamentally expressed in the provisions of the Berne Convention.

II. BERNE ENTRY

With the new Copyright Act now in operation, there is need to ask whether the United States ought to remain outside of the Berne community. Certain legal obstacles which would have barred entry have been eliminated through the new Act. This discussion will pinpoint those barriers which have been removed, and fundamental conflicts which still remain.

A. Barriers Removed

1. Duration of Copyright

The adoption of a life-plus-fifty years term was considered by Congress to be the most important goal in its copyright law revision.\textsuperscript{3} Previously, protection began on the date of publication and continued for twenty-eight years from that date, whereupon the copyright was renewable for another twenty-eight years.\textsuperscript{4} Among the reasons cited for the durational change, Congress noted the impact it would have internationally, with specific reference to the Berne Union.\textsuperscript{5}


\textsuperscript{5} A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. ... The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. 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.

\textit{Id.}
The change means that the United States now conforms to the durational requirement imposed on all members of Berne. It represents a significant step toward the goal of Berne entry.

2. The Manufacturing Clause

Before passage of the 1976 Act, a book or periodical in the English language had to have been manufactured in the United States before copyright protection vested.\(^{36}\) In the sense that this manufacturing clause sought to give special protection to book manufacturers, it can be compared to some of the early English notions as to who is to benefit from copyright. Before the clause was incorporated into our law, foreign works were permitted to be copied freely.\(^{37}\) In 1891, the clause was adopted as a compromise measure, offering some minimal protection to foreign authors, while protecting the interests of domestic book manufacturers who feared competition from abroad.\(^{38}\) The clause conflicted with the Berne mandate that the enjoyment and exercise of copyright shall not be subject to any formality.

Under the new Act, the manufacturing requirements have been scheduled for repeal as of January 1, 1981. Up to that time, a more liberalized manufacturing requirement will continue in effect.\(^{39}\) According to the House Committee, the five-year phase out was instituted to prevent the damaging effects that an immediate repeal might have had on some segments of the American printing industry.\(^{40}\) Though there is some evidence that the purpose of the phase out was to forestall any clear-cut decision on the matter of the manufacturing clause,\(^{41}\) for the purposes of this discussion, it will be assumed that the clause will be repealed on schedule.

\(^{36}\) Id. at 5780.


\(^{41}\) In a letter signed by Senators McClellan and Scott, the Copyright Office of the United States was asked to undertake "a thorough study of the ramifications of removal of the so-called manufacturing clause." The Copyright Office has expressed its willingness to conduct the study. It is to be completed one year before the manufacturing requirements are due to drop out of the copyright law. Ringer, The Unfinished Business of Copyright Revision, 24 U.C.L.A. L. Rev. 951, 973 (1977).

For discussions calling for repeal of the manufacturing clause, see Comment, note 37 supra; Ashford, The Compulsory Manufacturing Provision, 4 ASCAP Copyright L. Symp. 48 (1952); Note, 52 Ia. L. Rev. 1121 (1967). There is little, if any, support for the clause among scholars.
B. Fundamental Conflicts Remaining

Though commentators have pointed out a number of disparities between existing United States law and that which would be required for Berne entry, certain of these conflicts touch on matters which are fundamental to the American concept of copyright, specifically, the issues of moral right and statutory notice.

1. Moral Right

a. American copyright law does not accept, per se, the doctrine of moral right.

The Anglo-American notion of copyright is purely economic in nature and dates back to the early beginnings of the printing trade in England. With the advent of printing, the king sought a means for impeding the spread of heresy through the practice of issuing royal prerogatives. The printer was given a royal grant of the exclusive right to publish a particular manuscript. To further the policy of censorship, the Stationers’ Company was chartered by Queen Mary in 1557. Extraordinary powers were conferred upon it; printing was restricted to members of the Company; the number of members was few (twenty-two in 1586); and special privileges of monopoly were granted. Though the 1710 Statute of Anne shifted copyright protection from the printer to the author, the right continued to be framed in terms of a limited economic monopoly. An author was given a copyright grant of fourteen years, followed by another fourteen years if the author was still alive. The copyright-patent provision of the United States Constitution adheres to this same idea by giving Congress the 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."

The Berne Convention adopts the view that copyright is more than just an economic right. In this sense, Berne parallels the French idea that the *droit d'auteur* or author's right flows naturally from the creation of a work, and is not a matter of statutory privilege. The rights which fall under the *droit d'auteur* include both pecuniary rights in the work, and moral rights which seek to protect the personality of the author.

b. There are varying notions on what constitutes the moral right.

