A. Introduction

In the first edition of this book (written in 1986), the following comment appeared concerning the position following the 1967 to 1971 Revisions of the Berne Convention:

At present, a state of rough equilibrium appears to have been reached, and there are no current plans in train for another revision of the Convention. Nevertheless, as with most human institutions, changes are still occurring and new pressures emerging. It would be false, therefore, to think that the second centenary of the Berne Convention will not be as eventful, in one way or another, as its first.\(^1\)

As this chapter will show, this 'state of rough equilibrium' changed radically in the period immediately after these words were written.

A number of influences are to be seen at play here, but two in particular have been crucial. First, there has been the effect of technological change, in particular the advent of digital technologies and the subsequent development of networked communications and the Internet. Second, there has been the linking of protection of intellectual property rights with trade issues, culminating in the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights in 1994 (\textit{TRIPs Agreement}) as one of the annexed agreements of the newly established World Trade Organization (\textit{WTO}). Underlying the adoption of the TRIPs Agreement, in turn, was widespread dissatisfaction with the way that existing intellectual property rights agreements such as Berne dealt with questions of enforcement and the absence therein of any effective dispute-resolution mechanism between states.

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4.03 Both these issues are closely connected, but for the purposes of exposition it is helpful to deal with the way they were resolved in the different fora of the World Intellectual Property Organization (WIPO) and Berne, and then of the General Agreement on Tariffs and Trade (GATT) and the WTO. As the centre point of this commentary is the Berne Convention, we shall begin by considering that agreement and the possibility of its revision post-1971, leading to the adoption of the two WIPO treaties in 1996; we shall then move to a short description of the adoption of the TRIPS Agreement and the implications of this development. Inevitably, this style of treatment will mean that chronologies will overlap, but this is an inevitable consequence of the double helix that is now formed between Berne and its associated agreements, on the one hand, and TRIPS, on the other. A further twist in the helix is to be found in the adoption of separate international agreements concerning "neighbouring rights", but consideration of these is left for separate treatment in Chapter 19 below.

B. Revising Berne Again

(1) The period 1971–86: a period of reflection and regrouping

4.04 Enough has been said in the preceding chapter to indicate that, following the last two revision conferences in Stockholm (1967) and Paris (1971), it looked unlikely that the Berne Convention would be further revised in the foreseeable future. This was because these last two conferences had almost seen the complete breakdown of the international copyright system, as a huge gulf emerged between developed- and developing countries, particularly on the issues of compulsory translation and educational copying licenses. While these divisions were finally painted over at the Paris Conference of 1971, the prevailing opinion of experts was that it would be too dangerous to institute a new revision process in case these divisions were reopened. Subsequent developments, most of them external to the Berne Convention, began to alter this position from the mid-1980s on, and a new process of revision did, in fact, begin in 1991. Although this did not result in a revision of the Convention itself, within the comparatively short period of five years, a separate new treaty on copyright (the WIPO Copyright Treaty) was adopted in Geneva in December 1996— an outcome that looked unlikely even at the beginning of that year. This treaty, and its companion on performers and phonograms, came into force in early 2002. In this same period, of course, the TRIPS Agreement had also been formulated, adopted, and come into operation.

4.05 In recounting this most recent chapter in the history of international copyright relations, it is worth beginning with a reprise of the views that were expressed in the final chapter of the first edition of this commentary which was published in 1987—at a midpoint, as it transpired, between the period of cautious reflection and development that followed the adoption of the 1971 Paris Act of Berne and the period of frenetic norm-making that occurred in the years from 1987 to 1996.

In 1986, it was possible to view the Berne Convention through the prism of the following metaphor: a reasonably sized river craft that had just survived passage through some particularly steep and turbulent rapids and that was now entering a long stretch of shallow, sluggish water, which the paddlers hoped would continue, at least for the time needed to regain their strength and energy. But while all appeared smooth on the surface of the water, there was a much stronger underlying current: indeed, there were several such currents, with one in particular that was flowing in another adjoining riverbed that was shortly to add its force to the main stream. Viewed in less aquatic terms, it can be said that the Berne Convention, even as modified in Paris in 1971, was a reasonably impressive instrument so far as its embodiment of substantive copyright norms was concerned, for example, its prohibition on formalities, its mandatory term of protection, and its list of exclusive rights to be protected: in this regard, it compared favourably with its companion convention in the industrial property sphere, the Paris Convention for the Protection of Industrial Property. On the other hand, Berne was still a "work in progress", with many significant gaps, so far as its objective of providing protection, in as "effective and uniform a manner as possible", for the rights of authors in their literary and artistic works was concerned. As noted in the first edition of this commentary, two particular areas of concern were left relatively untouched by the 1971 Paris text: those dealing with questions of ownership and exploitation of the rights protected under the Convention, and those dealing with the means of enforcing those rights. The first of these matters is dealt with at some length in Chapter 7 below where it will be seen that, to date, attempts to deal with ownership and exploitation issues, even in the limited area of cinematographic works, have been very limited in their effect. This is an area of concern, moreover, that involves difficult issues of private international law, and these questions are addressed further in Chapter 20 below.

As for the second matter—enforcement—this was a significant lacuna in the Convention umbrella that became more evident as the Convention neared its centenary celebrations.

(a) Enforcement and compliance

In this regard, the Convention relied on the application of the principles of national treatment and independence of protection, under which the extent of protection and the means of redress afforded to the author are governed exclusively by the laws of the protecting country. This was qualified in two
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respects: first, as regards the requirement that the exercise of rights under the Convention should not be subject to any formalities, such as registration or the need for the lodging of security; secondly, with respect to the seizure of infringing copies. Otherwise, the Convention left the question of enforcement of rights to the law of the protecting country. Historically, this may be seen as a reflection of the late nineteenth-century conditions in which the Convention was born: its purpose was to secure recognition of the entitlement of authors to protection and, once this was accorded, it was left to the individual claimants to pursue the enforcement of their rights according to the laws of the country where protection was sought. A century on, however, the assumption that protecting countries would provide the necessary enforcement of rights could no longer be so confidently made, particularly in the absence of effective mechanisms at the international level to ensure that member countries would comply with their Berne obligations. As will be seen below, enforcement and compliance issues were the driving force behind the adoption of the TRIPS Agreement in the early 1990s. Beyond this, there were also concerns about the efficacy of many national court and administrative procedures: for many rights owners, it was of little comfort to receive formal protection of their rights in a country where they might take years and great expense to have a case finally determined.

(b) Gaps in substantive protection: the continuing debate

As Chapters 1 to 3 above demonstrate, the history of Berne up to 1971 had been the gradual development of a body of uniform substantive rules of protection to be applied by an increasing number of countries constituted as a 'Union for the Protection of the Rights of Authors'. But even this apparently simple ideal can raise questions of definition: which rights are to be protected in the first place, and what properly pertains to authors and their successors? At the Berne Conferences of 1884 to 1886, a number of delegates saw the instrument that was finally achieved only as a first step towards an ultimate universal codification of copyright. While a considerable number of rights were added to the Convention in its successive revisions, the 1971 text was still some way from embodying a uniform set of rights to be protected. Even at that time, it was clear there were significant and obvious gaps in substantive protection, for example, in the case of a right of distribution, while the formulation of some of the rights that were protected left considerable scope for the adoption of conflicting interpretations by member countries, for example, those of reproduction, broadcasting, and cable distribution (these matters are analysed in depth in Chapters 11 and 12 below). Furthermore, considerable variations were to be found with respect to

the protection of such subject matter as cinematographic works, while it was quite unclear whether new kinds of subject matter, such as computer software and databases, came within the scope of the Convention and, if so, how these matters were to be dealt with. In addition, the Convention left a wide discretion to member countries in relation to the important matter of exceptions to protection. Much therefore was subject to the application of the principle of national treatment, meaning that the protection accorded to authors claiming under the Convention still varied considerably from country to country. As the first edition of this commentary, written in 1986, stated, 'uniformity of protection, under the present [1971] Act, therefore is still only partial'.

Complete and absolute uniformity of protection, in the sense of an international codification of copyright applicable everywhere, is undoubtedly a utopian and unattainable goal, and may not even be ultimately desirable if states are to maintain some differences in their cultural and other copyright-related policies. However, the advantages of increased uniformity are clear, particularly the greater certainty that this gives authors in protecting and exploiting their rights in different countries of the Union. At the regional level, notably in the European Union, it has been possible to see a strong movement towards the harmonization of copyright in a number of key areas, such as rental rights, computer software, duration of protection, cable and satellite transmissions, and databases. In the larger context of the Berne Convention, there would be great scope for a new revision covering such matters if this were politically and practically possible. Somewhat hopefully, the first edition of this commentary suggested that a possible 'shopping list' for such a revision would include the following:

1. The exclusion of software from article 2(1) and a more precise definition of the meaning of 'literary and artistic'.
2. A proper definition of the term 'author'.
3. Recognition of a right of distribution, including rights of rental and lending.
4. Reformulation of the rights of broadcasting and performance to take account of the present uncertainties posed by satellites and cable distribution.
5. The proper regulation of the minor exceptions to performing rights implicitly allowed at present within the framework of the Convention, as well as the exceptions presently implied with respect to translations.
6. Some clearer definition of the meaning of 'private' in the context of copying and dissemination in a non-material form.
7. Regulation of the situations where compulsory licences and levies may be permitted.
8. Provision for criminal sanctions and similar remedies against pirates.

4.09

4.10

Paris Act, art 5(2). See further paras 6.101ff below.
Paris Act, art 16.
Art 884, 28–9 (debate on the German motion in favour of a universal codification).
9. Regulation of the basic conditions under which collective administration of rights may occur.

