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# Intellectual Property Protection through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States

## Keywords

Intellectual Property Law, States, Copyright, Software

# LEONARD v.B. SUTTON AWARD PAPER

## Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States

BRAD SWENSON\*

Only one thing is impossible to God, to find any sense in any copy-  
right law on this planet.<sup>1</sup>

### I. INTRODUCTION

Copyright laws lie at the root of a nation's culture and intellectual climate.<sup>2</sup> By conferring rights on expressive forms of information, copyright laws protect authors in a broad range of literary, artistic, and scientific works.<sup>3</sup> These protections induce authors to create and disseminate the works which shape modern society.<sup>4</sup> Without copyright protection, authors have little incentive to pursue their time-consuming research and development.<sup>5</sup> Without copyright protection, society has little chance of

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1. SAMUEL CLEMENS, *MARK TWAIN'S NOTEBOOK* 381 (1935 ed.)

2. See Barbara A. Ringer, *The Role of The United States in International Copyright — Past, Present, and Future*, 56 *Geo. L. J.* 1050 (1968) [hereinafter Ringer].

3. The Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1988), seeks "to stimulate [the creation of useful works] for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

4. See generally Gary M. Ropski & Michael J. Kline, *A Primer on Intellectual Property Rights: The Basics of Patents, Trademarks, Copyrights, Trade Secrets, and Related Rights*, 50 *ALB. L. REV.* 405 (1986) (providing a complete overview of intellectual property law).

5. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429, *reh'g denied*, 465 U.S. 1112 (1984) (discussing how reward motivates the creative activity of authors and "serves to induce release to the public of the products of his creative genius") [hereinafter *Sony*].

benefiting from the innovative ideas of its creative minds.<sup>6</sup>

In this information-based world, intellectual property has become a fundamental business asset in the global marketplace.<sup>7</sup> Increasing computer and database technologies have made access to copyrighted materials effortless. The transfer of copyrighted works across national boundaries is limited only by the capacity of modern communication systems.<sup>8</sup> As a result, the international dimension of copyright law grows every day.

As developing nations become increasingly reliant on information-based technology they also become increasingly vulnerable to the inadequacies of copyright protections abroad.<sup>9</sup> Technological advancements have made the reproduction and expropriation of copyrighted materials, in most cases, simple. Because the free and protected flow of information is imperative to global economies, a unified international copyright code is of unequalled importance.<sup>10</sup>

The Berne Convention for the Protection of Literary and Artistic Works<sup>11</sup> has emerged as the premier international convention for the protection of intellectual property. By setting minimum standards for the protection of copyrighted materials,<sup>12</sup> the Berne fosters cultural exchange, economic advancement, and the development of indigenous creativity.<sup>13</sup> The Berne Convention provides a framework by which an international exchange of copyrighted materials may confidently occur.<sup>14</sup>

To a great extent, the effectiveness of the Berne's international standards are limited only by those nations who refuse to participate.<sup>15</sup> With

6. *Id.* at 429.

7. Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 274 (1991) [hereinafter Leaffer]. See generally EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE (1980) [hereinafter EDWARD W. PLOMAN & L. CLARK HAMILTON].

8. See Ringer, *supra* note 2, at 1050.

9. Compare Leaffer, *supra* note 7, at 274 (discussing the United States increasing vulnerability as it moves to an information based economy).

10. See Note, *Berne-ing the Soviet Copyright Codes: Will the U.S.S.R. Alter Its Copyright Laws to Comply with the Berne Convention?* 8 DICK. J. INT'L L. 395 (1990) [hereinafter *Berne-ing the Soviet Copyright Codes*].

11. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 12 Martens Nouveau Recueil (ser. 12) 173, Additional Act and Declaration of Paris, May 4, 1896, 24 Martens Nouveau Recueil (ser. 12) 758, Berlin Revision, Nov. 13, 1908, 1 L.N.T.S. 217, Additional Protocol of Berne, Mar. 20, 1914, 1 L.N.T.S. 243, Rome Revision, June 2, 1928, 123 L.N.T.S. 233, Brussels Revision, June 26, 1948, 331 U.N.T.S. 217, Stockholm Revision, July 14, 1967, 828 U.N.T.S. 221, Paris Revision, July 24, 1971, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 27 (1978) [hereinafter Berne Convention].

12. Minimum standards are not imposed by the Union of member nations. Minimum standards are imposed by each member state, through its own domestic laws. Berne Convention, *supra* note 11, at art. 36.

13. See Ringer, *supra* note 2; Natalio Chediak, *The Progressive Development of World Copyright Law*, 42 AM. J. INT'L L. 797 (1948).

14. See Ringer, *supra* note 2.

15. See e.g., Roger Boyes, *Warsaw Pirates Plunder West's Glitzy Goodies*, THE TIMES, Nov. 22, 1991, § Overseas News (discussing the smuggling of pirated materials from Poland

the exception of the Soviet Union and the Peoples Republic of China, all major economic powers have acceded to the Convention.<sup>16</sup>

Recent changes in the Soviet Union have sparked questions regarding the opening of vast new commercial markets.<sup>17</sup> The recent emergence of the new Commonwealth of Independent States poses interesting problems for the international community.<sup>18</sup> It remains unclear whether the Commonwealth States' fledgling market economies will follow the copyright pirating traditions of its Soviet predecessor.<sup>19</sup> Faced with critical developmental needs, the new Commonwealth States may be forced to rely on the immediate and tangible benefits piracy may afford.<sup>20</sup>

Attention of the global marketplace will soon focus on the protections the new Commonwealth of Independent States can ensure for the world's copyrighted materials. Without strong protective assurances, the States of the new Commonwealth will, undoubtedly, face limited access to the western technology necessary to their transition to free-market economies.<sup>21</sup>

Part I of this Article examines the basic provisions and development of Soviet copyright law. In particular, it examines the Soviet perspective on international protection for copyrighted materials. Specific emphasis is placed on the conditions surrounding Soviet accession to the Universal Copyright Convention (U.C.C.).

Part II of this Article will focus on recent developments in Soviet copyright law. Specifically, it examines the intent and actions taken by the Soviet government to accede to the Berne Convention. This Article also reflects upon recent political developments and the present status of Soviet copyright law as followed by the new Commonwealth of Independent States.

Part III of this Article will discuss the new Commonwealth of Inde-

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into the Soviet Union).

16. For a complete list of nations participating in the Berne Convention see UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Berne Copyright Union, item H-2 (1987-88 Supp.).

17. These markets take on special meaning since United States copyright industries have grown more dependant on exports for their commercial success. See Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J. COPR. Soc'y 123 (1991) [hereinafter Schwartz].

According to recent studies, copyright industries represent 5.8% of the United States' gross national product. See Schwartz, *supra*, at 125 citing Stephen E. Siwek & Harold W. Furchtgott-Roth, *Copyright Industries in the U.S. Economy*, p. vii (Nov. 1990). Mr. Siwek's study was prepared for the International Intellectual Property Alliance.

18. See Michael McGuire, *U.S.S.R. is Dead, 3 Republics Say Russia, Ukraine, Byelorussia form New Union Slavic Leaders Vow to Ban Nuclear Arms*, CHI. TRIB., Dec. 9, 1991, § News, at 1, zone C, [hereinafter *U.S.S.R. is Dead*].

19. See Leonard A. Radlauer, *The U.S.S.R. Joins the Universal Copyright Convention*, 23 J. COPR. Soc'y, 1, 29 (1973) [hereinafter Radlauer]; see also, N.Y. TIMES, May 24, 1959, §2, at 3, col. 1 (citing the U.S.S.R. as one of the world's foremost pirating entities).

20. See generally Leaffer, *supra* note 7, at 280.

21. *Id.*

pendent States' necessary adherence to the Berne Convention. Particular emphasis will be paid to the growing problem of international piracy and the negative effects countries with weak copyright protections suffer. The Article will conclude with a discussion of the benefits the new Commonwealth of Independent States can derive from joining the Berne Convention for the Protection of Literary and Artistic Works.

## II. SOVIET COPYRIGHT LAW

### A. *Domestic Developments in Soviet Copyright Law*

The first embodiment of Soviet copyright law was the 1925 "Bases of Copyright Legislation."<sup>22</sup> The Bases of Copyright Legislation established the Soviet's first comprehensive intellectual property code.<sup>23</sup> The Bases designated the protection of intellectual works by territory and not nationality.<sup>24</sup> Consequently, works of Soviet authors published abroad received no protection unless a treaty for reciprocal copyright protection existed between the U.S.S.R. and the affected foreign government.