Part of the confusion which surrounds the concept of moral right stems from the conflicting definitions as to its composition. The most expansive of definitions would hold that a creator is entitled to all of the following: (1) the right to create and to publish, or not, in any form desired; (2) the right to paternity; (3) the right to modify and to prevent deformation; (4) the right to prevent excess criticism; and (5) the right to prohibit other attacks on the personality of the creator.

In practice however, each of the countries which purports to recognize the moral right has adopted a different view on what its contents are. The divergent treatment, in no small way, is a function of the varying doctrines which attempt to justify the right.

---

46 U.S. Const. art. I.
49 Comment, 43 Fordham L. Rev. 798, 798 n.52 (1975).

Another commentator has said:
There is no one 'correct' definition. The 'correctness' is relative, being dependent upon the scope one wishes to give to the doctrine of moral right. For instance, a good basic definition declares:

The moral right is the right of the author to create, or not to create, to present the creation to the public in a form of his choice, or to withhold it, to dispose of this form as he alone desires, and to demand that his personality be respected in so far as it relates to his status as an author.

In light of these differing attitudes, it comes as no surprise that the Berne Convention defines moral right with a fairly limited scope. A standard had to be chosen which would serve as a common denominator for all forms of the concept. Hence, the Berne abridged version:

Independent of the author's copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work, and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honor or reputation.51

Thus, the Berne standard encompasses the paternity right, i.e., the right to claim authorship, and the right to the integrity of the author's work.52 The other elements of the right have been dropped.

c. American courts recognize a group of rights which is nearly the equivalent to the Berne moral right.

The moral right has never been given recognition under past United States copyright statutes. The same holds true under the Copyright Act of 1976.53 All too often it has been said that the absence of a moral right in American copyright law is a major barrier to Berne entry.54 The courts, however, seem to be more wary of the label, than of the rights subsumed within the concept.55 As the follow-

51 Berne Convention, supra note 7, art. 6bis.

52 This paper will not consider the right to object to "any other action in relation to the said work which would be prejudicial to [the author's] honor or reputation." The ambiguity of the language seems to allow for the inference that this point of law is covered by our law of defamation. See Nimmer, supra note 42, at 522.

53 But see Nimmer, supra note 42, at 518 n.107, and accompanying text.

54 See, e.g., Abelman & Berkowitz, supra 4, at 631; Note, 43 FORDHAM L. REV. 793, 801-03 (1975); Comment, 51 TUL. L. REV. 509, 513 (1977); Strauss, supra note 48, at 506 (but finding that it is sufficiently recognized through other principles of law); Nimmer, supra note 42, at 518 (but also going on to demonstrate an acceptable body of law outside copyright).

55 'Moral right' seems to indicate to some persons something not legal, something metalegal . . . . The 'moral right' doctrine, as applied in some countries, included very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge; . . . as a result, the phrase 'moral right' seems to have frightened some of those courts to such an extent that they have unduly narrowed artists' rights. . . . Finally, it is not always an
ing discussion will demonstrate, American courts, resorting to principles of law other than copyright, have developed a body of principles which offer much of the same protection that would be accorded an author under the moral right doctrine.  

i. The paternity right

The paternity right is held to consist of the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written.

Courts have protected the right to the proper attribution of authorship by resorting to theories of contract, invasion of privacy, libel and unfair competition. Though the exception to the rule, it has been held that implied in a contract for the publication of a work is the promise to publish under the author's name; and that the failure to attribute the work is actionable. It has been held a violation of one's privacy to unmitigated boon to devise and employ such a common name. . . . A new name, a novel label expressive of a new generalization, can have immense consequences.

Granz v. Harris, 198 F.2d 585, 590 (2d. Cir. 1952) (Frank, J., concurring). In Granz, the court held that it was a breach of contract to sell truncated versions of a musical work performed by the plaintiff, and that an injunction would issue upon a determination that the plaintiff had not waived his rights arising from the breach. Id. at 589.

To pose this question, another issue is necessarily raised: Are past state court decisions of any authority on matters touching on "the moral right." Under the new Copyright Act, state law copyright protection has been pre-empted with respect to "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright" as defined by the statute. 17 U.S.C. § 301(a) (1976). Arguably, if the "moral right" is part of the "subject matter of copyright," then there is pre-emption. But the statute goes on to say that pre-emption does not attach to "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." Id. § 301(b)(3). Since moral rights are not treated in section 106, and are not equivalent to any of the rights mentioned therein, there is good reason to conclude that state courts can continue developing the American counterpart of "the moral right," without fear that this area of the law has been pre-empted.