10. Provision of general principles to govern: (a) employee authors, (b) contracts between authors and publishers, and (c) contracts between authors and other disseminators of works.

11. Residual rules governing the application of laws in the case of the ownership and exploitation of rights under the Convention.

4.11 Even more hopefully, the first edition went on to state that this list contained 'only a minimum number of changes that might be made to the Convention in order to attain a greater degree of uniformity', but acknowledged that it was 'still highly ambitious and, to an experienced eye, ... [would] appear unrealistic'. Nonetheless, it was a programme for action, and led to consideration of the possible routes by which some, at least, of these objectives might be reached. In view of subsequent events, these possibilities are worth recounting briefly.

4.12 (c) A conference of revision in the near or medium future

In 1986, the first edition described this as the 'ten-year option'—the holding of a revision conference some time before 1996. As noted above, this seemed an unlikely, even undesirable, prospect when viewed against the near collapse of the Berne system at the time of the 1967 to 1971 conferences. Having reached a settlement that all could live with, there was a general reluctance on all sides to reopen debates that might lead to a similar impasse. On the other hand, it could be said that the problems facing the Convention in 1986 were different in kind from those that were at the forefront in 1967. While the difficulties of developing countries had hardly disappeared, the threats to copyright protection were now coming from other quarters, mainly the new modes of exploitation made possible by technological development, while the possibilities of networked communications were already being dimly perceived. However, it was also likely that these very developments would make it even more difficult to achieve agreement than was the case in 1967 and 1971, particularly given the increasing membership of the Berne Union. The reality is that the hothouse atmosphere of a revision conference, held within a relatively confined period of time, can readily lead to stalemate, unless a fair degree of consensus between states on the matters to be discussed has emerged beforehand. This was so at each of the earlier successful revision conferences, notably those of Berlin and Brussels. But as far as the issues listed in the preceding paragraph were concerned, it could not have been said in 1986 that any significant level of agreement on any of them had yet been reached between Union countries. Accordingly, a full-scale revision conference, even within a ten-year timeframe, would most likely have been a pointless exercise and it does not seem that there was ever any serious consideration of this possibility.

4.13 (d) The 'guided development' of international practice with a view to its ultimate confirmation by a revision conference

An alternative, and perhaps more appealing, strategy was to delay preparations for a revision conference indefinitely so as to allow the necessary consensus referred to above to emerge. The growth of this consensus could be assisted by a number of measures: the convening of international groups of experts, the holding of forums, the carrying out of national and comparative studies and the formulation of model principles or provisions. The process would be slow and incremental, and might aptly be described as a policy of 'guided development'; or, perhaps more accurately, 'seeding the ground'. Nevertheless, over time it could lead Union members to identify far more clearly their points of agreement. If these points were adopted, or at least accepted, in national laws, this would finally lay the basis for a conference of revision that could amend the provisions of the Convention accordingly.

4.14 (2) 'Guided development': activities leading up to the Berne Protocol process, 1991

In essence, 'guided development' appears to have been the policy of WIPO since the late 1970s, with initiatives occurring in the following areas: reprography; storage of protected works in computers and computer-created works; computer software; cable television; expressions of

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folklore; rental and lending of phonograms and videograms; private copying; broadcasting satellites; publishing contracts; piracy; paying public domain; model statutes for authors’ organizations in developing countries; and the problems of handicapped readers. Furthermore, in the year of the Berne centenary (which was attended by celebrations in many Berne member states), WIPO announced that it was undertaking a systematic examination of new modes of exploitation in relation to each... works, phonograms, works of visual art, works of architecture, works of applied art, dramatic and choreographic works, and musical works. Work on these

11 The work in this area was extensive, but the most important meetings were those of the Working Group on the Intellectual Property Aspects of Folklore Creation which led to the preparation of a model law [1986 Copyright 110 and 1987 Copyright 282]. Work was also done on a draft multilateral treaty by the Group of Experts on the International Protection of Expressions of Folklore (Paris, 10–14 Dec 1984); [1985 Copyright 40. For further studies, see A Bogsch, ‘Works’ [1986 Copyright 291], 295 (‘Bogsch’ 1986).]

12 In particular, the WIPO/UNESCO Group of Experts on the Rental of Phonograms and Videograms (Paris, 26–30 Nov 1984); [1985 Copyright 16.


14 In particular, the WIPO/UNESCO Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite [1985 Copyright 180.


17 See n 13 above.


21 A Bogsch, ‘The Berne Convention: Towards the Future’, in Büchertreffen des Deutschen Buchhandels und International Publishers Association, International Copyright Symposium, as follows: printed works, audiovisual works (see further the preparatory document and report of Panama (Paris, 2–6 June 1980); [1986 Copyright 218), phonograms, works of visual art, works of applied art, dramatic and choreographic works and musical works.

B. Revising Berne Again

The advisory and training activities of WIPO with respect to development cooperation in developing countries during this period were also extensive, leading to a large number of accessions to the Convention by such countries. Much of this work ‘in progress’ still continues today, but, as will be seen below, it formed an important backdrop to the developments that occurred from 1991 with respect to the formulation of a separate new treaty, the WCT.

(4) Beginning the process of revision: 1991 and beyond

4.15 While the period of guided development was incremental and fragmented in... character, these activities were important in setting the scene for the process that was initiated in 1991 by WIPO for the preparation of a ‘possible protocol’ to the Berne Convention. Also extremely influential here were events occurring outside the arena of Berne and WIPO, in particular the inclusion of ‘trade-related’ intellectual property rights in the agenda for the Uruguay Round of the GATT that had begun in late 1986 (see paras 4.31ff below). Finally, it should be noted that, from 1989, Berne had a vigorous new member, the USA, which was

22 The preparatory papers and reports of these various committees of governmental experts are to be found in [1986 Copyright 208–9 (audiovisual works and phonograms), 1986 Copyright 403–11 (works of architecture), 1987 Copyright 70–82 (works of visual art), 1987 Copyright 185–215 (dramatic, choreographic, and musical works), 1987 Copyright 356–73 (works of applied art), 1988 Copyright 42–57 (printed wood), 1988 Copyright 362–89 (photographic works).


24 See further the discussion of this work by P Fox (2001), 10–11.

25 Ibid, 12.

26 Ibid. 27 For a general survey, see Bogsch 1986, 333ff.
now taking a close and continuing interest in developments in this particular arena for the first time (see further paras 4.43ff below).

(b) A note about Additional Acts and special protocols and agreements

By way of introduction to what has subsequently occurred, it is worth noting other devices that have been used in the past to introduce changes to the Berne Convention, but in a more limited fashion than occurs through a full revision of the existing text: an Additional Act, special protocols and special agreements. As seen in Chapter 2 above, an Additional Act was adopted in 1896 and was proposed, though not adopted, in 1971.\(^2\) The principal advantage of such an instrument is that it can provide for limited changes to the Convention that may then be accepted by all or part of the existing membership without disturbing the status and operation of the current Act. In other words, it is only a partial revision and can therefore provide a framework for limited changes to take account of more pressing matters (as in 1896). The problem with this approach, however, is that it creates yet another layer of conventional obligations where a number of member countries prefer to remain bound by the current Act only or by earlier Acts.

As for special protocols, the chief examples in the history of the Berne Convention are those of 1914 and 1967. Like an Additional Act, they may leave member states with the option of adhering, but are usually devoted to one particular matter and need not be directly incorporated into or appended to the Convention.

More generally, there is provision in article 20 of the Convention for parties to enter ‘special agreements’ between themselves, so far as such agreements ‘grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention’ (see further paras 6.132ff below). It is therefore possible to conceive of the development of a series of special agreements associated with the Convention that deal with particular matters of concern but are not otherwise embodied in, or incorporated into, it. In the first edition of this work, it was suggested that this might be an appropriate method for dealing with such issues as software or expressions of folklore, as well as the ownership and exploitation of rights, extensions of terms, and paying public domain. Until the adoption of the WCT, this procedure had not proved successful in the context of the Berne Union, with the failure of two attempts to develop treaties on software\(^9\) and folklore.\(^9\)

\(^9\) See n 9 above.

\(^{10}\) See n 11 above.

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(c) Beginning the process of revision

As might be expected, the first steps taken here were modest, compared with others that had attended earlier revisions. According to one of the key participants, the ‘vague idea’ for a more systematic norm-setting exercise arose out of the deliberations of the meetings of the WIPO governing bodies, including the Berne Union Assembly held in September to October 1989.\(^1\) One of the items in the 1990–1 programme for WIPO that was adopted at this session was a proposal for the International Bureau to convene meetings of a committee of government experts to draw up a protocol to the Convention that would be concerned with matters of clarification of the existing text or the establishment of new international norms where there were doubts under the present text of the Convention as to the extent to which it applied. The nature of the instrument to be drawn up was little unclear at this stage, i.e., whether it would take the form of a protocol strictu sensu or that of a special agreement under article 20. The formal starting point was the convening of a ‘committee of government experts’ that met in late 1991. Although this is only the recent past, it is salutary to recall that there were still only ninety members of Berne at this time, although, as noted above, one important new member, the USA, was now present. A committee of governmental experts is, in one sense, an exploratory kind of process, as, at a meeting of this kind, representatives cannot bind their governments officially. On the other hand, contributions at this stage are of great importance in reflecting the present or probable views of their countries on particular issues. As with other WIPO meetings, observers from a large number of non-governmental organizations with interests in copyright issues also attended this first (and subsequent) meetings, including representatives of computer manufacturers, software producers, film producers, publishers, and the like. The representatives of these organizations were given the right to contribute to the discussions of the committee, and there was considerable lobbying that took place, both in the formal submissions made to these sessions and behind closed doors.