The 1925 Bases of Copyright Legislation were revised and re-issued in 1928. This revision represented the state of Soviet copyright law for over three decades.<sup>25</sup> It was not until December 8, 1961 when Soviet intellectual law was again substantially modified. On that date, the Supreme Soviet of the U.S.S.R. promulgated the Fundamentals of Civil Legislation of the Soviet Union and the Union Republics.<sup>26</sup> On May 1, 1962 the Fundamentals of Civil Legislation came into force.<sup>27</sup> The 1961 Fundamentals, for the first time, integrated copyright law into the Soviet civil code.<sup>28</sup>

22. See Yuri Matveev, *Copyright Protection in the U.S.S.R. — The Eleventh Annual Jean Geiringer Memorial Lecture on International Copyright Law*, 20 BULL. COPR. Soc'y 219, 221 (1973) [hereinafter Matveev]. For an in-depth review of early Soviet copyright law see ALOIS BOHMER, *COPYRIGHT IN THE U.S.S.R. AND OTHER EUROPEAN COUNTRIES OR TERRITORIES UNDER COMMUNIST GOVERNMENT, SELECTIVE BIBLIOGRAPHY WITH DIGEST AND PREFACE* (1960).

23. MICHAEL A. NEWCITY, *COPYRIGHT LAW IN THE SOVIET UNION* 20-21 (1978) [hereinafter NEWCITY].

24. Section 1 of the Copyright Act of 1925 states in pertinent part: "Copyright to a work published on the territory of the U.S.S.R. . . . or extant there as a manuscript, sketch or in any other material form, shall belong to the author or his successor in law, regardless of their nationality."

U.S.S.R. Copyright Act of 1925, §1, as quoted in Radlauer, *supra* note 19, at 11.

25. See EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 121-22.

26. Decree of the Presidium of the U.S.S.R. Supreme Soviet, *On Approval of the Fundamentals of Civil Legislation of the Soviet Union and the Union Republics*, 50 Vedomosti SSSR, item 525 (Dec. 8, 1961).

27. *Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics*, reprinted in *SOVIET CIVIL LEGISLATION AND PROCEDURE* 102 (Y. Sdobnikov trans. 1964) [hereinafter *1961 Fundamentals*].

28. *Id.* arts. 96-106.

## B. *Basic Provisions of Soviet Copyright Law*

The Soviet Constitution granted authority to protect copyrighted materials in Article 47:

Citizens of the U.S.S.R., in accordance with the aims of building communism, are guaranteed freedom of scientific, technical, and artistic work. This freedom is ensured by broadening scientific research, encouraging invention and innovation, and developing literature and the arts . . . The rights of authors, inventors and innovators are protected by the state.<sup>29</sup>

Soviet copyright law was divided into two categories, personal and property rights. The personal rights of a Soviet creator were comprised of five essential entitlements:<sup>30</sup> (1) the right to be acknowledged as the author of the works; (2) the right to publish; (3) the right to reproduce and distribute; (4) the right to have the work protected against improper alterations or adaptations by others; and (5) the right to royalties for its use under the system of compensation provided by copyright law. Ownership of a copyright vested with the creator of the work.<sup>31</sup>

Property rights, in the traditional sense, differ from Soviet use of the term. Under Soviet copyright law, an author's right in his work is not the equivalent of private property.<sup>32</sup> Consequently, an author's right is not a primary means of ensuring a fair return on his labors. Rather, the right is created with the primary goal of enhancing education and cultural dissemination.<sup>33</sup> Public interest, in most cases, is paramount to the rights of the author.<sup>34</sup>

One particularly problematic provision to the Soviet Union's participation in an international copyright union was the 1961 Fundamentals', article 102:<sup>35</sup> "Any published work may be translated into another language without consent of the author, but must be brought to his knowledge to insure respect for the integrity and spirit of the work . . . ."<sup>36</sup>

The presence of several languages and dialects within the Soviet

29. Konst. SSSR, art. 47 (1977), reprinted in UNESCO, *COPYRIGHT LAWS AND TREATIES OF THE WORLD*, U.S.S.R., Item 1, (1987 Supp.).

30. See EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 122. See also Harold J. Berman, *Rights of Foreign Authors Under Soviet Law*, 7 *BULL. COPR. SOC'Y* 67, 74 (1959) [hereinafter Berman].

31. *1961 Fundamentals*, *supra* note 27, arts. 97-98.

32. See EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 123.

33. *Id.*

34. *Id.*

35. For a full discussion of the motivations surrounding codification of the "freedom of translation" see Serge L. Levitsky, *The New Soviet Copyright Law*, 9 *BULL. COPR. SOC'Y* 295, 303-304 (1961-62); see also Hiller B. Zobel, *Copyrights, Comrades, and Capitalists: An Inquiry into the Legal Rights of Soviet and American Authors*, 8 *BULL. COPR. SOC'Y* 210, 216-19 (1960-1961).

36. UNESCO, *COPYRIGHT LAWS AND TREATIES OF THE WORLD*, U.S.S.R., (Supp. 1963); see Radlauer, *supra* note 19, at 12.

Union (approximately 89) demanded, as a matter of practicality, that a translation provision exist. Since few Soviet citizens could read works in foreign languages (even languages within their own country) foreign and domestic authors were subjected to the deleterious effects of article 102 which deemed translations not to be an infringement of copyright.<sup>37</sup>

### C. *International Developments in Soviet Copyright Law*

After the October Revolution of 1917, the newly formed Soviet Government retreated into international isolationism with regard to its intellectual property attitudes.<sup>38</sup> International agreements for the protection of copyrighted materials were deemed capitalistic instruments used to exploit individual authors.<sup>39</sup> As a result, the Soviet Government withdrew from all international agreements protecting copyrighted materials created during pre-soviet history.<sup>40</sup> This isolationistic attitude would pervade Soviet copyright and intellectual property law for the next 50 years.

In the early 1960's the Soviet Government began to experience a sensitivity to the immense growth of Western technology.<sup>41</sup> The desire to keep pace with the West slowly began to find its way into Soviet foreign policy. Rather than engage in costly domestic development, however, the Soviets decided to pursue licenses to Western technology.<sup>42</sup> It quickly became evident, however, that Western nations would be reluctant to exchange new innovations without assurances of adequate intellectual property protections.<sup>43</sup>

Pressure from the international community and their desire to maintain competitiveness with the West, precipitated the Soviet's adherence to the Paris Convention for the Protection of Industrial Property in 1965.<sup>44</sup> The Paris Convention provided the Soviets with the procedures to secure licenses to Western technology.<sup>45</sup> Adherence to the Paris Conven-

37. 1925 Bases of Copyright Legislation, §4, as cited in Radlauer, *supra* note 19, at 11. Between 1917-1960 approximately 1 billion copies of books protected by foreign copyright were published in the U.S.S.R. Berman, *supra* note 30, at 80-81.

38. NEWCITY, *supra* note 23, at 17-31.

39. MARK MOSIEVICH BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERATURE AND SCIENTIFIC WORKS 64 (1979) [hereinafter BOGUSLAVSKY].

40. *Id.*; see also NEWCITY, *supra* note 23, at 1-16.

41. See NEWCITY, *supra* note 23, at 38-39.

42. *Id.*

43. See generally Leaffer, *supra* note 7, at 280.

44. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as revised by Act of Brussels, Dec. 14, 1900, 32 Stat. 1936, T.S. No. 411; Act of Washington, June 2, 1911, 38 Stat. 1645, T.S. No. 579; Act of the Hague, Nov. 6, 1925, 47 Stat. 1789, T.S. No. 834; Act of London, June 2, 1934, 53 Stat. 1748, T.S. No. 941; Act of Lisbon, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931; Act of Stockholm, July 14, 1967, 21 U.S.T. 1629, T.I.A.S. 1583.

45. For a discussion regarding the protections afforded by the Paris Convention for the Protection of Industrial Property, see Pierre Maugue, *The International Protection of Industrial Designs Under the International Conventions*, 19 U. BAL'T. L. REV. 395 (1989).



tion marked the first time the Soviet Government had willingly joined an international agreement for the protection of intellectual property.<sup>46</sup>

Two years following their accession to the Paris Convention, on November 17, 1967, the Soviets entered into a bilateral treaty with the Hungarian People's Republic.<sup>47</sup> Coming into force on January 1, 1968, this agreement provided for the reciprocal protection of copyrights between the two nations.<sup>48</sup> Each nation was required to afford citizens of the other nation the same copyright protections it would afford to its own citizens. The agreement protected only the rights of authors who are U.S.S.R. or Hungary citizens and have their permanent residences in those countries.<sup>49</sup>

The Soviets continued to test the waters of international copyright protections. On December 14, 1970 the Soviets signed an agreement with Poland concerning cultural and scientific cooperation.<sup>50</sup> The agreement called for the two nations to work toward the establishment of a system for the protection of copyrights.<sup>51</sup> The agreement, however, never reached formal treaty status.