Strauss, supra note 48, at 508.

Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties . . . . If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it,
make an unauthorized distorted version of a painting, attribute it to the artist, and use it as a design on a sofa cushion in a magazine ad for the purpose of promoting sales of design patterns. An injunction will issue on a theory of unfair competition if a truncated version of an artist's musical performance is sold as a recording under the performer's name. A cause of action for libel has been stated where a sensational story was falsely attributed to a well-known newspaper correspondent. Even where an individual does not hold copyright in his

the author is entitled not only to be paid for his work but to have it published in the manner in which he wrote it. The purchaser cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him to do so. Clemens v. Press Publishing Co., 67 Misc. 183, 193-94, 122 N.Y. Supp. 206, 207-08 (1910) (Seabury, J., concurring). Notwithstanding the above, the right of an author to demand credit is only imperfectly realized in the United States. See Nimmer, supra note 42, at 520.

69 Neyland v. Home Pattern Co., Inc., 65 F.2d 363 (7th Cir. 1933). The statute was one for the invasion of privacy:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

N.Y. CIVIL RIGHTS LAW, § 50 (McKinney 1976). The statute also provided for a private right of action. Id. § 51.

Similarly, where the defendant has mutilated the plaintiff's story by its adaptation for a movie, a court has granted an injunction against use of the author's name in connection with the film produced. Curwood v. Affiliated Distributors, 283 F. 219, 223 (S.D.N.Y. 1922). See also Kerby v. Hal Roach Studios, 53 Cal. App.2d 207, 127 P.2d 577 (1942).

60 See note 66 infra. An unfair competition theory also was raised in Bonner v. Westbound Records, Inc., 49 Ill. App.3d 543, 364 N.E.2d 570 (1977). There, the plaintiffs (members of the group, The Ohio Players) made the following claim: Defendants took unedited and unfinished Ohio Players performances on tape, wrote new music and new words to go along with the incomplete songs, hired other musicians to play the new music and words into the Ohio Players performances, edited the new songs, and released them as being performed by the Ohio Players in the album "Rattlesnake." The court held that the "plaintiffs [had] established the likelihood of success on the merits of their claim that defendant committed a deceptive trade practice." 49 Ill. App.3d at 551. "As we understand the law, it is implied at law in contracts for the sale of artistic or literary creations, that the purchaser may not materially alter the literary property or creation, in the absence of express language so permitting." Id. at 550. Expressly disclaimed was any intent to render a decision as to whether the action was justifiable under the doctrine of moral right. Id. at 551.

own work, a cause of action can lie against another who has taken credit for the work.\textsuperscript{62}

It should be noted that the courts have stopped short of full recognition of the paternity right. For instance, it has been held that an author need not be credited for a contribution to an encyclopedic work.\textsuperscript{63} Furthermore, the right to receive credit for one's work is imperfectly recognized and can be contracted away, if done so expressly.\textsuperscript{64}

\section*{ii. The right to the integrity of the work}

Again, outside the statutory body of copyright law, American courts have sought to prevent tampering with artistic work by employing other principles of law. As a general rule, if the author has not expressly waived the right to consent in his contract, courts are willing to grant injunctive relief where an adaptation deviates substantially from the original work.\textsuperscript{65} A more extreme view would hold that changes are

\textsuperscript{62} In Bajpayee v. Rothernich, 53 Ohio App.2d 117, 372 N.E.2d 817 (1977), the plaintiff had written a scientific article in the course of his employment regarding a discovery he had made. The article was never published. Under the plaintiff's employment contract, he retained no copyright interest in the article. The plaintiff charged the defendant, a fellow employee, with having appropriated his "ideas and language." Specifically, the defendant had written an abstract relating to the same discovery, and presented it before the American Society for Clinical Pharmacology and Therapeutics. Various tort theories were proposed to support the claim. The court, recognizing that this was a case of first impression, held that a cause of action did lie:

[I]s there a right in plaintiff to be recognized for his work product which was violated by defendant's claiming that work product as his own? We conclude that there is such a right? Although such right may not be invaded by a failure to give recognition to another upon an authorized publication, it is invaded when one claims the other's work product as his own.