Unlike previous Berne revisions, there was no ‘host government’ overseeing the proceedings, and it was the WIPO secretariat alone that prepared a programme of proposals for consideration by the committee. This drew heavily on the work that it had undertaken in the period of ‘guided development’ over the preceding decade or so. Although the proposals covered a wide range of topics, they were somewhat vaguely formulated as a ‘possible protocol’ to the Convention, rather than as a full revision of the principal text. The strategic and pragmatic considerations operating here are readily apparent, in that there is usually less

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\(^{11}\) Ficos (2001), 18.
difficulty in getting states to agree to a protocol or separate special agreement, if it is not necessary for them then to become a party to it in order to retain their membership of the principal convention. On the other hand, there is the possibility that states that do not adhere to the new instrument may still obtain the benefits of any enhanced level of protection that is accorded by it in those states that do join it. This is because there is often a requirement in such agreements that parties should apply the provisions of the new instrument to non-signatory states that are still members of the parent convention, and there was, indeed, a provision to this effect in the original WIPO proposals. One may suppose that underlying this enforced benevolence was the view that the recipients of this higher level of protection would ultimately feel morally obliged to adhere to the protocol themselves.

4.18 The initial programme of proposals advanced by WIPO at the first meeting of the committee in November 1991 included proposals relating to both new and old subject matter (the protection of databases, artificial intelligence and computer-produced works, recognition of the status of computer programs as literary works, and separate protection for sound recordings) and new rights (including distribution, rental, and public display rights and clarification of the rights of reproduction and satellite broadcasting). There were also proposals for lengthening the term of copyright protection to the life of the author plus seventy years, abolition of the exception in favour of the mechanical recording licence, and for regulation of the collective administration of rights.22 Nothing at this stage, however, was directed to the rapidly emerging phenomenon of the Internet and the specific challenges that this posed to the protection and exploitation of authors’ rights. The discussion at this first meeting was inconclusive on many of the issues that had been raised by WIPO, with the ‘most passionate debates’23 centring on the question of whether sound recordings might properly be dealt with in any proposed protocol. Following a second meeting of the committee in February 1992, governments were asked to reflect on their views and to submit further proposals to WIPO for presentation at a third session of the committee to be held in November 1992. Very few national submissions were forthcoming and WIPO then proposed to defer further meetings of the committee indefinitely.24 At this stage, it might have been thought that efforts at revision were premature, although it should be noted that, in the other negotiating arena of GATT, discussion of a new agreement dealing with trade-related intellectual property rights was in full swing (see further paras 4.31ff below). It is also possible, at this stage, that there was some uncertainty about the respective roles of WIPO and GATT (soon to become the WTO) with respect to ‘norm creation’ in the intellectual property field, and this matter was not to be clarified for a little while yet. From a longer-term perspective, it can be seen that the TRIPS Agreement negotiators’ principal concerns with matters of enforcement and compliance did not really pre-empt the task of WIPO and the ‘traditional’ intellectual property conventions, such as Berne, from investigating and developing new substantive norms, but it was also true that, in the period from 1986 to 1993, the ‘main game’ was taking place in the TRIPS forum and that was where most of the time and energies of Berne members were focused. Nonetheless, it was significant that, in September 1992, a meeting of the Assembly of the Berne Union (the governing body of the Union) voted to continue the revision process, and, in fact, to bifurcate it with the creation of another committee of experts to prepare a possible new instrument on the protection of the rights of producers of phonograms, which were coupled to proposals on the rights of performers. Thereafter both committees met on five further occasions, holding their sessions one after the other (June to July 1993, December 1994, September 1995, February and May 1996). At its December 1992 meeting, the Assembly also decided to add two items to the agenda for the possible Berne Protocol—enforcement of rights and national treatment, the first of these reflecting the emphasis given to enforcement issues in the concurrent TRIPS Agreement negotiations.

4.19 (d) The shift to the ‘digital agenda’

Inevitably, things began to move more quickly after the completion of the GATT Uruguay Round and the adoption of the TRIPS Agreement. The most significant development to occur here was the move away from a ‘possible protocol’ to Berne that dealt with a number of disparate topics to proposals for a separate new instrument, albeit a ‘special agreement’ within the meaning of article 20 of Berne, that dealt specifically with issues arising from the challenges of the networked environment, or the ‘digital agenda’ as it was called. The reasons for this shift and its timing are not easy to pin down in precise terms, but it was a prescient response to developments that were occurring at the national and regional levels where policymakers and legislators were beginning to grapple with the challenges of the new phenomenon known as the Internet.25

22 For the texts of these proposals and reports of the first two meetings in Nov 1991 and Feb 1992, see [1992] Copyright 38–49, 66–82, and 93–110. See further the descriptions of these sessions in Ficior (2001), 19–22.
24 (1992) Copyright 182–7. In his commentary, Dr Ficior takes a rather more positive view of this request to member states for their views, remarking that this reflected a concern by the delegates to get more actively involved in the process and to take over the running from the International Bureau: Ficior (2001), 22–3.

26 See in particular the work of President Clinton’s Information Infrastructure Task Force that produced both a Green and White Paper on intellectual property: Green Paper—
Digital technologies and networking now posed challenges to the proper protection and exploitation of works that had not been so apparent, even at the start of the Berne Protocol process. It is difficult now for us to appreciate how swift the advent of the Internet was in this area, given that it appears always to have been with us. But in 1994 and 1995, its dimensions and challenges were only beginning to be properly appreciated, and it was something of a shrewd strategic move for WIPO and its members to incorporate these matters into the protocol revision process. Indeed, the shift to the ‘digital agenda’ enlivened a process that, up to this stage, had been somewhat faltering and reactive (to the changes occurring in the TRIPS arena). It now became proactive, with a theme and coherence that had previously been missing. In this regard, WIPO appears to have played an important catalysing role, sponsoring a series of impressively titled ‘worldwide’ or ‘global’ symposia dealing with digital issues, beginning with one in Harvard in 1993, then in Paris in 1994, Mexico City in May 1995, and Naples in the same year. The centrepiece of the proposals was now a new right of communication to the public which extended to the making available of works online. This was coupled with proposals for technological protection measures and the protection of rights management information, while other proposals were modified to take more specific account of digital and network issues. As part of this refinement of the programme, the original proposals relating to collective management and duration were quietly jettisoned (although a more limited proposal affecting the length of the term of protection for photographic works remained); it was also thought to be premature and/or unnecessary to deal with issues relating to artificial intelligence and computer-generated works, and it was decided to deal with the subject of databases in a separate instrument. Within a relatively brief time, at least by international standards, two draft treaties were ready for consideration and adoption by a formal diplomatic conference—these were the WCT and the Performances and Phonograms Treaty (‘WPPT’), to which was added a draft treaty on databases. At the meeting of the diplomatic conference in Geneva in December 1996, the first two of these, with necessary amendments and revisions, were adopted and laid open for signature. Both are now in force, with the WCT becoming so on 6 March 2002 and the WPPT on 20 May 2002. Consideration of the proposed databases treaty, however, was deferred for the time being and had not been proceeded with at the time of writing. For sake of completeness, it should also be noted that, in the post-1996 period, a further diplomatic conference was held in 2000 in relation to the protection of audiovisual performers, but failed to adopt a final text (see further paras 19.83ff below), while a proposal for the protection of the rights of broadcasting organizations was under consideration by WIPO at the time of writing (see further paras 19.87ff below). The WIPO agenda for formulation and extension of international copyright and related rights norms has continued in the post-1996 period, with the establishment of a Standing Committee on Copyright and Related Rights that replaces the former system of committees of experts and which meets on a regular basis.

C. The WIPO Copyright Treaty

(1) The diplomatic conference

This was held in Geneva from 2 to 20 December 1996 and, as noted above, dealt with the two treaties that were finally adopted (the WCT and WPPT) in back-to-back sessions. From the perspective of the Berne Union, this was the largest diplomatic conference that had ever been held on copyright and related rights issues, with representatives from 127 countries attending. These included delegates from a number of notable ‘new’ Berne members, including Russia, China, the Republic of Korea, Indonesia, and, of course, the United States of America, as well as a number of new states that had only come into

42 In Mar 1998, the system of committees of experts was replaced by standing committees, with the relevant one here being the Standing Committee on Copyright and Related Rights (‘the SCCR’): WIPO Document A/32/INF/2, available at www.wipo.int/documents. See further the discussion of the role of this committee in Chapter 16 below.


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existence after the centenary of Berne in 1986, for instance, Slovenia, Belarus, Slovakia, and Georgia. There was also a sizeable delegation from a major regional grouping, the European Community, with observers from a further three states (Ethiopia, Iran, and Dominican Republic), and seven intergovernmental organizations. Some national delegations were very well supported, such as those of the USA with nearly thirty members and the EC with fifteen, but a number of others had more than ten members, including Indonesia, Thailand, and Japan. Observers from a large number of non-governmental organizations representing every sector of copyright owners and users were also present, as well as representatives of several independent research institutions, such as the Max-Planck Institute in Munich. By comparison with the intimate nature of the early Berne conferences, there was a huge gathering, attended with all the colour and movement of any modern international meeting, with hurried corridor conferences, hectic lobbying, and frantic mobile telephone and e-mail communications between delegates, interest groups, and home bases. For WIPO as an organization, it could also be seen as a considerable achievement, following the apparent relegation of that organization to the background during the TRIPs Agreement negotiations. Two completed agreements within the space of three weeks is something of a record for any international gathering, particularly in view of the large number of states involved. The provisions of the WCT are analysed in detail, and in their relationship to the Berne Convention, at the relevant points of this commentary. For present purposes, the following summary will simply indicate the overall structure and principal features of the new treaty.