The tenor of U.S.-Soviet relations also reflected the slow change of Soviet attitudes toward international copyright protections. Traveling under a U.S.-U.S.S.R. Cultural Exchange Agreement, a delegation of U.S. book publishers<sup>52</sup> visited the Soviet Union in September 1962<sup>53</sup> and again in October 1970.<sup>54</sup> The objectives of the visits were to study the Soviet publishing system and to encourage the commercial exchange of literary, artistic, and scientific publications.<sup>55</sup> Attempting to achieve the productive exchange of intellectual property between the nations, U.S. delegates raised the issue of international copyright protections on several occa-

46. See NEWCITY, *supra* note 23, at 39.

47. U.S.S.R.-Hungarian Convention on the Reciprocal Protection of Copyright, 30 SP SSSR, art. 213 (1967), *reprinted in* A CALENDAR OF SOVIET TREATIES 1958-1973, (Robert M. Slusser & George Ginsburgs eds., 1981).

48. For a detailed discussion of the U.S.S.R.-Hungary copyright treaty see Vaksberg, *La protection des droits en Union Sovietique*, 67 REVUE INTERNATIONALE DU DROIT D'AUTER 141, 167-75 (1971).

49. See NEWCITY, *supra* note 23, at 40.

50. *Id.*

51. *Id.*

52. The delegation included: Curtis G. Benjamin — Chairman of the Board of McGraw Hill Book Company and representative of the American Book Publishers Council (ABPC) & American Test Book Institute (ATPI); Kurt Enoch — President of the New American Library; Storer B. Hunt — Chairman of the Board W. W. Norton & the Reading Development Committee for the ABPC; M. R. Robinson — President Scholastic Book Services & the ATPI; W.B. Wiley — President of John Wiley, Inc. and Chairman of the Joint Committee on International Trade of the ABPC and ATPI; Robert W. Frase — Director of the Joint Washington Office of the ABPC and ATPI.

53. Martin B. Levin, *Soviet International Copyright: Dream or Nightmare?*, 31 J. COPR. Soc'y 127, 134 (1983) [hereinafter Levin].

54. *Id.*

55. REPORTS OF DELEGATIONS OF U.S. BOOK PUBLISHERS VISITING THE U.S.S.R. AUGUST 20 — SEPTEMBER 17, 1962, 65 (1977) [hereinafter BOOK PUBLISHING IN THE U.S.S.R.].

sions.<sup>56</sup> A concerted effort was made to demonstrate the disadvantages of the Soviet's isolationistic position as a non-signatory to either the U.C.C. or the Berne Convention.<sup>57</sup>

During their 1970 visit, the U.S. delegation again encountered an impasse on the issue of Soviet accession to an international copyright convention.<sup>58</sup> Yet, developments in Soviet international copyright policy sent a positive message that productive future negotiations on the issue were possible.<sup>59</sup> General Secretary Brezhnev's formal statement to the 24th Party Congress in April 1971, however, made clear that any Soviet role in the international copyright arena would develop at a careful, Soviet controlled pace: "[W]orkers in literature and art are in one of the crucial sectors of the ideological struggle. The Party and the people have not tolerated, and will not tolerate, attempts — no matter what their origin — to blunt our ideological weapons, to stain our banner."<sup>60</sup>

In early 1972, Soviet international copyright policy continued its

56. See Levin, *supra* note 53, at 131.

57. *Id.* Some of the U.S. delegations arguments in favor of Soviet participation in an international copyright convention were as follows:

(1) Soviet books, articles, music, opera, and plays are or would be popular in the U.S. Because of high prices charged for books and other forms of entertainment in the U.S., the royalty rate when applied to these high prices would generate a large dollar income for the Soviet publisher. Consequently, the balance of payments in hard currency would be in the Soviet's.

(2) The Soviet Union would not have to pay back royalties because the UCC does not require retroactive royalty payments.

(3) Dissemination of Soviet works in the English language will reach more markets than is presently available to Soviet authors.

(4) It is unfair to deny payment to authors for translation rights and publication in a foreign country.

(5) The U.S.S.R. is the only major power not a member of either the Berne Convention or the UCC.

Some of the Soviet's responses to the U.S. Delegation's arguments were as follows:

(1) The outflow of currency would be unbearable if the Soviets had to pay royalties retroactively.

(2) High royalty rates would be required by the United States publishers, thus increasing the retail price of books sold in the Soviet Union.

(3) The Soviet Union as a matter of policy makes its books available without royalty payments to sister socialist republics and to the poorer underdeveloped nations of the world. The UCC would require the Soviet Union to charge the high capitalist rate of royalty.

(4) Significant changes would be needed in the Soviet domestic copyright laws.

(5) The U.S. had not provided international copyright protection during its formative years.

BOOK PUBLISHING IN THE U.S.S.R., *supra* note 55, at 172-75, reprinted in Levin, *supra* note 53, at 131-32.

58. See NEWCITY, *supra* note 23, at 41, relying on BOOK PUBLISHING IN THE U.S.S.R., *supra* note 55, at 35-38.

59. *Id.*

60. Leonhard, *The Domestic Politics of The New Soviet Foreign Policy*, 52 FOREIGN AFF. 61, 64 (Oct. 1973).

growth. At that time, a reciprocal copyright protection agreement with the People's Republic of Bulgaria was consummated.<sup>61</sup> Much like the U.S.S.R.-Hungary agreement of 1967, this agreement also provided for the reciprocal protection of copyrights between the two nations. By late 1972, a change in Soviet attitudes toward international copyright protections had unquestionably occurred. Soviet accession to the Universal Copyright Convention appeared to be a forthcoming and natural consequence of literary and scientific development within the country.<sup>62</sup>

#### D. *Soviet Accession to the Universal Copyright Convention*

Although accession to Universal Copyright Convention was a matter of lengthy deliberation for the Soviets, the decision to accede came quickly and to the surprise of many. On February 14, 1973, the Soviets announced that, effective May 27, 1973, they would adhere to the provisions of the Universal Copyright Convention.<sup>63</sup> Foreign Minister Andrei Gromyko deposited the formal documents of adherence<sup>64</sup> at UNESCO headquarters in Paris on February 27, 1973.<sup>65</sup>

On February 28, 1973, a decree of the President of the Supreme Soviet amended and revised the 1961 Fundamentals to bring Soviet domestic copyright law in conformance with U.C.C. requirements.<sup>66</sup> The Soviets, however, unwilling to accept the 1971 Paris revisions' explicit provisions on broadcast and performing rights,<sup>67</sup> ruled that their accession to the U.C.C. would exclude adherence to the 1971 revisions.<sup>68</sup>

Adherence to the U.C.C. marked the end of nearly sixty years of Soviet isolationism from international copyright relations.<sup>69</sup> In acceding to

61. U.S.S.R.-Bulgaria Agreement on the Reciprocal Protection of Copyright, 1972, 855 U.N.T.S. 235.

62. See Matveev, *supra* note 22, at 219.

63. See Radlauer, *supra* note 19, at 1.

64. Official announcement of Soviet adherence to the Universal Copyright Convention, reprinted in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, U.S.S.R., Item 3A, (1987 & 1973 Supp.). See also Announcement, U.S.S.R. Joins Universal Copyright Convention, 20 BULL. COPR. Soc'y, 1 (1973).

65. See NEWCITY, *supra* note 23, at 44.

66. Decree of the Presidium of the U.S.S.R. Supreme Soviet, *On Making Changes in and Additions to the Principles of Civil Legislation of the U.S.S.R. and the Union Republics*, 9 Vedomosti SSSR, item 138 (Feb. 3 1973) [hereinafter 1973 Decree of the Presidium]. For an in-depth analysis of the changes made in Soviet law, see JON BAUMGARTEN, U.S.-U.S.S.R. COPYRIGHT RELATIONS UNDER THE UNIVERSAL COPYRIGHT CONVENTION (1973) [hereinafter BAUMGARTEN].

67. See BAUMGARTEN, *supra* note 66.

68. 203 PUB. WKLY. 32, Mar. 12, 1973.

69. By 1989 the Soviets had acceded to eight additional bilateral agreements for the protection of copyright. The Soviet Union concluded bilateral treaties with Bulgaria, 855 U.N.T.S. 235, Czechoslovakia, 161 L.T.S. 309, GDR, 1973 NEUES DEUTSCHLAND 2211, Hungary, THE CALENDAR OF SOVIET TREATIES 1981, Poland, Austria, Cuba, and Sweden. See 4 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1981-1983).