372 N.E.2d at 821.


\textsuperscript{64} See note 58 supra; Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947). In Vargas, the plaintiff, an artist, sued to enjoin the reproduction of pictures made by him under contract to the defendant publisher, because of the failure to credit the plaintiff with the work. The plaintiff had achieved considerable fame through publication of his drawings. Esquire, in the past, had always credited the drawings to the plaintiff either by the credit line "Varga" or "Vargas," or by captioning the drawings "Varga Girls." Under a new contract for drawings, the following provision appeared: "The drawings so furnished, and also the name 'Varga,' 'Varga Girl,' 'Varga, Esq.,' and any and all other names, . . . shall forever belong exclusively to Esquire, and Esquire shall have all rights with respect thereto, including . . . the right to use, lease,
permitted in an adaptation only to the extent that they are made necessary by the different mode of production.\textsuperscript{66}

There also has been recognition of the right to integrity under federal unfair competition laws. In a recent federal case,\textsuperscript{67} much com-

sell or otherwise dispose of the same as it shall see fit . . . ." On the basis of this provi-
sion, the court held that the plaintiff had divested himself of all title, claim and in-
terest in drawings, made under the contract, and names used in connection therewith. \textit{Id.} at 526. The plaintiff had no right to be credited with the drawings. \textsuperscript{65}

In \textit{Manners v. Famous Players-Lasky Corporation}, 262 F. 811 (S.D.N.Y. 1919), the defendant had acquired the theatrical and motion picture rights to the plaintiff's story. Under the contract, "no alterations, eliminations, or additions" could be made without approval of the author. The plaintiff objected to the motion picture adapted from the play. The following represents the view of the court:

\begin{quote}
It is impractical to analyze the motion picture, scene by scene, and compare it with the spoken play. The writer of the scenario evidently had in mind the kind of presentation which pleases the audience of a motion picture play, and to that end departed from the sequential expeditious course of the spoken play. To illustrate that it is not necessary to follow the play literally, I may observe that I should not regard the ballroom scene in the picture as in violation [of the consent clause]. This scene, which forms a pleasant picture, does not detract from the theme or continuity of the story, and, if anything, might be regarded as a helpful illustration.

... But the point is, in view of [the clause], there cannot be a substantial deviation from the locus of the play or the order and sequence of the development of the plot. If these substantial features are retained, then such pictures as may be necessary to explain the action of the play, and as may be necessary in substitution for dialogue, may be entirely proper, and not in violation of the [the clause].
\end{quote}

\textit{Id.} at 814-15.

Notwithstanding the emphasis placed on the consent clause in \textit{Manners}, another court has stated a somewhat softer rule, in the absence of any mention of consent to change in the contract:

\begin{quote}
And now as to what is acquired when one procures the right to elaborate upon an original story . . . I take it that, while scenery, action, and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon the elaborator to retain and give appropriate expression to the theme, thought and main action of that which was originally written. The unqualified grant of this right is, I should say, fraught with danger to a writer of standing, particularly when he inserts no provision for his approval of such elaboration as may be made. Nevertheless, elaboration of a story means something other than that the same should be discarded, and its title and authorship applied to a wholly dissimilar tale.
\end{quote}


\textsuperscript{66} See note \textsuperscript{65} \textit{supra}.

\textsuperscript{67} \textit{Gilliam v. American Broadcasting Companies, Inc.}, 538 F.2d 14 (2d Cir. 1976).
mented upon, it has been held that a statutory claim for mutiliation of an artistic work can be made under section 43(a) of the Lanham Act. The court was faced with the following set of circumstances: In 1975, American Broadcasting Company (ABC) contracted with Time-Life, Inc. to broadcast two ninety minute specials featuring the comedy group, Monty Python’s Flying Circus, and edited out twenty-four of the original ninety minutes of each. Time-Life, Inc. had bought an American distribution license from the BBC which in turn had obtained the right to license overseas broadcasts from the Monty Python Group through a scriptwriter’s agreement. Under the agreement, the group had maximum control over the scripts; the BBC did not have the right to edit once the programs were recorded. Upon learning of the editing done by ABC, which came after the broadcast of the first of the programs in the United States, the group sued to enjoin broadcast of the second special, and for damages. The district court denied a preliminary injunction, and an appeal was taken.