(a) Relationship to Berne

While not an Additional Act, protocol or appendix to Berne, the WCT is nonetheless a 'special agreement' within the meaning of article 20 of Berne: WCT, article 1(1). It is further provided that nothing in the WCT is to derogate from obligations that member countries might have between themselves as Berne members: article 1(2). Finally, although Berne membership is not a requirement for membership of the WCT, compliance with articles 1 to 21 and the Appendix of Berne is expressly required: article 1(4). In particular, protection is required of the categories of works protected under article 2 and 2nd of Berne (see further Chapter 8 below), while the points of attachment required for protection under articles 3 to 6 of Berne (see further Chapter 6 below) are to be applied mutatis mutandis to protection under the WCT: article 3.

(b) Points of clarification

A number of articles of the WCT 'clarify' matters previously thought to have been unsettled or unclear under Berne. Thus, article 2 embodies the well-known principle that '[C]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.' The status of computer programs as literary works within the meaning of article 2 of Berne 'whatever may be the mode or form of their expression' is also declared: WCT, article 4. In addition, the status of compilations of data as literary works under Berne is clarified under article 5 of the WCT so as to apply to '[C]ompilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations.'

(c) 'Agreed statements'

Clarification, both of existing Berne provisions and of new provisions embodied in the WCT, itself, is also provided in the form of a series of 'agreed statements' adopted by the 1996 Diplomatic Conference at the time of adoption of the final text of the WCT. The legal status and effect of these 'agreed statements' is dealt with at length in the next chapter (in particular at para 5.19), as well as at the appropriate points in the following commentary. For present purposes, however, it suffices to state that their purpose is to provide guidance in the interpretation of particular treaty provisions, both past (in the case of Berne) and future (in the case of the WCT). Significant, so far as Berne is concerned, are the following agreed statements:

- on the scope of the reproduction right and exceptions to article 9 of Berne (agreed statement to WCT, article 1(4));
- the scope of protection for computer programs under article 2 of Berne, and the TRIPs Agreement (agreed statement to WCT, article 4);
- on compilations of data under article 2 of Berne and the TRIPs Agreement (agreed statement to WCT, article 5);
- the scope of permissible limitations and exceptions in the digital environment (agreed statement to WCT, article 10).

Other agreed statements relate more specifically to the new provisions of the WCT, but are also concerned to maintain compliance with relevant provisions of Berne:

- the rights of distribution and rental under articles 6 and 7 of the WCT (agreed statements to articles 6 and 7 as well as to article 7 on its own);
- the provision of physical facilities for the making of communications (agreed statement to article 8 of the WCT);
- obligations with respect to 'copyright management information' (agreed statement to article 12 of the WCT).
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4.24 Articles 6 and 7 of the WCT contain new exclusive rights with respect to the subsequent exploitation of physical or tangible copies of protected works: the distribution of copies of literary and artistic works generally, at least up to and including first sale (WCT, article 6), and the rental of computer programs, cinematographic works, and works embodied in phonograms (WCT, article 7). These requirements are amplified in accompanying agreed statements.

4.25 The centrepiece of the WCT, so far as the advent of the networked environment is concerned, is to be found in article 8 which confers on authors the exclusive right of authorizing the 'communication' of their works to the public by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them'. This covers both 'push' and 'pull' communications technologies, and fills in gaps in the exclusive right of broadcasting and other transmissions under article 11th of Berne, as well as expanding the scope of those rights. (These matters are analysed at length in Chapter 12 below, notably paras 12.55ff.)

4.26 These are dealt with in article 10, which adapts the three-step test contained in article 9(2) of Berne and applies it to the new rights contained in the WCT, as well as more generally to use in the digital environment. As noted above, there is an important agreed statement attached to this article. (These matters are dealt with in detail in Chapter 13 below at paras 13.03ff.)

4.27 Articles 11 and 12 contain provisions that, for the first time, provide protection for copyright owners outside the usual framework of a law of authors' rights with its traditional classifications of conditions for protection, protected subject matter, exclusive rights, and allowable limitations and exceptions. Both articles are responses to the perceived threats to works that arise in the digital context where technology can be readily and effortlessly used to undermine or bypass authors' exclusive rights. Thus, article 11 states that member states are to provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law'. There is a similar, although rather more detailed, provision in article 12 with respect to protection against the removal of 'right management information'. (Both these articles are

D. The WIPO Performances and Phonograms Treaty, Geneva 1996

analysed at length in Chapter 15 below, and, as noted above, there is an agreed statement with respect to article 12.)

4.28 (b) Other matters
Although the original WIPO programme proposal for a general extension of protection to life-plus-seventy years was not proceeded with, article 9 of the WCT has an important provision with respect to the term for photographic works, assimilating these to other works (see further para 9.64 below). On the matter of the application of the WCT 'in time', that is, the extent to which its provisions are to be retrospectively applied, article 13 of the WCT applies the rules contained in article 18 of Berne (see further paras 6.112ff below). Finally, in the area of enforcement, there is a general obligation in article 14 of the WCT that 'Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.'

In other matters of a procedural character, the WCT follows closely the model provided by the Berne Convention, with the establishment of an Assembly of Contracting Parties (article 15) and the delegation of administrative tasks associated with the treaty to WIPO (article 16). Membership of the WCT is open to any WIPO member (article 17(1)), but is also extended to any intergovernmental organization . . . which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty' (article 17(2)). The latter provision is expressly extended to the European Community, 'having made the declaration' referred to there (article 17(3)). At the time of writing, the European Community had not availed itself of this facility, although its 2001 Directive on the Information Society covers almost all of the matters dealt with in the WCT.

D. The WIPO Performances and Phonograms Treaty, Geneva 1996

As noted above, this instrument grew out of the work of the initial committee of experts on a possible protocol to the Berne Convention (see above), where there had originally been a proposal to deal with phonograms within the context of the proposed Berne Protocol. This proposal was rejected, consistently with the historic attitude of Berne members to the inclusion of such subject matter within the scope of a convention concerned with authors' rights (see further
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para 8.112 below). Nonetheless, phonograms, together with performers’ protection, were now given to a second committee of experts, which, in tandem with the first committee developed a draft text for a separate agreement that would supplement and amplify the protection already given to these subject matters under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. (The background and history of the Rome Convention and its relation to Berne are set out in more detail at paras 19.05ff below.) The provisions of the WPPT are also considered in that chapter, so for present purposes it suffices to note that these go considerably further than those contained in the Rome Convention, and ‘track’ the provisions of the WCT so far as the ‘digital agenda’ is concerned, that is, with respect to the recognition of an exclusive right of communication to the public, protection against technological circumvention, and the removal of rights management information. A notable aspect of the provisions with respect to performers is the requirement to protect their moral rights (see further paras 19.52ff below). On the other hand, audiovisual performances are excluded from the scope of the WPPT, and there have been faltering and, as yet unsuccessful, attempts within the WIPO framework to formulate a further treaty on this question (see further paras 19.82ff below).

E. Uruguay Round of the GATT and the Influence of Trade Concerns

(1) In general

As we have already noted, the pressure for a revision of the Berne Convention in the late 1980s not only came from the activities and efforts of WIPO. There were several other very significant external factors that were relevant here. The first and most notable of these was the Uruguay Round of GATT trade negotiations that began in 1986 and concluded in 1994 with the constitution of the World Trade Organization (WTO) with the TRIPS Agreement as one of its annexed agreements. The latter seeks to eliminate the barriers to trade that may be caused by insufficient protection of intellectual property rights in different countries. So far as copyright matters are concerned, the standards of protection contained in the TRIPS Agreement are based on those contained in the Berne Convention, but, to a limited extent, they also build upon and clarify those standards. A curious situation has thus arisen where the impetus for countries to adhere to Berne standards of protection has not emanated so much from WIPO, as from a different international forum that is concerned with trade, namely the WTO, the international organization that now has responsibility for the agreements that were negotiated in the Uruguay Round. Countries that wish to join the WTO must accept the requirements of the TRIPS Agreement, along with all the other trade agreements that are administered by that body.

(2) The background to the TRIPS Agreement

It is unnecessary, for the purposes of the present work to trace in detail the developments that led to the negotiation and adoption of the TRIPS Agreement: this material has been well traversed by a number of other commentators. However, a brief description of the pre-Uruguay Round position and the steps leading up to the adoption of the TRIPS Agreement is useful in setting the background for a proper understanding.

(a) The pre-Uruguay Round position

The idea of an international trade organization was originally envisaged as a complement to the International Monetary Fund that was established at Bretton Woods in July 1944. After some negotiations, a charter for an International Trade Organization (the ‘Havana Charter’) was adopted by the United Nations Conference on Trade and Employment in March 1948, but this never came into


45 Gervais (2003), 3.
existence, in part, it appears, because of US reluctance. From 1948 until the establishment of the WTO on 1 January 1995, the GATT, which had been signed in Geneva in October 1947, was administered on an ad hoc and provisional basis by its own secretariat.6 The GATT itself was subject to a number of revision rounds (twelve in all) over the succeeding years, dealing principally with trade and tariffs on goods. A number of intellectual property matters, however, were dealt with in the GATT, including limited obligations with respect to marks of origin and geographical indications (article IX) and the protection of patents, trade marks, copyrights, and prevention of deceptive practices (article XX(d)).62 By the end of the Tokyo Round (1979), concerns about trade in counterfeit goods had begun to be expressed and were highlighted in the report of a group of experts to the GATT Council in 1985.63 At this stage, there was uncertainty as to whether it was preferable to deal with such matters in the context of GATT or whether they more properly belonged in the forum of WIPO.