Additionally, President Ford and Chairman Brezhnev signed the Helsinki Final Act on August 1, 1975. The agreement stated that signatory nations would agree to: "the wider use

the U.C.C., the Soviets established copyright relations with over seventy nations.<sup>70</sup> Soviet accession facilitated the exchange of its copyrighted materials and opened a previously closed window to the international marketplace of ideas.<sup>71</sup> The Soviets exclaimed the hope that accession would unlock new perspectives in the development of international cultural and scientific relationships.<sup>72</sup>

The events leading to Soviet accession, however, do not reflect an entirely idealistic endeavor on the part of the Soviet Union.<sup>73</sup> Arguably, a major factor in the Soviet's accession to the U.C.C. was an exchange of commercial advantages provided by a bilateral tax convention signed on June 20, 1973 by U.S. Secretary of the Treasury, George P. Shultz, and Soviet Minister of Foreign Trade, Nikolai S. Patolichev.<sup>74</sup>

The tax convention excluded from taxable income, among other things, royalties for the use of copyrights.<sup>75</sup> The U.S. sought the protections afforded by the U.C.C. for its copyrighted materials in the Soviet Union.<sup>76</sup> The Soviets sought concessions in the patent area and favorable tax treatments.<sup>77</sup> Following the Soviet's accession to the U.C.C., each nation got what it bargained for.

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of commercial channels and activities for applied scientific and technological research for the transfer of achievements obtained in this field while providing information on the protection of intellectual and individual property rights."

Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 73 DEP'T ST. BULL 323 (1975) reprinted in 14 ILM 1292 (1975).

70. See BAUMGARTEN, *supra* note 66, at 5.

71. See Levin, *supra* note 53, at 129.

72. See Matveev, *supra* note 22, at 219.

73. See Levin, *supra* note 53, at 140.

74. See *id.*

75. Convention on Matters of Taxation with Related Letters, June 20, 1973, U.S.-U.S.S.R., art. III, T.I.A.S. No. 8225, at 1. Article III provides in pertinent part:

1. The following categories of income derived from sources within one contracting state by a resident of other contracting state shall be subject to tax only in that other contracting state:

(a) rentals, royalties or other amounts paid as consideration for the use of or right to use literary, artistic, and scientific works, or for the use of copyrights of such works, as well as the rights to inventions (patents, author's certificates), industrial designs, processes or formulae, computer programs, trademarks, service marks, and other similar property or rights, or for industrial, commercial or scientific equipment, or for knowledge, experience, or skill (know-how).

(b) gains derived from sale or exchange of any such rights or property, whether or not the amounts realized on sale or exchange are contingent in whole or in part, on the extent and nature of use or disposition of such rights or property.

76. See Levin, *supra* note 53, at 140.

77. *Id.*

## 1. Basic Provisions of the Universal Copyright Convention

The preamble to the Universal Copyright Convention<sup>78</sup> expresses the hope that an international union for the protection of copyrights would stimulate the creation, development, and exchange of intellectual properties amongst signatory nations.

[A] system of copyright protection appropriate to all nations of the world and expressed in a universal convention . . . will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts . . . [and] will facilitate a wider dissemination of works of the human mind and increase international understanding . . . .<sup>79</sup>

The U.C.C. has its foundations in the national treatment of foreign authors. Consequently, member states must afford foreign works the same protection afforded to domestic creations.<sup>80</sup> Signatory nations must also modify domestic copyright laws to conform with five minimum standards.<sup>81</sup> First, each member state must provide for the "adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific, and artistic works . . . ."<sup>82</sup>

Second, foreign works will satisfy all formalities (notice, registration, manufacture),

if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol (c) accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.<sup>83</sup>

Third, member states must grant a minimum copyright term of twenty-five years or the life of the author plus twenty-five years.<sup>84</sup>

Fourth, member states must grant exclusive publication and translation rights to the creator.<sup>85</sup> After a term of seven years, however, a member state in which a translation has not been published may obtain a "non-exclusive license from the competent authority thereof to translate

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78. Universal Copyright Convention, Sept. 6, 1952, preamble, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 (effective Sept. 16, 1955) (Geneva Act) revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178 (effective July 10, 1974) (Paris Act) [hereinafter UCC]; see also 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 24 (Geneva text) and app. 25 (Paris text) (1986).

79. UCC, *supra* note 78, at preamble.

80. *Id.* art. 2(1).

81. Although the U.C.C. calls for several requirements of signatory nations, the five described herein are most important for the purposes of this Article.

82. UCC, *supra* note 78, art. 1.

83. *Id.* art. 3(1).

84. *Id.* art. 4(1) and art. 4(2).

85. *Id.* art. 5(1).

the work into that language and publish the work so translated."<sup>86</sup>

Finally, the U.C.C. contains a "Berne" conflict clause. This clause restricts Berne Convention signatories from ignoring Berne provisions and relying on the U.C.C. in its copyright relations with another Berne Union member.<sup>87</sup> The U.C.C. is administered by the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

## 2. Impact of Soviet Accession to Universal Copyright Convention

The February 3, 1973 Decree of the Supreme Soviet<sup>88</sup> amended the 1961 Fundamentals<sup>89</sup> to provide for minimum copyright protections required by the U.C.C. This amendment worked four basic changes into Soviet intellectual property law.<sup>90</sup> First, and perhaps most significantly, the "freedom of translation" provision, article 102, was eliminated from Soviet copyright law.<sup>91</sup> The U.C.C. extends authors broad rights over translations of their works.<sup>92</sup> Arguably, the most problematic hurdle to Soviet participation in an international copyright union had finally been eliminated.

Second, Soviet copyright law was amended to provide for the payment of royalties for any reproduction of a foreign author's work. Article 101 of the 1961 Fundamentals states that "use of an author's work by other persons is not permitted except on the basis of a contract with the author or his assignees, except in cases stipulated in the law."<sup>93</sup>

Third, in compliance with article four of the U.C.C., the 1961 Fundamentals were amended to provide for copyright duration to extend for the life of the author plus twenty-five years.<sup>94</sup>

Finally, in compliance with the U.C.C.'s established assignment rights, the 1961 Fundamentals were amended to allow an author's assignees to rightfully exercise rights under the author's copyright.<sup>95</sup>

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86. *Id.* art. 5(2)(a).

87. *Id.* art. 17(1).

88. 1973 Decree of the Presidium, *supra* note 66.

89. 1961 *Fundamentals*, *supra* note 27.

90. See Michael A. Newcity, *The Universal Copyright Convention as an Instrument of Repression: The Soviet Experiment*, 24 J. Copr. Soc'y 1, 9-15 (1980).

91. Article 102 as amended reads:

The translation of a work into a different language for the purpose of publication is permitted only with the consent of the author or his assignees. Competent U.S.S.R. agencies can, according to a procedure established by U.S.S.R. legislation, authorize the translation of a work into a different language and the publication of this translation, with the observance, where appropriate, of the terms of international treaties or international agreements to which the U.S.S.R. is a party.

92. UCC, *supra* note 78, art. 5.

93. 1961 *Fundamentals*, *supra* note 27, art. 101 (as amended 1973).

94. *Id.* art. 105 (as amended 1973).

95. *Id.* art. 97 (as amended 1973).

### 3. Limitations of the Universal Copyright Convention

Soviet accession to the U.C.C. was a major step forward for the international protection of copyrighted materials. By stimulating multinational trade, Soviet accession to the U.C.C. opened the way for an international exchange of information and culture.<sup>96</sup> The U.C.C., however, is limited in its protective capacities.

In seeking the lowest common standards so as to attract the most members, the control or effect of the U.C.C. is limited. Further, as aptly demonstrated by the Soviets during the 1970's,<sup>97</sup> few nations will allow their domestic law to become subservient to a supranational body. The U.C.C. only provides a general obligation of national treatment,<sup>98</sup> and its minimum protections are insufficient to establish a controlling document for the international protection of copyrighted materials. When operating under the U.C.C. one is forced to continually ask the question: Will the target countries' laws protect my intellectual properties from the ravages of piracy, expropriation, and infringement?

## III. RECENT DEVELOPMENTS IN THE SOCIET UNION

### A. *Basic Provisions of the Berne Convention*

Until recently neither the United States<sup>99</sup> nor the Soviet Union had sought adherence to the Berne Convention. Yet, this Convention has arguably played the single most important role in the development of international copyright protection.<sup>100</sup> In early 1886, ten signatory states<sup>101</sup> began a new era in international copyright protection. An era had begun

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96. See Levin, *supra* note 53, at 161.