The Court of Appeals reversed the decision by the district court, and directed that a preliminary injunction be issued. The ruling was based, in part, on the court’s determination that the plaintiffs were likely to succeed on two alternative theories. The first was a claim of copyright infringement for unauthorized editing which exceeded the license granted by the proprietor of the copyright. The second claim made was that the editing constituted a “mutilation” of the group’s work in violation of section 43(a) of the Lanham Act. That provision generally prohibits the false designation or misrepresentation of the origins of goods and services. Up to the time of suit, the Act had

70 Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or, representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.
never been extended to cases touching on common law copyright issues. Nevertheless, the court reasoned that a complaint for mutilation would seek to redress the same rights sought to be protected by the Act and, therefore, should be recognized as stating a cause of action under that statute.

d. Does the law in the United States meet the Berne standard of moral right?

From the foregoing, it is apparent that a considerable portion of the Berne moral right is recognized in the United States. Clearly, there are deficiencies, and under a strict reading of article 6bis of the Convention, the United States would fail to comply with the standard articulated.

But do the Berne Union members practice what they preach? Have all other members recognized the Berne moral right to the extent provided in the Convention? Clearly not, and the instance where it is most apparent is in the case of the United Kingdom. This is not surprising, since British copyright law so closely parallels our own. In the United Kingdom, for instance, just as in the United States, the author has no inalienable right to receive credit for his own work. This appears to be one of our own major stumbling blocks in complying fully with Berne. In another vein, the British case law demonstrates that there are limitations to its recognition of a right of integrity, and this too is inconsistent with the Berne mandate giving the author the right "to object to any distortion, mutilation or alteration thereof." (emphasis added)

Despite these deficiencies, the British have remained members of Berne, and no other member country has been heard to complain. Therefore, on the basis of the general acceptance of the United Kingdom's narrow scope of moral right protection, there is reason to believe that the protection offered in the United States would meet the Berne standard as it is applied in practice.

2. Statutory Formalities

The notice provisions under the new Copyright Act clearly conflict

---

71 538 F.2d at 26 (Gurfein, J., concurring).
72 Id. at 24-25.
73 Compare Marvin, supra note 50, at 694, with note 58 supra.
74 Marvin, supra note 50, at 702-03 (emphasis added).
75 Consider id. at 678 and Nimmer, supra note 42, at 523 n.132, and accompanying text.
with the Berne Convention. Affixation of notice has been a requirement for statutory copyright in the United States since 1802.\(^7\) In contrast, since the Berlin Revision of 1908, the Berne Union has abandoned all statutory formalities with regard to the vesting of copyright except those required for a country's own nationals.\(^7\)

Before the 1976 Copyright Act became effective, a dual system of copyright protection was in operation. An author retained perpetual common law protection of his work so long as it remained unpublished. Upon publication, common law protection was lost, and the author could only receive protection under the federal statute.\(^7\) In the early Supreme Court case of _Wheaton v. Peters_ it was held that this statutory right could only vest upon strict compliance with the formalities set out in the statute.\(^7\)

Though the formalities at the time of _Wheaton_ were considerable, they have been whittled away considerably over the years. For instance, the copyright statute at that time called for a title of the book to be deposited in the clerk's office; notice of the record made by the clerk had to be published on the page next to the title page of the book; public notice had to be given in the newspapers; and six months after publication a copy had to be deposited with the Department of State.\(^8\) These requisites of copyright were relaxed considerably in the Act of 1909, which required that a notice of copyright had to be affixed to each copy of the work which was distributed.\(^8\) Under the 1976 Act, the failure to give notice and the failure to correct such omission\(^8\) will

\(^7\) Act of April 29, 1802, ch.36, § 1, 2 Stat. 71.

\(^7\) Article 4 reads: "The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work." Berne Convention, _supra_ note 7, art. 4.


\(^7\) 33 U.S. 591, 633 (1834).

\(^8\) See id. at 633-34.

\(^8\) Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1077. Contrary to the popular belief, registration and deposit were not, and still are not, conditions precedent to the securing of copyright. Under the old and new Acts, they represent conditions to be met before the bringing of a suit for copyright infringement.

\(^8\) 17 U.S.C. § 405(a) (1976) provides:

Effect of Omission on Copyright.—The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or
result in the author's dedicating his work to the public. The persistence of some formal requirement in our statute may simply reflect the traditional Anglo-American view that copyright is a privilege granted by the state, rather than a natural right growing out of the work.