These uncertainties had disappeared by the time the next (Uruguay Round) began in 1986, and it seems that US and Japanese pressure was important here in bringing all intellectual property rights, not just trade marks, into consideration. The starting point was the Ministerial Declaration adopted at a conference in Punta del Este (Uruguay) on 20 September 1986 which listed the following matters for inclusion in the round that was about to commence. Insofar as intellectual property rights were concerned, pages 7 to 8 of the Declaration stated:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim at clarifying GATT provisions and elaborating appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

As Gervais remarks,64 when this text is compared with the final TRIPs Agreement, there is a considerable gap between the careful language of the Declaration which harks back to pre-existing GATT provisions and the breadth of the

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67 Ibid, 7–8.
48 The principal points of the report of the group of experts are extracted at ibid, 8.
69 Ibid, 11.

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1. The ‘Brussels draft’ was presented to the meeting of Ministers in Brussels in December 1990 and represented the nearly complete draft agreement that would have been capable of adoption had other parts of the Uruguay Round negotiations been at the same point. While there were options for various provisions, these were clearly articulated for the negotiating parties, but final agreement was not reached at this stage because of stalemate in the negotiations on trade in agriculture. However, the Brussels draft was very close to the final Act adopted at Marrakesh, with many of the outstanding issues being drafted matters only and generally capable of resolution.62

2. The ‘Dunkirk draft’ of December 1991, which now left out options and was also very close in its terms to the final Act. With some exceptions, this represented the culmination of the efforts of the TRIPs negotiators and was now left aside until agreement in other areas, such as agriculture, could be reached. Further changes were negotiated during 1992 and 1993, but essentially this was the text that was finally adopted at Marrakesh in April 1994.62
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(b) The principal features of the TRIPs Agreement

4.34 The TRIPs Agreement works in a simple and efficient way as follows:

1. The protection of intellectual property rights (including copyright and neighbouring rights) is linked to trade through the provision in article 64 that member states may invoke the dispute-settlement procedures of the WTO in the event that another member fails to comply with TRIPs standards in its protection of intellectual property rights belonging to nationals of the complainant country (in the final analysis, this may allow for the imposition of trade sanctions against the offending country, thus providing a real mechanism for achieving compliance that was not provided under the traditional conventions such as Berne).

2. In the case of copyright, the substantive standards of Berne (articles 1–21 and the Appendix) are incorporated directly into the TRIPs Agreement, with some additional obligations and/or clarifications of existing Berne requirements. The fundamental obligation here is contained in article 9(1), which has the effect of requiring countries, whether Berne members or not, to adopt Berne standards if they wish to adhere to the WTO and its agreements.

3. The inclusion in the TRIPs Agreement of specific standards relating to the enforcement of intellectual property rights, noting here that such obligations were, by and large, absent from earlier conventions such as Berne, although they are now part of the WCT and WPPT.

(c) The requirements of national treatment and most favoured nation treatment

4.35 As a starting point, the TRIPs Agreement adopts the principle of national treatment, requiring member states to accord to the nationals of other member states no less favourable treatment with respect to the 'protection of intellectual property' than that accorded to their own nationals: article 3(1). In this regard, the term 'protection' receives a wide interpretation as including matters affecting the 'availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement'. In the case of copyright, performers and phonogram producers, exceptions allowable within the scope of the Berne Convention are permitted, and exceptions in relation to judicial and administrative procedures are also allowed, so long as these are not inconsistent with the Agreement and are not applied in such a manner to constitute a disguised restriction on trade.

A further obligation in article 4, not present in the Berne Convention but

52 Note to arts 3 and 4.

common in trade agreements, concerns 'most favoured nation treatment'. This requires that, with regard to the protection of intellectual property, 'any favour, privilege or immunity granted by a Member to the nationals of any other country should be accorded immediately and unconditionally to the nationals of all Members'. This flow-on requirement is intended to prevent special deals being done with other countries (whether members or not) without sharing the benefits with all other members. There are some exceptions to this requirement, the most relevant in relation to copyright and neighbouring rights being with respect to those obligations under the Berne or Rome Conventions that are subject to reciprocity rather than national treatment: article 4(b).

(d) Specific obligations as to substantive norms of protection

While the TRIPs Agreement deals with all intellectual property rights, those concerned specifically with copyright and neighbouring rights are contained in section 1 of Part II ('Standards concerning the availability, scope and use of intellectual property rights'). The most significant additional ('Berne-plus') obligations in this section relate to the protection of computer programs as literary works under Berne (art 10(1)) and compilations of data (art 10(2)), commercial rental rights for computer programs and cinematographic films (subject to certain limitations) (art 11) and enhanced levels of protection and terms of protection for performers, sound recordings (phonograms) and broadcasting organizations (art 14). (The latter, in fact, build upon the framework of obligations contained in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.) Significantly, at the insistence of the USA, the general obligation under article 9(1) for WTO members to comply with articles 1 to 21 of, and the Appendix to, Berne does not include the obligation to protect moral rights under article 6 of that convention.

(e) Obligations with respect to enforcement

Part III of the TRIPs Agreement contains a series of detailed obligations with respect to the enforcement of intellectual property rights. The overall requirement here is that enforcement procedures shall be available so as to permit 'effective action against any act of infringement of intellectual property rights protected by this Agreement' (article 41(1)). There are also obligations to ensure that procedures are 'fair and equitable' and not subject to unreasonable delay (article 41(2)), with decisions made on the merits of a case to be in writing and with reasons (article 41(3)). More specific obligations deal with matters of procedure (article 42), evidence (article 43), remedies to be available, including 'provisional' or interim measures (articles 44–50), border measures (articles 51–60) and criminal procedures (article 61). As noted above, these provisions set the TRIPs Agreement aside from its predecessors such as Berne, which dealt only incidentally with matters of enforcement.
4.38 The real steel in the spine of the TRIPs Agreement is provided by the dispute-prevention and dispute-settlement provisions in articles 63 and 64. The first of these seeks to ensure ‘transparency’ of members’ laws, regulations, judicial decisions, and administrative rulings on the protection of intellectual property rights, so that each member can be made aware of laws, decisions, etc. that may affect its rights under the Agreement. The second provides that the provisions of articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding are to apply to consultations and the settlement of disputes arising under the Agreement. The requirement for each member to ‘accord sympathetic consideration to, and afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement’ arises under article XXII.1. If consultations do not achieve a resolution, then article XXIII provides for a more formal process of consultation and investigation, with the ultimate application of sanctions against the offending party. In formal terms, these steps can be taken where a party considers that any benefit accruing directly or indirectly under the Agreement is being ‘nullified or impaired’ or that the attainment of any objective of the Agreement is being impeded by the failure of another contracting party to carry out its obligations under the Agreement, or by the application of any measure by that party that has that effect or by the ‘existence of any other situation’; article XXIII.1. The detailed procedures under which these matters may be pursued is set out in the Understanding and includes a requirement for the making of representations to, and ‘sympathetic consideration’ thereof by, the party against whom the complaint is made (article 4); establishment of a Dispute Settlement Body to administer the whole process (article 2); the appointment of panels to hear complaints (articles 6–16); and appellate review by a standing Appellate Body (articles 17–18). Where a panel or the Appellate Body concludes a measure of a member is ‘inconsistent with a covered agreement’, ie TRIPs, it is to recommend that the member bring the measure into conformity with that agreement, and may suggest ways in which the member concerned can implement the recommendations (article 19). There are time limits and procedures for monitoring implementation of recommendations and rulings (articles 20 and 21), while there are provisions for compensation and the suspension of concessions or other obligations under the agreement in question in the event that implementation has not occurred within ‘a reasonable period of time’ (article 22(1)). These are ‘temporary measures’, the assumption being that members will move to implement recommendations and rulings of a panel or the Appellate Body. However, sanctions in the form of suspension of concessions or other obligations under the Agreement can be applied in a graduated way in the event of non-compliance, and may be applied in ‘other sectors’ than that covered by the agreement in question (article 22(3)). In other words, it may be possible for concessions to be suspended with respect to a particular member under a different agreement than the actual agreement which that member has been found to contravene, for example, a suspension of a concession with respect to agricultural products might be allowable in case where the member has acted to nullify or impair an obligation under the TRIPs Agreement. There is a subtle calibration of suspensions that is provided for here, subject to the requirements that the level of suspension of concessions or other obligations should be equivalent to the level of nullification or impairment and should not be prohibited by the agreement in question (article 22(4) and (5)).

4.39 As in the case of services and goods, article IV of the Marrakesh Agreement establishing the WTO also establishes a Council for Trade-Related Aspects of Intellectual Property Rights (the ‘Council for TRIPs’). This is required to ‘oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights’ and, more specifically under article 68 of the TRIPs Agreement itself is mandated to ‘monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder and ... [to] afford Members the opportunity of consulting on matters relating to trade-related aspects of intellectual property rights’. It has broad powers to carry out these functions and, in particular, to provide assistance with respect to dispute-resolution procedures. An early item on the agenda of the Council was to reach appropriate arrangements for co-operation with WIPO and its bodies (see further para 4.40 below). Another task that the Council and its secretariat have done is to review national laws to identify possible inconsistencies with the TRIPs Agreement. This process was conducted during 1996 and 1997 with respect to the laws of developed countries, and a second stage of reviewing the legislation of developing countries commenced in 2000 (under articles 65 and 66, these countries have longer transitional periods in which to achieve compliance).