97. On December 28, 1973, prior to VAAP's assumption of exclusive jurisdiction over Soviet works, Nobel prize-winning author, Alexander Solzhenitsyn, published the book "The Gulag Archipelago." Published by the YMCA press, Solzhenitsyn's work was granted an international copyright.

The Soviet response was quick, decisive and defiant. Relying on the power of their own domestic copyright law, the Soviets arrested Solzhenitsyn, stripped his citizenship, and expelled him from the country. Significantly, the Soviets action was taken without any reliance on newly founded U.C.C. international copyright protections.

98. U.C.C., *supra* note 78, art. 2.

99. On Oct. 20, 1988 the United States Congress ratified accession to the Berne Convention for the Protection of Literary and Artistic Works. See 134 CONG. REC. S16939 (daily ed. Oct. 20, 1988). Eleven days later President Reagan signed the Berne Convention Implementation Act of 1988 into law. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). For an interesting comparison of Soviet and U.S. copyright law prior to the United States accession to the Berne Convention see Adolf Dietz, *United States and Soviet Copyright Systems: An Essay in Comparison*, 12 I.C.C., 153 (1981).

100. For a full and detailed discussion of the development of the Berne Convention and the implication of U.S. adherence, see Comment, *Development of the Berne International Copyright Convention and Implications of United States Adherence*, 13 Hous. J. INT'L L. 149 (1990) [hereinafter *Development of the Berne*].

101. Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom.

where individual nations were prepared to relinquish individual interests for the good of international order.<sup>102</sup>

The Berne Convention contains thirty-eight articles which discuss the substantive requirements of Convention members and the administrative structure of the Convention itself. The Convention charges member nations with providing international copyright protection through domestic laws.<sup>103</sup> Of vital importance to this Article are the substantive requirements discussed in articles one through twenty of the Convention. Among these rights are duration of the copyright, right of translation, reproduction, public performance, broadcasting, adaptation, and arrangement.<sup>104</sup>

The Berne Convention, unlike the U.C.C., sets forth specific minimum conditions to which each signatory must adhere.<sup>105</sup> As a general matter these conditions may be broken into five categories:<sup>106</sup> Primacy, Coverage, Activation of Coverage, Exclusive Rights, and Term of Protection.

**PRIMACY** — Each member nation is required to accord foreign authors the same level of copyright protection it provides to its own citizens.<sup>107</sup> Signatory nations must grant protection at a level equal to or above the minimum standards espoused by the Convention.<sup>108</sup> Unless otherwise provided in a given article, national discretion to rely on its own domestic law<sup>109</sup> is not permitted. Convention provisions maintain primacy over national legislation.<sup>110</sup>

**COVERAGE** — Coverage under the Convention extends to a broad variety of subject matters. Coverage extends to "every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression . . ."<sup>111</sup> Expressly excluded, however, is "news of the day or . . . miscellaneous facts having the character of mere items of press information."<sup>112</sup> Coverage also extends to an author's unpublished

102. See EDWARD W. PLOMAN & L. CLARK HAMILTON, *supra* note 7, at 25.

103. *Development of the Berne*, *supra* note 100, at 157.

104. See Berne Convention, *supra* note 11, art. VII (duration), art. VIII (right of translation), art. IX (right of reproduction), at art. XI (right of public performance), art. XIbis (right of broadcasting), art. XII (right of adaptation, arrangement, and other alteration).

105. For an excellent comparison of Berne and U.C.C. Convention characteristics, see Note, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential*, 4 CARDOZO ARTS & ENT. L. J. 203, 216-26 (1985) (including text of speech made by Lewis Flacks, Policy Planning Advisor for the U.S. Register of Copyright).

106. See generally *Berne-ing the Soviet Copyright Codes*, *supra* note 10, at 398 (discussing method of five category breakdown of Berne Convention's substantive articles).

107. Berne Convention, *supra* note 11, art. 5(3).

108. *Id.* art. 5(2) and art. 6(1).

109. *Id.* art. 19 and art. 20.

110. *Id.* art. 2(4); art. 2(7); art. 2bis(1-2); art. 7(4); art. 10(2); art. 10bis; art. 14bis(3); art. 14ter(2); art. 16(3).

111. *Id.* art. 2(1).

112. *Id.* art. 2(8).



works.<sup>113</sup>

**ACTIVATION OF COVERAGE** — The Berne Convention excludes all formalities that precondition the existence, scope and duration of copyright protection. Once created, a work's entitlement to protection under the Convention is not premised on any administrative formality.<sup>114</sup> Exercise of rights under the Convention is immediately available and independent of any exercise of protection in the work's country of origin.<sup>115</sup>

**EXCLUSIVE RIGHTS** — The Berne Convention protects an author's personal rights and the right created in his works. The Convention seeks to maintain minimum protective standards which signatories deem essential to the success of international copyright.<sup>116</sup> Among these rights are the right of translation, reproduction, public performance, broadcasting, adaptation, and arrangement.<sup>117</sup> Any reproduction of an author's work made in violation of any Convention exclusive right is subject to seizure.<sup>118</sup>

**TERM OF COVERAGE** — The Berne Convention establishes a minimum term of copyright protection for life plus fifty years or an alternative term of fifty years from the date of first publication.<sup>119</sup>

#### B. *Recent Developments in Soviet International Copyright Law*

On April 19, 1989, Vladimir F. Petrovsky, the Soviet Deputy Foreign Minister, announced the Soviet Union's intention to join the Berne Convention for the Protection of Literary and Artistic Works,<sup>120</sup> "[I] can inform you that our country is finalizing the necessary preparatory work which will soon enable us to accede to the Berne Copyright Convention."<sup>121</sup>

On June 1, 1990, the Soviets made significant Berne preparations as Soviet President Gorbachev signed an historic trade agreement<sup>122</sup> with

113. *Id.* art. 3(1) and 3(3).

114. *Id.* art. 5(2).

115. *Id.*

116. *Development of the Berne*, *supra* note 100, at 159.

117. See Berne Convention, *supra* note 11, art. VIII (right of translation), art. IX (right of reproduction), art. XI (right of public performance), art. XIbis (right of broadcasting), art. XII (right of adaptation, arrangement, and other alteration).

118. Berne Convention, *supra* note 11, art. 16(1).

119. *Id.* art. 7(1-3).

120. Berne Convention, *supra* note 11; *Soviet Union to Join Berne Convention*, REUTERS, Apr. 19, 1989; *Soviets Will Join Berne Convention*, L.A. TIMES, Apr. 19, 1989, Part A, pg. 3, col. 1; *The U.S.S.R. to Join Berne Convention*, Agency Chief Says, TASS, August 30, 1989.

121. Clyde H. Farnsworth, CHINA CALLED TOP COPYRIGHT PIRATES, N.Y. TIMES, Apr. 20, 1989, at D7, col. 4. Mr. Petrovsky's announcement was made at the London Information Forum of the Conference on Security and Cooperation in Europe.

122. *Bush and Gorbachev Sign Trade Pact with Intellectual Property Provisions*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 984, at 128 (June 7, 1990); For text of the U.S.-U.S.S.R. Trade Agreement relating to copyright provisions and accompanying Side Letter,

the U.S., committing the two nations to provide for substantial intellectual property protections. The agreement also bound the Soviet Union to implement legislation necessary to carry out their commitment.<sup>123</sup> The

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see *Intellectual Property Provisions of U.S. - Soviet Trade Agreement*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 984, at 144 (June 7, 1990); see Schwartz, *supra* note 17, at 213-218.

123. The agreement states the bilateral commitment of each nation to submit "to their respective legislative bodies, the draft laws necessary to carry out the obligations of this Article and to exert their best efforts to enact and implement these laws" to:

- (1) Adhere to the Berne Convention (Paris Act, 1971);
- (2) Provide copyright protection for computer programs and data bases as literary works;
- (3) Provide sound recording protection including—
  - (a) national treatment (immediately after both parties, i.e., the Soviets, have enacted domestic sound recording protection) for sound recordings first fixed by their respective nationals or first published in their national territory; and
  - (b) at a minimum, rights in producers of sound recordings shall include: a right of reproduction, public distribution and importation, and exclusive commercial rental and lending rights;
- (4) After both are members of the Berne Union, "the protection of works in existence prior to that date [of Berne relations] shall be determined in accordance with Article 18 of the 1971 Paris Act of the Berne Convention."; and
- (5) To constitute a working group on intellectual property matters in accordance with the Agreement and side letter.