Apparently, the choice of continuing to require notice was not an easy one. There had been considerable debate on this issue for some time, with vehement supporters on both sides. The Congressional decision was, in large measure, affected by the recommendation of the Copyright Office that the notice requirement be retained. The Office's proposal came within the context of a preliminary draft bill on copyright revision submitted to the Congress, after an exhaustive study of the field had been undertaken. Notwithstanding the careful treatment given the notice issue by the Copyright Office, it would be helpful to reexamine the problem.

a. The argument against notice

Those who call for the abandonment of the notice requirements

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

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

Under section 405(b), an innocent infringer who has been misled by the omission is absolved from liability. See also section 406 which pertains to errors in the notice.

It is of course true that the publication of a copyrightable "work" puts that "work" into the public domain except so far as it may be protected by copyright. That has been unquestioned law since 1774 . . . and courts have often spoke of it as a "dedication" by its "author or proprietor." That, however, is a misnomer, for "dedication," like "abandonment," presupposes an intentional surrender, which is in no sense necessary to the "forfeiture" of a copyright." An author, whose work is "forfeited," need have had no such purpose, and ordinarily does not . . . .


See F. Kase, COPYRIGHT THOUGHT IN CONTINENTAL EUROPE 6-8 (1967).


See Ringer, supra note 1, at 478 n.4, 489 n.87, and accompanying text.

See id.
BERNE ENTRY

claim that its usefulness does not outweigh the dramatic loss of proprietary rights sustained by authors in the instance where they have voluntarily dedicated their work to the public domain. The case law is replete with sad tales on this point, and this is corroborated through estimates on the extent of the problem. It is argued that while the

88 Of these, the case most often referred to is Holmes v. Hurst, 174 U.S. 82 (1899). Oliver Wendell Holmes, Sr., was the author of the serialized The Autocrat of the Breakfast Table. The book was published in twelve successive issues of the Atlantic Monthly during the years 1857 and 1858. Pursuant to the agreement with the publisher, the firm was granted only the right to publish, and nothing more. No copyright was secured, either by the author or the publisher, in any of the twelve serialized parts. After the publication of the last issue, the book was printed as a whole, and both Dr. Holmes and his publisher recorded copies with the district court clerk of courts. Notice was given in every published edition of the entire book. Dr. Holmes later (in 1886) deposited a copy with the Librarian of Congress. In 1894, the defendant began selling copies of the book, all copied from the twelve Atlantic Monthly issues, and saying so much on each copy of the book. Holmes brought suit for infringement. The Supreme Court held that the entire book had been dedicated to the public upon publication of the last Atlantic Monthly issue. Id. at 88-89.

See also cases cited in Finkelstein, The Copyright Law—A Reappraisal, 104 U. PA. L. REV. 1025, 1054 n.89 (1956). The decisions referred to are somewhat dated, and do not reflect the trend in recent litigation which indicates judicial willingness to find "substantial compliance" with the statute. See, e.g., Comment, 59 MICH. L. REV. 616, 619-30 (1959). This doctrine is, in certain respects, consistent with section 404(a) of the statute. See note 82 supra. In all likelihood, cases in the future will not turn on the more trivial technicalities which were the critical focus in many of the cases cited by Finkelstein.

89 Ladas has cited a statistic presented by the International Bureau of Berne in 1910 that, among the some hundred court proceedings in which the Convention had been involved until then, one seventh of the disputes pertained to compliance with the formalities in the country of origin. S. LADAS, supra note 5, at 269-70. In another place, Ladas says that it is estimated by authors in the United States that about one half of the literary works are technically without copyright protection because of errors in the fulfillment of the formalities required by law. Ladas, Inter-American Copyright, 7 U. PIT T. L. REV. 283, 289 (1941). This latter figure is partially corroborated with the observation made by the Copyright Office that most published material bears no notice, and is therefore in the public domain. The Office says that in these cases, there is no desire to secure copyright; the instances where this occurs most frequently are in the publication of pamphlets, annual reports, advertising matter, scholarly and other informational material. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 62 (House Comm. Print 1961). While the creators of some of these materials would find little value in the acquisition of copyright, it is questionable whether the same can be said for academic and scientific work. More likely than not, they would probably want the benefit of copyright for the purpose of pursuing blatant abusers. This would not be inconsistent with acquiescence in the case of a technical infringer who photocopies for his own use, or alternatively, where the material is put to "fair use." See 17 U.S.C. § 107 (1976).
presence of a copyright notice may be of some assistance at times to potential users insofar as it may give a lead or starting point in tracing the present owner of the particular right of use in a work for which the user would require an appropriate license, the lead is in no sense the final answer.\textsuperscript{90} Moreover, it is further pointed out that the United States stands practically alone in making notice a condition of copyright protection for all types of artistic works.\textsuperscript{91} Now that the United States has joined ranks with countries which grant a term of life of the author plus fifty years, it is persuasively shown that the notice requirement serves little value.\textsuperscript{92}