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As with Berne, review and amendment procedures are built into the TRIPS Agreement: despite the far-reaching scope of the Agreement, it is far from comprehensive, and it was recognized that updating and modification would be required, even within the fairly near future. The starting point for the first review to occur was therefore after the completion of the transitional period required for members (other than least-developed countries) to bring their domestic laws into TRIPS compliance: see generally article 71(1). In practical terms, this meant some time after 1 January 2000, and it might have been reasonable to expect that, in the area of copyright and neighbouring rights, this would include modifications to take account of the new norms now embodied in the WCT and WPPT. In fact, the agenda for review appears to have been more focused on implementation issues, with attention also being given to geographical indications, patentable subject matter and the protection of traditional knowledge. Copyright issues appear to have been left aside while these other more controversial topics are pursued.

(b) Relationship with WIPO

As noted above, there were some early uncertainties about the role of WIPO and the traditional intellectual property conventions in the brave new world of trade-related intellectual property rights. Undoubtedly, there were concerns on the part of WIPO about ‘turf’ and the possible usurpation of its norm-making role by the brash newcomer (the WTO). On the other hand, as one of the leading TRIPS Agreement negotiators readily concedes, the expertise of WIPO and its officials was needed in the early days of the TRIPS negotiations and it appears that considerable assistance was given to bring the TRIPS negotiations ‘up to speed’. The relations between the two international organizations are now embodied in a formal ‘agreement of co-operation’ dated 22 December 1995, which deals with matters of co-operation at the institutional level (exchange of information, particularly concerning laws and regulations, technical and legal assistance), and can be seen as implicitly recognizing the different

F. Unilateral Trade Measures, Regionalism, and the Return to Bilateralism

While the TRIPS Agreement is an enormously important development in the framework for the international protection of intellectual property rights gener-

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56 Gervais (2003), 370.
58 See the comments by Lars Ansell, chairman of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, in the Foreword to the first edition of Gervais (2003), reproduced in ibid. An example of WIPO assistance to TRIPS negotiations is to be found in a ‘communication’ from WIPO-dated 28 Feb 1990 and corrected 6 Mar 1990. MTN/GNG/NG/1/1666 and MTN/GNG/NG/1/1666/Cov1. on the matter of who are beneficiaries of national treatment under WIPO treaties, including Berne, and the exceptions to national treatment allowed by these treaties, also contained in Gervais (2003), Annex 7. In the case of Berne, there is a useful list of exceptions to national treatment where material reciprocity can be required as between members.
59 For the text of this, see Gervais (2003), 467.
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ally and copyright in particular, it should also be noted that there were other sources of pressure for enhanced protection of copyright and neighbouring rights that operated in the period under consideration. One of these was the European Union, which began, in the early 1980s, to look at ways to harmonize intellectual and industrial property laws among the member states where these have an effect on the free flow of goods and services between them. In the area of copyright, this has led to the preparation of Directives on such matters as software, topographies of semiconductor chips, databases, rental rights, and the term of protection. These initiatives by the European Union to bring about harmonization of copyright laws have inevitably added to the pressure for change at the broader international level, particularly in the Berne Convention. If new norms of protection, higher than those currently contained in Berne, are set within the EU, this obviously provides an incentive to other Berne states to increase their own levels of protection.

4.42 A further driving force over the past two decades has been the USA, which has engaged in a continuing and vigorous, if not aggressive, campaign to achieve full and effective protection of its intellectual property rights in other countries. This was clearly evident in the GATT and TRIPs negotiations. However, even before the launch of the Uruguay Round the USA had begun to pursue its objectives on a unilateral basis, using the powers of the US Trade Representative under 'Special 301' (of the US Omnibus Trade and Competitiveness Act 1988) to bring pressure to bear upon states that were perceived to be reluctant to rectify or change their domestic intellectual property laws. Countries such as Brazil, Korea, and Singapore have felt the full impact of this pressure, but even countries such as Australia, Germany, and Italy were regarded with some suspicion by US trade officials in areas such as sound recordings, computer programs, and films. At the risk of vast overgeneralization, these activities by the US Government may be seen as part of a concerted effort to shore up US trade interests at a time (the early 1980s) when the US economy was in considerable difficulties, and there appeared to be great threats to these iconic American industries at the hands of unscrupulous persons in other countries, particularly in the developing world. There can be no doubt, however, that pressure from the US played a very considerable part in changing the domestic copyright laws of a number of states, as well as in providing strong momentum for the TRIPs negotiations and the subsequent adoption of the two WIPO treaties in December 1996. By way of conclusion of this chapter, it is therefore worth exploring the role of the USA, both historically and in the future, with respect to the development of the international copyright framework.

F. Unilateral Trade Measures, Regionalism, and the Return to Bilateralism

(1) The case of the United States of America

Ironies abound in this area, not the least being that, at the very time that US officials were becoming concerned at the threat to US intellectual property rights abroad and the failure of these countries to observe their obligations under the traditional intellectual property conventions such as Berne, the USA itself was not actually a Berne member. It is easy for a cynical European, or even Australian, to take this to mean that the US is not as committed by treaty to the protection of its own intellectual property rights as it could be. The Berne Convention is not the only international copyright system represented by the Berne Convention, however, and is worth considering, before attempting an overview of what the future might hold. As will be seen, one of the principal reasons for the long detachment of the USA from the international copyright system represented by the Berne Convention is to be found in the different copyright tradition in the USA, in particular its commitment to registration systems.

(a) The history of US relations with the Berne Union

It has already been seen in Chapters 1 and 2 that US interest in the Berne Convention goes back to its very inception. Indeed, it was the announcement by the US Government that it would attend the 1885 Conference that provided the necessary stimulus for the UK Government to be represented as well. Nonetheless, there was still, at this time, a strong domestic US reluctance to engage in international copyright relations. The US representative, Boyd Winchester, therefore attended both the 1885 and 1886 Conferences only in an observer capacity and was restricted to expressing the general approval of his government for the aims of the proposed Convention. At the first session of the 1886 Conference, he described the attitude of his government as one of "caution in expectation." In his report to the US Government, however, he was more forceful in giving his personal views:

. . . . the Government of the United States cannot afford to stand by; the world as the only important and deeply concerned power persistently refusing to do common justice to foreign authors, and . . . it may be justly anticipated, that the

43 See para 2.39 above.
45 Act 1885, 60-1 (statement by Winchester to Conference).
46 Act 1886, 19.
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Copyright Union being formed and acceded to by the more important European countries, it will before long feel it difficult to abstain from being a party to it also, and Congress will proceed to pave the way to adhesion of the United States to the [Berne] Union. 67

Nonetheless, while the US Government favored adherence to the Convention and preserved the option of doing so in the future, 68 this was not the predominant view in Congress, and the USA therefore continued to be an observer at both the 1896 and 1908 Revision Conferences. Indeed, the second of these conferences saw the emergence of a deeper gulf than had previously existed between the provisions of US law and the Convention, in particular with respect to the matters of formalities and duration. 69 Despite this, US interest in adhering to the Convention resumed after World War I and a number of Bills to bring US law into line with the Convention were introduced into Congress in the interwar period. 70 The possibility of US adherence also had an effect on the deliberations of the Rome Conference, where US concern over the question of retroactivity led the Conference to extend the time for ratification of the Rome Act so as to allow the USA the possibility of still adhering to the Berlin Act. 71 In the event, the USA did not accede to the Convention, but governmental interest in accession continued during the 1930s and in April 1935 the US Senate actually ratified the Convention. 72 However, no enabling domestic legislation had been prepared, and the ratification was withdrawn two days later. 73 Disagreements on the form of implementing legislation led to the failure of subsequent attempts to secure US adherence prior to World War II. 74

4.45 Quite apart from the strong domestic sentiment against entering international copyright relations, 75 the incentive to adhere to the Berne Convention was reduced by the possibility of protection for US authors under the Convention by the device of first publication in a Union country (the 'backdoor to Berne', as it was often called). 76 Furthermore, after 1945, the US Government became intimately involved in the preparations for the Universal Copyright Convention ("UCC"), of which it became a member in 1955 (this instrument, and its role as a halfway house between Berne and non-Berne members is discussed more fully in Chapter 18 below). This temporarily deflected US attention away from the Berne Union, but it had the significant effect of bringing the USA into fuller participation in international copyright relations. Rather than being a 'bridge convention' between the US (and the other American republics) and the countries of the Berne Union, the UCC could be seen as a stepping stone to Berne, a 'low staircase' which provided a level of protection analogous to that of the Berne Act of 1886. 77 It could therefore be hoped that the USA would draw closer to eventual adherence to the older Convention. This began to occur with the close co-operation that developed through the holding of joint meetings of the Berne Union Permanent Committee and the Intergovernmental Committee of the UCC, and the USA became increasingly concerned with the affairs of the Berne Union. It played a crucial role in resolving the crisis brought about by the claims of developing countries in the years 1967 to 1971 and, with the revision of its own copyright law in 1976, the areas of incompatibility between the provisions of the Berne Convention and those of US domestic law steadily decreased. This was particularly so with respect to the question of duration and the reduction of formalities (notably the abolition of renewal as a condition for securing a second term of twenty-eight years under the previous law and liberalization of the consequences of omission of the copyright notice). 78