The agreement also states that the legislative proposals of the parties shall be in accordance with the principles enumerated in the side letter. The contents of the side letter may be summarized as follows:

- (1) The Soviet Government agreed that in keeping with the Resolution of the Supreme Soviet of March 6, 1990, the "Law on Property in the U.S.S.R." the Supreme Soviet had charged the Council of Ministers to introduce legislation in 1990 to amend the copyright law in order to adhere to the Berne Convention; and
- (2) "The Government of the U.S.S.R. will introduce in 1991 the draft laws necessary to fulfill the obligations contained in Article VIII of the Agreement and will undertake all possible measures to enact these laws during 1991. The Government of the U.S.S.R. will seek prompt implementation of these laws."
- (3) The Government of the U.S.S.R. will incorporate the following principles in their legislative proposals:
  - (a) For computer software protection: to extend protection under copyright for computer programs, at the level and for the same duration as literary works and any limitations on rights would be compatible to those applicable to literary works under Berne—and to incorporate limitations on copying allowing for a single back-up copy under conditions similar to those provided under United States copyright law;
  - (b) For sound recordings: to consider a term of protection for fifty years from the date of first publication and to consider adherence to the Geneva Phonograms Convention immediately upon enactment of sound recording protection in the U.S.S.R.
- (4) The Government of the U.S.S.R. in cooperation with the United States government will create a working group on intellectual property matters to exchange information and discuss the implementation of intellectual property protection in the respective countries.

See Schwartz, *supra* note 17, at 158-59. The author of this paper extends full credit to Mr.

U.S.-U.S.S.R. agreement included commitments to: (1) adhere to the Berne Convention, (2) protect computer programs and data bases, (3) protect sound recordings, (4) product and process patent protections for 20 years from application date or at least 17 years from grant, and (5) comprehensive trade secret protection.<sup>124</sup>

Since the signing of the U.S.-U.S.S.R. Trade Agreement, Soviet lawmakers have formulated draft legislation that would amend Chapter IV of the 1961 Fundamentals of Civil Legislation and bring Soviet copyright law into conformity with the Berne Convention's minimum standards.<sup>125</sup> On May 31, 1991, in a special commission of the Supreme Soviet of the U.S.S.R., amendments to the 1961 Fundamentals of Civil Legislation were adopted. Anatoly Lukyanov, Chairman of the Supreme Soviet and highest ranking official in the Soviet Government's legislative branch, stated, "We understand that the protection of intellectual property rights is extremely important . . . I am strongly personally committed to this. The law will fully conform to the Berne Convention and all established international standards. It is not only important for you, it is equally important for us."<sup>126</sup>

Shortly after adoption, the amended Fundamentals of Civil Legislation appeared in the June 26 issue of *Izvestia*. The Fundamentals, as amended, contained 10 copyright law provisions, which were integrated into the Soviet's Civil Code, Chapter IV. Among these provisions were the following:<sup>127</sup>

- (1) The list of copyrighted items includes literary works such as fiction, textbooks, etc., dramatic works, musical works, audiovisual works such as cinema or television, radio productions, photography, etc. Computer programs are listed separately but are not included as literary works, as provided in the Trade Agreement.<sup>128</sup>
- (2) Registration of a work, or compliance with any other formalities, is not required for copyright protection.
- (3) The term of protection is the life of the author plus 50 years, counting from the first day of the year following the author's death.<sup>129</sup>
- (4) Authors will have exclusive rights to their works, including the rights to authorship and integrity of the work, the rights to publish and to use the work,<sup>130</sup> and the right to remuneration.<sup>131</sup>

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Schwartz for his excellent summaries of the U.S.-U.S.S.R. Trade Agreement and accompanying Side Letter. Mr. Schwartz's summaries, with limited alterations, were utilized in full.

124. *Treaties, Soviet Union*, 42 PAT. TRADEMARK & COPYRIGHT J. No. 1044, at 405 (August 22, 1991).

125. See Schwartz, *supra* note 17, at 149.

126. *Chairman of the Supreme Soviet Pledges Commitment to Copyright Protection*, BUSINESS WIRE, July 15, 1991, Int'l desk.

127. The summaries of the new amendments as provided in *Izvestia* were taken from *New Copyright Law Enacted, But U.S. Groups are Skeptical*, INT'L BUS. DAILY (BNA), Aug. 28, 1991 [hereinafter *New Copyright Law*].

128. *Id.* art. 134.

129. *Id.* art. 137.

130. *Id.* art. 135(2).

Significantly, the 1991 amendments to the Fundamentals of Civil Legislation also added provisions to protect computer programs and data bases under copyright law<sup>132</sup> and established a right of public performance. The 1991 amendments were set to take effect on January 1, 1992.<sup>133</sup>

Many of the revisions were made in anticipation of Soviet adherence to the Berne Convention. It remains a question of debate whether the Soviet amendments do, in fact, bring it into conformity with Berne Convention.<sup>134</sup>

### C. *Political Changes and the New Commonwealth of Independent States*

On December 8, 1991 one of the century's most dramatic events occurred in the Soviet Union. The Presidents of Russia, Ukraine and Byelorussia declared an end to the Soviet Union and the creation of a new Commonwealth of Independent States.<sup>135</sup> The preamble to the Commonwealth Agreement stated: "We, as the founding states of the U.S.S.R. and the co-signatories of the 1922 Union Treaty . . . state that the U.S.S.R. is ceasing its existence as a subject of international law and a geo-political reality."<sup>136</sup>

New Commonwealth leaders immediately extended an open invitation to all states interested in joining the Commonwealth.<sup>137</sup> Prior Soviet ties, however, were not made a prerequisite to enrollment.

In their initial meeting, Commonwealth leaders, Boris Yeltsin, Leonid Krawczuk, and Stanislav Shushkevitch, agreed to "conduct coordinated radical economic reforms aimed at the creation of full-blooded market mechanisms, the transformation of attitudes to property, [and] guarantees for freedom of enterprise."<sup>138</sup> Resolutions were also passed to create an inter-bank agreement, establish a coordinated budget policy, institute liberalized price standards, and abstain from acts harmful to mu-

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131. *Id.* art. 135.

132. *Id.* art. 134(2) provides that "computer programs" are in the subject matter of works protected under copyright.

Irina V. Savelyeva, Professor of Law, Moscow State University and deputy director of Steptoe & Johnson Lex International in Moscow predicted that enactment of the computer related provisions would allow the Soviet Union to join the Berne Convention and would bring the Soviet law more closely in tune with Western protections. *European Unification is Focus of AIPLA Mid-Winter Meeting*, 41 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 1018, at 333 (Feb. 14 1991).

133. Fundamentals of Civil Legislation of the U.S.S.R., Chap. IV, Fundamentals of Copyright Law of 1961 (as amended May 31, 1991).

134. See Schwartz, *supra* note 17, at 157. For a list of complaints developed by the International Intellectual Property Alliance (IIPA) see *New Copyright Law*, *supra* note 127.

135. Mark Trevelyan, *Focus-Slav Republics Declare Soviet Union Dead*, REUTERS, Dec. 9, 1991, § Money Report [hereinafter Trevelyan].

136. *U.S.S.R. is Dead*, *supra* note 18.

137. *Id.*

138. See Trevelyan, *supra* note 135.

tual economic interests.<sup>139</sup>

From a legal perspective, Soviet domestic law faced extinction. New Commonwealth leaders openly declared all Soviet law null and void on their territory and Soviet organs obsolete.<sup>140</sup> Independent State legislation is to replace years of Soviet legal domination.<sup>141</sup> Commonwealth leaders noted, however, that international treaty obligations signed by the U.S.S.R. would continue to be honored.<sup>142</sup>

The disintegration of the Soviet Union may have fatalistically interfered with recent advancements in the international protection of copyrighted materials. In Commonwealth territories, the January 1, 1992 enactment of the May 31, 1991 amendments to Soviet copyright legislation will have no effect.<sup>143</sup> As a result, Soviet copyright law will not come into conformity with international copyright standards and Soviet intents of accession to the Berne Convention will not reach fruition. The Commonwealth's commitment to Soviet international treaty obligations inauspiciously reveals that Soviet Commonwealth membership in the Berne Convention was missed by only a few weeks.

#### IV. ADHERENCE TO THE BERNE CONVENTION BY THE NEW COMMONWEALTH OF INDEPENDENT STATES

##### A. *A Matter of Survival for a Birthing Market Economy*

Commonwealth States face a difficult period as they move toward free-market economies. Critical economic conditions in each of the post-Soviet States are pressuring new leadership to make the transition as quickly and smoothly as possible. The expediency and ease of these transitions, however, are conditioned upon each State's ability to exist and function in the global marketplace.