Aside from practical considerations, other proponents have taken the position that the intent to copyright should be implied in every artistic work:

But let us consider how important this requirement of notice of copyright really is. What does it mean? The author expresses his intention to claim his authorship in his work and therefore to prohibit others from copying his work. But this intention is to be implied in the fact alone that an author has expended labor and time in creating his work and bringing it before the public. No author is to be deemed to want his work to be copied. As stated above, literary and artistic creation is today a profession and the author means and expects to support himself from the economic value of his work. In

\textsuperscript{90} It merely shows that at one time there was an apparent claim of copyright in the work by some one. The name in the notice need not necessarily be that of the present owner of the copyright, nor need it be that of the exclusive licensee of the particular right sought. Under the new principle of "divisible ownership" [as embodied in section 101 of the new Act], the person named in the notice may be that of a partial owner of the copyright, or an exclusive territorial licensee concerned with rights other than those in which the prospective user is interested.


\textsuperscript{91} The only other countries to do so are the Phillipines (whose copyright statute is patterned after the United States statute), Nicaragua, Argentina and Chile. Doyle, Cary, McCannon & Ringer, Study No. 7, Notice of Copyright, in I STUDIES ON COPYRIGHT 252-53 (Arthur Fisher mem. ed. 1963).

\textsuperscript{92} "In so far as the formality of notice was supposed to give evidence of the beginning of the copyright term, it would obviously be of little value under the system based on the life of the author plus a term of years." Young, The Copyright Term, 7 ASCAP COPYRIGHT L. SYMP. 139, 172 (1956). Young does point out, however, that the date of publication would be of some value in facilitating searches in the Registration Office. Id. at 172. Also see Finkelstein, supra note 88, at 1052.
the very rare cases where the author desires to dedicate his work to
the public, as is the case of publications issued by certain founda-
tions, this intention will be made clear by the author's desisting from
prosecuting those who copy his work or by an explicit declaration on
the work that free reproduction is permitted. This would seem to conform with the European view that copyright is
akin to a natural right. But more than mere idealism, the argument is
persuasive, especially when we consider an artist who is so befuddled
by various lay interpretations of the copyright law that he decides to
ignore it, thinking that his work will bring in so little money as not to
justify the expense of a lawyer.

b. The argument for notice

The Copyright Office concluded that the public interest was best
served by keeping free of copyright restrictions the large mass of
material in which the authors do not wish to secure copyright. It was
felt that notice was "a simple and highly useful device to accomplish
that purpose, and also to give the public information as to the
copyright status and ownership of any work." In support of the latter,
there was considerable evidence amassed that various industries
used the notice in their everyday operations to determine whether
copyright existed in works used. The Office further insisted that the
arbitrary and unjust forfeitures in the past could be avoided by relaxed
provisions concerning the inadvertent omission of, or error in the
notice.

c. A compromise solution

For some time, a proposal had been offered to reconcile these op-
posing views through a system under which certain remedies would be
conditioned upon proper notice, but this notice would not affect the
inherent rights of the author. Under a system such as this, notice

93 Ladas, Inter-American Copyright, 7 U. Pitt. L. Rev. 283, 287 (1941).
94 Report of the Register of Copyrights on the General Revision of the U.S.
95 Id.
96 Blaisdell, Study No. 8, Commercial Use of the Copyright Notice, in I Studies
97 Report of the Register of Copyrights on the General Revision of the U.S.
98 This proposed scheme first appeared as part of the Vestal Bill (on copyright
revision) which passed in the House of Representatives in 1931. H.R. 12549, 71st
would be abolished as a mandatory requirement of copyright protection. For the benefit of the innocent infringer (since under this system he would not be guaranteed notice), the following conditions would apply: The innocent infringer would be subject to an injunction only upon reimbursement of his reasonable outlay innocently incurred. Secondly, actual notice would have the effect of removing his defense of innocence for undertakings begun thereafter. Third, the infringer might or might not be subject to a reasonable license fee.\textsuperscript{99} Finally, no other remedies, including statutory damages, would be available against the infringer. Accordingly, a plan such as this would offer a substantial incentive to provide notice, since a copyright owner would be entitled to damages if notice were given.