Following the adoption of the new US law, the Director General of WIPO took the initiative of convening a Group of Consultants in 1978 to consider the question of compatibility between the new law and the Berne Convention. After careful consideration, the Group concluded that the 'principal, if not the only, obstacle' to the accession of the USA was the remaining provisions in US law dealing with formalities. 79 This was possibly a generous view of the remaining areas of potential incompatibility, but it enabled the Group to endorse a proposal to summon a diplomatic conference to prepare a protocol to the Convention that would have permitted the USA to apply, for a limited period of time, the provisions on formalities allowed under the UCC. 80 This proposal was ultimately not proceeded with, in the light of declarations by the US Government that it was likely that it would further modify its domestic law so as to make

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67 Quoted in Solberg (n 64 above), 96.
68 Thence the possibility of future accession was mentioned expressly in President Cleveland's annual message to Congress at the end of 1896: Solberg (n 64 above), 97.
70 Ringer (n 64 above), 1059; Sandison (n 69 above).
71 Acts 1928, 280-1. See also para 17.10 below. It appeared that the US Government preferred the retroactivity provisions of the Berlin Act to those in the Rome Act.
72 Ringer (n 64 above), 1059; Kampelman (n 64 above), 421.
73 Id. 74 See n 64 above.
75 See n 64 above.
76 Rome Act, art 6(1). The normal 'backdoor' for American authors was, of course, Canada. See further, Nimmer on Copyright, vol 3 (1983), 17-21ff.
77 The idea of a 'low staircase' emerged in the third meeting of the Committee of Experts that was examining the basis for the new Convention: Summary Record of Third Meeting of Committee (1949) 2 UNESCO Copyright Bulletin 186, 188. See further Sandison (n 69 above), 97.
78 Copyright Act 1976, 17 USC §§ 97, 304(a) (renewal) and 401, 402 (notice).
79 Report of the Group of Consultants (Geneva, 5-7 June 1978), Doc BE/GC1/1 (1979) Copyright 95. The sections in question were 17 USC §§ 405(b), 405(d), 408(b), 410(a), 411 (registration); 205(e)(2) and 205(d) (renewal); and 407 and 408 (deposits).
80 Report (n 79 above). See also the earlier BIRPS study by M B Nimmer (1967) 19 Stan L Rev 499.
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it fully compatible with the Convention.\(^{81}\) Subsequently, US interest in Berne membership increased further as a consequence of that country's growing disenchantment with UNESCO, the international agency responsible for administering the UCC. This culminated with its decision to withdraw from UNESCO at the end of 1984. Although its adherence to the UCC was not affected by this action, it nonetheless diminished US influence over the copyright policies of UNESCO and encouraged the USA to direct its attention to the Berne Convention.\(^{82}\) Furthermore, as noted above, the USA was now increasingly concerned about the damage to its copyright owners that was occurring in other countries, many of which were Berne members but which appeared to be failing in their Berne obligations. In May 1985, the Senate Judiciary Committee's Subcommittee on Patents, Copyright and Trademarks, chaired by Senator Charles Mathias, heard testimony from a number of important witnesses on the implications of US adherence to the Convention.\(^{83}\) The State Department also convened an Ad Hoc Working Group of various experts with long experience in the copyright area to examine the technical question of compatibility between the provisions of US law and the Berne Convention.\(^{84}\) This Group presented a preliminary report at the end of 1985 that was circulated for comment, and in April 1986 further testimony was heard from interested parties by the Mathias subcommittee.\(^{85}\) In this testimony, the main advantages in favour of US accession were canvassed, but there was also an indication of the kinds of opposition that would be mounted to it.\(^{86}\) On 18 June 1986, the US President (Ronald Reagan) transmitted a message to the Senate, with the text of the Convention, recommending that the Senate give its consent to US adherence.\(^{87}\) Following this, a Bill to make the necessary changes to US law to enable accession to occur was introduced and, after careful review by committees in both the House and Senate, the Berne Convention Implementation Act was finally passed in 1988, effective 1 March 1989.

(b) The implications of US adherence to Berne

At the time of writing the first edition of the work, US adherence to Berne had not occurred, but the following likely advantages that would flow from this were suggested: the opportunities that US adherence would offer for the more effective enforcement of international copyright protection; the impact it would have on the development of the Convention itself; the effect it would have on other countries still outside the Union; and its ramifications with respect to the general question of implementation of Convention obligations. By and large, the years that have followed US accession have clearly illustrated significant effects in each of these areas.

(c) More effective international protection of copyright

It was clear from much of the testimony heard by the Mathias sub-committee in 1985 that clear advantages to US authors and copyright owners were seen to follow from accession to Berne.\(^{88}\) In the main, this had to do with US initiatives at that time to gain protection for intellectual property rights throughout the world, particularly in countries that were seen as centres of piracy such as Korea, Thailand, Egypt, and Taiwan. The moral standing of the USA in seeking such protection was clearly weakened by the fact that it was not a member of the international convention that embodied the highest level of protection. The subsequent TRIPS negotiations saw the substantive Berne obligations incorporated into that Agreement, with a comprehensive set of new obligations with respect to enforcement and compliance through the GATT dispute-resolution machinery. Likewise, these concerns have been reflected in the new WIPO treaties. In each of these exercises, the contribution of the USA has been seminal, reflecting the oft-quoted statement of the late President Lyndon Johnson to the effect that it is always preferable to be inside the tent looking out rather than outside the tent looking in.\(^{89}\)

(4) The substantive development of the Convention

The impact of US membership on the future development of the Berne Convention itself has already been considerable. In the first edition of this work, it was suggested that this would finally sever the Convention from its European roots and shift its centre of gravity to the common law and English-speaking

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82 Sandison (n 69 above), 103ff.
83 These included the Director General of WIPO, the Acting Registrar of Copyright and a former Registrar (S Ringer), and senior officials from the Department of State, Patent and Trademark Office and US Trade Representative. The hearings were held on 16 May 1985 before the Subcommittee on Patents, Copyrights and Trademarks, Senate Judiciary Committee, US Senate (chairman: Senator C Mathias) (information and statements of witnesses kindly supplied to the author by H Sandison of Washington).
84 See the Foreword to Preliminary Report of the Ad Hoc Group on US Adherence to the Berne Convention (31 Dec 1985), 3 (list of members and affiliations); also reproduced in (1985) 10 Columbia-ULAC Journal of Law & the Arts 514.
85 The hearings were held on 15 Apr 1986.
86 The interested associations presenting submissions included the Association of American Publishers, Inc; the Motion Picture Association of America, Inc; the National Music Publishers' Association; the Computer and Business Equipment Manufacturers' Association; the Information Industry Association; the National School Boards Association; the National Cable Television Association; the American Music Operators' Association; the Authors' League of America, Inc; and the Graphic Artists' Guild.
88 eg those representing publishing, computer and information technology, authors' and artists' organisations; see n 64 above.
89 The actual quotation is, of course, rather more early than the paraphrase in the principal text, but the essential sense of it is still retained!
countries. While this would clearly advance the enforcement of the Convention (see above), it would also bring to the Berne Union and its organs a different intellectual tradition and set of attitudes, and would undoubtedly have far more effect than had a century's membership of the Convention by the UK and Commonwealth countries. While this influence has not yet been felt directly in the text of the Convention itself, there can be no doubt that the USA was instrumental in the development of the digital agenda that led ultimately to the adoption of the two new WIPO treaties of 1996.

(c) Effect on other non-Union countries

4.50 US accession to Berne has clearly been infectious so far as those countries that were still outside the Union at the time of the first centenary of the Convention. As noted above, very few nations now remain outside, and the adoption of Berne standards as the baseline of obligations under TRIPs and the WCT has made Berne the centerpiece of the current multilateral copyright system. In the first edition of this work, it was suggested that US accession would 'encourage' the accession of those countries still outside, and this, in fact, happened. US pressure on some of these countries, through trade sanctions and otherwise, has also had its effect here, but Berne has provided a useful benchmark for setting the standards of protection. There is nothing new here: at the end of World War I, the Allied Powers that were members of the Berne Union also used their position of strength to require accession to the Berne Union by the various new independent states that had emerged from the dismemberment of former enemy territories.

(f) Implementation of Convention obligations

4.51 US adherence to Berne was instructive in several respects. First, it highlighted the absence, within the Berne Convention itself, of any effective machinery for ensuring compliance on the part of an intending member (and, indeed, of ensuring continuing compliance by existing members). Secondly, it provided a

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94 In the case of China, which was on the brink of accession at the time of the first centenary in 1986, see Guo Shudong, 'China and the Berne Convention' (1986) 11 Columbia-ICIJ of Law & the Arts 121, 121ff.
96 This point was made by Dr Bogsch, then Director General of WIPO, in his statement to the Mathias sub-committee on 16 May 1985. Note also that in his testimony, with respect to the US patent laws, Dr Bogsch suggested that even if this did provide a theoretically lower level of protection than required by the Convention, this was 'not of sufficient importance from an economic viewpoint' to require any changes in US law in order to permit accession to Berne referred to in the Preliminary Report (n 84 above), ch III, 9-10. As to this, the Report states that it may be doubted whether the Convention sanctions a lower level of protection based upon the relative economic value of the activity involved.

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97 Preliminary Report (n 84 above). See also Nimmer (n 80 above).
98 Preliminary Report (n 84 above), ch III (17 USC § 110).
99 ibid, ch IV (17 USC § 601).
100 ibid, ch VII (17 USC §§ 401 and 402).
101 ibid, ch IX (17 USC §§ 406(a), 406(b), 408(a), 408(b), 411 and 412).
102 ibid (17 USC §§ 202(c)(2) and 205(d)).
103 ibid (17 USC §§ 407 and 408).
104 ibid, ch VIII (17 USC § 110). 105 ibid, ch VI.
106 ibid, ch XIV (17 USC §§ 103 and 201(b)).
107 ibid, ch X (17 USC §§ 304(a) and 302(c)).