Today's global free-market economies are dependent upon information-based technology and innovations.<sup>144</sup> Computer-integrated-manufacturing systems control and monitor the production of materials.<sup>145</sup> Advanced telecommunication and electronic-data-interchange systems link

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139. *Id.*

140. *New Commonwealth May Create Favorable Environment for Legal Framework*, 2 SOVIET BUS. L. REPT. No. 11, Dec. 13, 1991; Trevelyan, *supra* note 134. *Compare Soviet Union Still Alive, Constitutional Committee Says*, TASS, Dec. 11, 1991 (positing that Soviet Law still remains in order to preserve even minimum human rights and freedoms).

141. Trevor Fishlock, *Balts Forced to Pay Heavy Price for New Freedom*, THE DAILY TELEGRAPH, January 12, 1992, § Int'l, at 15.

142. *U.S.S.R. is Dead*, *supra* note 18.

143. *See* Trevelyan, *supra* note 135.

144. *See generally* James E. Meadows, *Software Protection in Transactions with the Soviet Union*, 12 RUTGERS COMPUTER & TECH. L. J. 133 (1986).

145. *See* Tom Peters, *The Destruction of HIERARCHY: The Information Revolution is Killing Traditional Corporate Hierarchy. When You Can No Longer Hoard Information, Your Old Basis for Power is Gone*, INDUSTRY WEEK, Aug. 15, 1988, § Features, at 33 [hereinafter Peters].

suppliers, distributors and purchasers on a global scale.<sup>146</sup> Information of all types can be transmitted, exchanged, updated, or monitored from points around the globe in milliseconds.<sup>147</sup> These advanced systems as well as the information that is transmitted through them are the subject of careful protections under available international copyright codes.

A Commonwealth State's transition from state-owned to free-market economy, therefore, will depend immensely on its ability to obtain established Western information-based technologies, stimulate comparable indigenous technological developments, and integrate these technologies into its economic system.<sup>148</sup> In light of existing critical economic conditions in the Commonwealth States, Commonwealth leaders must seek to attain the highest degree of access to these intellectual goods that the international marketplace will allow.

Direct foreign investment is imperative to the integration of state-of-the-art technology into the developing Commonwealth economies.<sup>149</sup> Foreign nations, however, will be reluctant to engage in any form of direct technological investment or exchange without assurances that its intellectual goods will be adequately protected.<sup>150</sup> Moreover, domestic development will progress equally as slow where copyright protections do not exist as an incentive to indigenous scientists, authors, and engineers.<sup>151</sup>

Lack of Berne Convention membership will work a significant disadvantage on each Commonwealth State's attempt to obtain information-based technologies from foreign trade partners.<sup>152</sup> As the premier union for the international protection of copyrights, the Berne Convention defines "adequate" minimum standards of copyright protection. Fledgling economies which are reluctant to assure these adequate protections will not be readily trusted in the global marketplace.<sup>153</sup>

Transition to and maintenance of a free-market economy depends on the free and protected flow of information. Broad access to Western, information-based technology must be a matter of utmost concern for Commonwealth leaders. Accession to the Berne Convention is a necessary precursor to any such access.

## B. *The Necessities of Adherence*

### 1. The Ravages of Piracy

The term "piracy" has no settled meaning in international law. In its

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146. *See id.*

147. *See id.*

148. *See* Edward C. Runte, *Transborder Data Flow—Planning for the Future*, Sept. 21, 1982, § Int'l Data Networks, at 11 [hereinafter Runte].

149. *See* Leaffer, *supra* note 7, at 279-281.

150. *See id.*

151. *See* Sony, *supra* note 5, at 429.

152. *See generally* Leaffer, *supra* note 7, at 279-281.

153. *See id.*

broadest sense, piracy is the systematic and intentional reproduction or use of someone else's copyrighted materials.<sup>154</sup> Pirates of copyrighted materials enjoy low production costs and occupy the opportune locations to satisfy the demands of developing economies.<sup>155</sup> As a result, piracy has become an attractive short-term solution to the technological inadequacies of developing nations.

In this age of technology, reports of the computer industry demonstrate well the staggering impacts of piracy on domestic and international economic conditions.<sup>156</sup> Between 1981 and 1984 the U.S. software industry lost 1.3 billion dollars.<sup>157</sup> Studies indicate that 1985 losses alone exceeded one billion dollars.<sup>158</sup> The increasing reliance of modern society on computers lends to a breeding ground of software piracy.

Recent commercial and technological developments in the field of information-systems (compact disks, optical scanners, computer networks and advanced software) will cause the piracy of information and information-based technology to become even more acute. Strict adherence to domestic and international copyright protections is the foremost means of combating the illegal pirating of another's works. Countries employing inadequate domestic and international copyright protections will attract these damaging pirating activities.

## 2. Impact of Domestic Economy

The damage piracy can cause to domestic economies is far reaching. The losses of the copyright owner are three-fold. Copyright owners lose monies acquired by pirators, royalties potentially paid by pirating organizations, and a product's goodwill where pirated imitations are of inferior quality.<sup>159</sup> Consumers of pirated products are also victimized by poor quality goods that threaten the public health and welfare. Furthermore, losses create a disincentive to disseminate works. Authors will selectively begin releasing their works in an attempt to avoid the unfair competition from cheaper, pirated works.<sup>160</sup>

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154. For a thorough discussion of the term, see J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 770-80 (1989).

155. See Leaffer, *supra* note 7, at 280.

156. For an extensive review of the economic impact on U.S. trade as a result of piracy in the specific areas of: motion pictures, records and tapes, books, and computer software, see Jon A. Baumgarten, *International Matters*, 222 PRAC. L. INST. 25, 47-51 (Apr. 17, 1986) [hereinafter *International Matters*].

157. Frank Emmert, *Intellectual Property in the Uruguay Round — Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1326-27 (1990) [hereinafter *Emmert*], relying on 3 BUSINESS SOFTWARE PIRACY: REPORT ON FEDERAL DATA SYSTEMS 4 (1985).

158. See *id.* at 1331-33.

159. *Id.* at 1321-21.

160. *International Matters*, *supra* note 156, at 25. Conservative estimates indicate that 2.2 million, or 2.2% of the U.S. civilian labor force were involved in copyright industries

A State's disregard for intellectual property rights also inhibits the development of indigenous technological and scientific advancements. Scientists, authors, and engineers are reluctant to expend the labor of creation when uncontrolled pirating, counterfeiting, and infringing will impede a fair return on their labors.<sup>161</sup> The failure to protect domestic incentives may actually result in the exodus of important minds to countries where strong copyright protections are happily afforded.<sup>162</sup>

Indirect effects on the economy may also be felt. Where piracy is widespread, research and development will be less profitable and consequently decrease.<sup>163</sup> Decreases in creative development will impact the number of jobs available in the affected industries.<sup>164</sup> Reduced creative development will also affect those industries that supply the raw materials or services involved in the manufacture, transportation or distribution of the creative works.<sup>165</sup> At the governmental level, reduced industrial activity will mean smaller tax resources for domestic governmental tasks.<sup>166</sup>

Much like a chemical dependence, a country with little regard for the protection of intellectual property will develop an unhealthy technological dependence on foreign economies.<sup>167</sup> As domestic creative elements are eliminated, pirated products will become the country's sole window to Western and advanced technology goods.

### 3. Impact on International Trade Relations

By operating without adequate copyright protections, a country demonstrates its lack of regard for the international community of ideas.<sup>168</sup> Although this disregard for copyright protections may yield positive short-term results, it will likely harm a country's development in the long-term.<sup>169</sup>

Nations with strong copyright protections may forbid the importation of pirated, counterfeit, and infringing products.<sup>170</sup> Nations may restrict trade with a country that has a record of violating even minimum

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during 1984.

161. See Sony, *supra* note 5.

162. J. Davidson Frame, *National Commitment to Intellectual Property Protection: An Empirical Investigation*, 2 J.L. & TECH. 209, 211 (1987) [hereinafter Frame].

163. See Emmert, *supra* note 157, at 1321-22.

164. *Id.* A 1982 estimate found 131,000 jobs in five industry sectors were lost due to foreign product counterfeiting. See United States International Trade Commission, Pub. No. 1479, *XVII Effects of Foreign Product Counterfeiting on U.S. Industry* 4-13 (1984).