d. Analysis

No doubt, mandatory notice will continue to serve some useful function. Primarily, its presence or absence will indicate to would-be users whether there is need for inquiry. Contrary to the Copyright Office's assumption, however, it is highly questionable to presume that the absence of notice shows an intent not to copyright, especially with respect to authors of scientific and academic articles.\textsuperscript{100} Moreover, the utility of notice has been reduced because the term of copyright for works created after 1977 begins, not with the date of publication, but with the date of the author's death, \textit{i.e.}, the date of publication will have no bearing on the term. For works which received copyright protection before the Act went into effect, the date of publication will still

\textsuperscript{99} The Vestal Bill would have permitted a remedy for "the fair and reasonable value of a license." Mr. Henn's proposal did not allow for such liability. See note 98 \textit{supra}, and citations therein.

\textsuperscript{100} A further argument has been made that free communication and scholarship would be hampered under a system in which notice is not required; for a person might be discouraged from using a work out of fear that it is copyrighted. Thus, so the argument continues, publication without notice is a way of informing the public that the work should be freely circulated and used. See \textit{Hearings Before the House Comm. on Patents on H.R. 10434}, 69th Cong., 1st Sess. 57 (1926). \textit{But see notes 62 \& 89 supra.}
serve a useful purpose, but this, in and of itself, is no reason to continue requiring its inclusion in later works. Though notice will serve as a somewhat useful lead in researching copyright ownership, it is by no means a final answer. The main effect of continuing to impose notice requirements will be to keep free of copyright restrictions the great bulk of published material produced in the United States today.

From an administrative point of view this may have been a wise decision, since the copyright workload is that much more reduced each time that notice is omitted. Similarly, the forfeiture issue seems to have been handled in a reasonable fashion through the relaxed provisions for correcting errors or omissions. The glaring problem, however, is the minimum value contributed to our copyright law by the requirement of notice.

The compromise measure discussed above represents a better solution to the question of notice. First of all, under the incentive approach, the problem of forfeiture would drop out of copyright law completely. At the same time, the innocent infringer would be given adequate protection in the event of a suit. Even if a reasonable license fee were to be assessed against him, the net effect would be the same as under our present law, since notice triggers the inquiry which ultimately leads to the payment for use of the copyright. Under the incentive approach, the scholar or scientist who has failed to give notice would, at the very least, have the remedy of an injunction available to correct any blatant abuse of his work. Though a provision such as this increases the likelihood of litigation, in the vast majority of cases, a minor copyright infringement would not justify the expense of a lawsuit. Moreover, where the stakes are high, artists and publishers would be expected to take greater pains to assure themselves of an adequate remedy by making sure that notice is given. In short, all interests are protected, and the role played by notice takes on a character which more nearly comports with its real significance.

CONCLUSION

The issues of moral right and mandatory notice have remained obstacles to Berne entry for some time. American courts have been inclined to declare that the moral right is not recognized because our copyright law is commercially based, and is not concerned with protec-

101 Pursuant to 17 U.S.C. § 304(b) (1976), subsisting copyrights will receive protection for 75 years from the date of publication.
ting the personality of the author. Mandatory notice continues to be justified on the assumption that copyright is not sought for the vast majority of works which are published each year.

It has been shown that our courts have not been unmindful of the unique problems of the author, and have developed a body of law outside of copyright which substantially recognizes the moral right. There appears to be no obstacle to Berne accession because of the moral right doctrine. Also demonstrated has been the modern concern over the problem of forfeiture of copyright due to the omission of notice. The response to the forfeiture issue, thus far, has been the development of a "substantial compliance" doctrine by the courts,102 and the various relaxed notice requirements offered by the Congress in the 1976 Copyright Act.103 Nevertheless, the notice provisions of our new copyright statute remain the major stumbling block to United States adoption of the Berne Convention.

In all probability, the notice question will remain dormant for many years to come. The present copyright statute is the product of far too many years of deliberation and compromise for anyone reasonably to expect revision in the near future. But eventually the urge to tinker with the Act will come. At that time, mandatory notice is likely to be called into question again, and the better course would be to replace our present requirements with the incentive scheme outlined in this Note and, as a consequence, remove the final major conflict between our own copyright law and the Berne Convention.

RICHARD JACOBSON*

---

102 See note 88 supra.
103 See note 82 supra.

* J.D. (1979), Case Western Reserve University. This paper won 1st Place in the Case Western Reserve University School of Law 1978 Nathan Burkan Memorial Competition, sponsored nationally by the American Society of Composers, Authors and Publishers. The author also received an Honorable Mention in the national competition.