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striking example of the domestic processes through which the question of compliance was pursued and fundamental questions as to the meaning of particular Berne obligations were canvassed and debated in the US Congress. Given the absence of machinery within the Convention for assessing these questions, it is really left to the good faith and common sense of national legislators and officials to determine these matters for themselves, and, in this regard, the open character of the US Congressional processes is revealing. It is also relevant to note that there was no particular incentive for existing Berne members, who have an interest in obtaining new accessions, to object to apparent failures on the part of an intending member, such as the USA, to make its laws wholly compatible with the Convention. In the case of the USA, the question of compatibility was first carefully analysed by the Ad Hoc Group referred to above. While this found that the areas of incompatibility were significantly reduced under the 1976 Act, it identified a number of inconsistencies that still remained, notably with respect to the compulsory licence for jukeboxes, the requirement of domestic manufacture, the requirement of notice, the requirements of registration, recordation, and deposit, and the public broadcasting licence insofar as it referred to the making of reproductions. On the other hand, it concluded that substantial compliance was to be found in relation to moral rights (under the common law and associated heads of protection), employed authors, and duration. These matters were then debated at length before the respective House and Senate committees of the Congress, before the final implementing legislation was prepared, and particular points of interest, for example, in relation to formalities, moral rights, and retrospectivity, are referred to at the relevant points in the following chapters. In general, it must be said that the USA was a conscientious international citizen in its efforts to achieve compliance prior to accession, but the highly visible process that attended its accession highlighted the way in which it is all too possible for new members to obscure particular issues on their accession in order to obtain
domestic approval for this step. In the event that real failures in compliance occur at this stage, failure by existing members to object, or even tacit encouragement from them with a view to securing adherence, must be to the ultimate detriment of the Union and the frustration of the Convention's object of achieving as uniform protection as possible. (These matters are explored further at paras 17.80ff.)

(g) The USA, Berne, and beyond

4.52 While US adherence to Berne has been the most pivotal and influential event in the second century of the Convention, a new and disturbing trend must be noted, one that falls largely outside the scope of the present commentary but one, no doubt, that will provide the basis for more reflective and complete discussion in any subsequent edition. This is not a work of political science, but it would be unrealistic for it to proceed without some reference to a world situation that is entirely different from that prevailing at the time of the first edition. In 1987, it was still possible to speak of a world of superpowers: there was a Soviet Union, an arms race and a 'socialist bloc' of nations behind the Iron Curtain. These realities changed dramatically within the space of three years, with the collapse of the Soviet Union, the emergence of democratic regimes in most of Eastern Europe, and the steady emergence of the USA as the only significant world power. Such a development seems unprecedented: even in the time of the Roman Empire, there were counterweights in the east and, of course, the rest of the globe developed relatively unaware of the Pax Romana prevailing within one small area.

4.53 There are obviously many consequences that flow from being a hyperpower, and we have seen many examples of the exercise of this global strength in various spheres, particularly under the current US administration. For those outside the tent, it is frequently difficult to discern the benefit or virtue behind such exercises of strength, but in the area of copyright and neighbouring rights it is relevant to note one development that has profound potential implications for the multilateral system that is represented by Berne, the 1996 WIPO treaties, and the TRIPs Agreement. This is the increasing use of bilateral trade agreements by the USA.

4.54 As noted above, there is nothing in the existing agreements to preclude parties striking better deals as between themselves; in principle, this may even be seen as a desirable development whereby individual states or groups of states can raise the levels of protection between themselves without having to wait for others to catch up. In some areas, the requirements of such agreements may also be relatively non-contentious. Thus, it is possible that the North American Free Trade Agreement between the USA, Canada, and Mexico contains nothing that interferes with or cuts across multilateral obligations that arise in the area of copyright and neighbouring rights. This is not necessarily the case with more recent bilateral free-trade agreements that the USA has negotiated. At the time of writing, there was a steadily growing handful of these, including agreements with Morocco, Jordan, Singapore, Chile, Bahrain, and six Central American republics (agreed 5 August 2004 and covering Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua),100 while negotiations were being carried on with the Andean Countries (Colombia, Peru, Ecuador, and Bolivia) and Panama.101 One of the more recent agreements is with Australia, a longstanding Berne member. A significant chapter of this agreement, negotiated in early 2004, deals with intellectual property rights (others were concerned with matters more dear to Australian hearts, such as access to US markets for beef and other agricultural products), but the provisions with respect to copyright and neighbouring rights were extraordinarily detailed and, sought to reflect in Australian law the detailed requirements of US law, notably with respect to the term of protection, circumvention measures, copyright management information, temporary reproductions, and safe harbours for Internet service providers for copyright infringement. Implementation legislation with respect to just these matters in Australia ran to nearly 100 pages,102 and further was required by the USA in order to satisfy its trade negotiators.103 No corresponding change to US domestic laws occurred (or was thought to be necessary for the purposes of the agreement) indicating that the negotiations in relation to copyright and related rights were something of a one-way street, in which Australian legislation was required to conform to US standards, particularly with respect to the provisions of the US Digital Millennium Copyright Act 1998.104

100 For the text of these agreements, see www.ustr.gov and go to 'Trade Agreements' and then 'Bilateral Trade Agreements'.
102 Copyright Legislation Amendment Act 2004 (Cth). In this regard, the website of the US Trade Representative notes that, 'The United States had raised concerns with Australia that its FTAs implementing legislation, which its Parliament passed in August 2004, did not fully implement a number of the FTA commitments made in that agreement; www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Implementation/Section...24/02/2005. See further the final 'side letter' from the US Trade Representative to the Australian Government dated 17 Nov 2004, available at www.cfr.org.au/trade/negotiations/us_fta/final-text-letter.pdf.
103 An interesting question, however, may arise as to whether the US itself complies with one of the requirements of the Free Trade Agreement which requires adherence by both countries to the WPPT. Much of the Australian implementing legislation was concerned with giving effect to this requirement with respect to performers and their moral rights, but it is unclear that the US itself actually gives effect to its WPPT obligations in this regard. There are no provisions in the US Copyright Act conferring attribution or integrity rights on performers, and, following a US Supreme Court decision that casts doubt on recourse to the Lanham Federal Trademarks Act to enforce moral rights, it is not clear that performers (or authors) may draw on other provisions of federal law to approximate those rights. See Dastar v Twentieth Century Fox Film Corp, 539 US 23
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4.55 The consequences for multilateralism are significant here, particularly as it appears that the USA is using the Australia Free Trade Agreement format (as developed in earlier agreements such as that with Chile) as a template for its future bilateral trade agreements. There can, of course, be no objection in principle under Berne so long as such agreements do not detract from, or are not inconsistent with, Berne obligations (Berne, article 20). There is, however, a consequence under article 4 of the TRIPs Agreement, namely that Australia (and parties to other bilateral treaties) will have to extend the most favoured nation treatment to be extended to US nationals to nationals of all other TRIPs members. More significantly, the requirements of the US-Australian Free Trade Agreement will require Australia, in any future revision of its domestic law, to have a close eye to whether it complies with this agreement, which now reflects, in a number of important respects, the provisions of US copyright law, rather than the more general requirements and standards contained in the older multilateral agreements. Inevitably, Australian copyright law will come to mirror that of US copyright law—an excellent result, no doubt, for US copyright owners, but possibly to the impoverishment of Australian domestic law-making and policy. More generally, the move towards bilateralism must have implications for the multilateral system as the bilateral agreements come to contain stipulations that reflect the domestic standards of the hyperpower—it is unrealistic to suppose that any subsequent contracting party, with the possible exceptions of China or the European Union, will be able to insist upon


110 This has happened automatically as a result of the operation of regulations made under the Copyright Act 1968 see the Copyright (International) Regulations 1969 (as amended), reg 4. This may not be the case with respect to the extended term of protection, in view of article 7(8) of Berne, but Australia has not availed itself of this facility under its implementing legislation. In this regard, cf the requirement of reciprocity under article 7(1) of the EC Council Directive 93/98, 29 Oct 1993, on the harmonising of term within the EC.

111 In this regard, the mechanisms for achieving bilateral free trade agreements that reflect the US view of things are delightfully exposed for all to see at www.usneg.gov. There is an elegant machinery provided for under 2104(e) the Trade Act of 2002 and s 135(e)(1) of the Trade Act of 1974 for trade advisory committees across all relevant sectors to prepare reports on proposed trade agreements. In the case of the Australia Free Trade Agreement, there were some thirty-one of these advisory committees, and, in the case of intellectual property, the relevant committee (Industrial Property Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IPAC-3)) recommended US negotiators for achieving a 'very strong agreement' and 'for a job well done'. In particular, IPAC-3 applauded the negotiators for having incorporated within the agreement the obligations set forth in the WCT and WPPT and 'for convincing Australia to adhere to, and come

into full step with, key provisions of those treaties consistent with the manner these were implemented in the US in 1998 in the DMCA'. It is worth noting here that, three years earlier, Australia had reached its own agreement to implementation of the WCT, though not all of the WPPT obligations in the Copyright (Digital Agreements) Amendment Act 2000.

112 Some provision for recognition or remission of local norms can be made through the provision of side letters of agreement, that then allow the template of the principal agreement to remain unchanged and ready for future use elsewhere. Examples of such side letters are to be found in the case of the Singapore Free Trade Agreement (with respect to anti-circumvention measures).