165. See *International Matters*, *supra* note 156, at 25.

166. See Emmert, *supra* note 157, at 1321-22.

167. See Frame, *supra* note 162, at 211.

168. See *International Matters*, *supra* note 160, at 30.

169. See Frame, *supra* note 162, at 211.

170. Greeley, *The United States Customs Service and Protection of Intellectual Property Rights*, 83 PAT. & TRADEMARK REV. 5, 6 (1985) (discussing U.S. Customs Service practice of screening imports for counterfeit, pirated or patent-infringing goods).



protective standards.<sup>171</sup> Fearing the loss of control over ground-breaking developments, nations may grow reluctant to license new technologies.<sup>172</sup>

Production of intellectual property has become increasingly expensive. As a result, research and development efforts demand large international markets and firm copyright protections to maintain adequate returns.<sup>173</sup> In light of these rising costs, nations can ill afford to eliminate any possibility of fully operating in the international marketplace.

### C. *The Benefits of Berne Convention Membership*

By joining the Berne Convention, Commonwealth States would receive international copyright protection in more than eighty nations.<sup>174</sup> Commonwealth authors would enjoy copyright protection in several countries, not members to the U.C.C. More significantly, new Commonwealth authors would enjoy the protection of the highest international copyright standards available today.

International copyright protection is imperative to ensure access to the world's technology, and to ward off the ravages of piracy. Membership in the Berne Convention will provide these protections and facilitate the Commonwealth State's move into world markets.<sup>175</sup>

#### 1. Increased Domestic Creativity and Development

Most developing countries have an infrastructure supporting a certain level of research and development.<sup>176</sup> The full potential and growth of that infrastructure can not be realized without adequate copyright protections.<sup>177</sup> As a foundation, strong copyright laws will ensure that indige-

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171. See Frame, *supra* note 162, at 211, 226; see Moscovitz, *Law Moves to Protect Ideas, Not Just Goods, from Piracy*, WASH. POST, Oct. 29, 1984, (Business Supp.), at 29, col. 1 (noting use of Generalized System of Preferences (GSP) to protect U.S. goods from piracy).

For example, the GSP is being used by the United States Government to pressure countries with little regard for intellectual property rights to develop stronger intellectual property laws. The degree of intellectual property protection a country offers affects the level and type of GSP benefits it may receive. Consequently, countries with limited intellectual property protections may receive GSP benefits (duty free tariffs).

Additionally, Section 301 of the Trade Act of 1974 (as amended in 1984), is another weapon the United States government has come to rely on as a means of prompting nations to adopt stronger intellectual property laws. Under this approach the inadequacy of a nation's intellectual property laws is addressed as an unfair trade practice.

172. See Frame, *supra* note 162, at 211; see J. Davidson Frame, *Political Risk in International Technology Transfer*, 10 J. TECH. TRANSFER 1 (1986).

173. See GILLES Y. BERTIN & SALLY WYATT, *MULTINATIONALS AND INDUSTRIAL PROPERTY: THE CONTROL OF THE WORLD'S TECHNOLOGY* 127 (1988).

174. The United States became the eighty-first member-nation to the Berne Convention. See N.Y. TIMES, Apr. 20, 1989, at D7, col. 4.

175. See generally BOGUSLAVSKY, *supra* note 39, at 216.

176. See Emmert, *supra* note 157, at 1349.

177. See *id.*

nous creators remain at home.<sup>178</sup> Once a State's creators are content, creative activity can flourish in a collected and confident environment.

The protection of copyrighted materials is the primary means by which creators are ensured a fair return on their labor.<sup>179</sup> Strong copyright protections will provide authors with the incentive to continue in their creative endeavors.<sup>180</sup> The full and free dissemination of information, methodologies, and innovations among indigenous scientists and engineers raises the level of scientific consciousness.<sup>181</sup> As a result, incremental and steady advances in technology enhance the standard of living within domestic society.<sup>182</sup>

Authors in Commonwealth States will benefit from a large, previously unavailable, paying market.<sup>183</sup> Increased trade relations between foreign nations and Commonwealth States will foster interest in the customs and lifestyles of people in the Commonwealth States.<sup>184</sup> Commonwealth citizens, scientists, teachers, and officials, will experience the rich heritage of foreign cultures and the true international marketplace of ideas.<sup>185</sup>

## 2. Enhanced Position in the Global-Marketplace

Universal or international copyright protections help ensure that a creator's innovations will bring a profit in the global marketplace.<sup>186</sup> Western economic models demonstrate that global creativity and development increases when additional nations protect intellectual property and thus make innovation more profitable.<sup>187</sup> The Commonwealth States will serve important national interests of economic stability and technological growth by becoming Berne Convention members.<sup>188</sup> Membership will provide Commonwealth States with a credible presence in the fast growing, information-based, global economy. Membership will also establish negotiation mechanisms with many influential trade partners.<sup>189</sup>

Membership guarantees participation in the formulation and management of international copyright policy.<sup>190</sup> It will enhance the plausibil-

178. *See id.*

179. *See Sony, supra* note 5.

180. *See id.*

181. Dennis S. Karjala, *United States Adherence to the Berne Convention and Copyright Protection of Information-Based Technologies*, 28 *JURIMETRICS J.* 147, 148 (1988).

182. *Id.*

183. *See Radlauer, supra* note 19, at 20.

184. *Id.*

185. *See Levin, supra* note 54, at 161.

186. Compare Carlos J. Moorhead, *H.R. 2962. The Berne Convention Implementation Act of 1987*, 3 *J.L. & TECH.* 187 (1988) [hereinafter Moorhead].

187. Emmert, *supra* note 157, at 1351.

188. *See Moorhead, supra* note 186.

189. *Id.* Berne members include nearly all free market countries. 4 *M. NIMMER, NIMMER ON COPYRIGHT*, app. 22 (1988).

190. "[T]he maintenance and development of the Union and the implementation of

ity of a Commonwealth State's trade positions,<sup>191</sup> and provide the necessary show of good-faith to cautious trade partners. Membership will evidence that the Commonwealth State intends to hold the same respect for intellectual property protections as the other economically and technologically advanced nations of the world.

### 3. Improved Access to Cutting-Edge Technology

Adequate protection of copyrighted materials is becoming increasingly important to the decisions of foreign investors.<sup>192</sup> Where a work may be the subject of piracy, counterfeiting or infringement, inventors are understandably eager to seek out all available protections. Trade secrecy and limited dissemination provide such potential protections.

Facing the potential of losing control over new innovations, copyright owners tend to be reluctant in disclosing their innovations where copyright protections are inadequate.<sup>193</sup> When the purchasing nation offers inadequate protections, inventors are content to send outdated and non-competitive technology to these "dangerous" markets and maintain the competitive integrity of their cutting edge technology.<sup>194</sup> Membership in the Berne Convention would provide cautious trade partners with the protective assurances they desire.

## V. CONCLUSION

A major step in the development of the new Commonwealth of Independent States would be their immediate adherence to the Berne Convention. Unquestionably, the Commonwealth's prospect for future development is closely tied to its ability to acquire and nurture strong technological capabilities. The doorway to these capabilities lies in each State's indigenous creative resources and its ability to deal in the global market for the acquisition of innovative technologies.

By necessity the Commonwealth States must begin at home, nurturing indigenous technological advancements. Internal growth and a clear regard for copyright protections will expand the much needed technological base of these developing countries. Countries that are economically, scientifically, and technologically successful (U.S., Sweden, France, Germany, United Kingdom) have carefully maintained the protection of in-

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this Convention" shall be governed by an Assembly comprised of one member from each of the Governments that are a party to the Convention. Berne Convention, *supra* note 11, at art. 22.

191. Important trade partners, (U.S., United Kingdom, Sweden, Japan) will not easily forget the billions of dollars lost through copyright infringements in the past. Adherence to the Berne Convention indicates a willingness and commitment to reform and correct years of unacceptable piracy within the Soviet Union.

192. See generally Emmert, *supra* note 157, at 1351.

193. See *id.* at 1352.

194. See Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989).

lectual property rights as part of their economic development strategies.<sup>195</sup> To this end, Commonwealth States must strive to protect their indigenous intellectual property in an attempt to encourage the development of domestic creative capacities.

To follow the Soviet's historical disregard and animosity for international copyright protections will only drive these budding nations into technological isolationism and an unhealthy dependence on the piracy of other nation's goods. Any disregard for international intellectual property protections will only weaken domestic technological capacities and limit foreign investment opportunities.

The new Commonwealth States, upon entering the international trade markets, will have to abide by the rules of the medium. Intellectual property rights must be respected. At this critical time, these States cannot afford to have indigenous work force scientists and engineers leaving the country in search of better protections or remaining at home with no incentive to create.

Although Soviet Law has, arguably, been voided in Commonwealth territories, new Commonwealth leaders must be cognizant of the impact former Soviet positions on copyright protection may have on present policy decisions. Western distrust of Soviet copyright protections as a result of extensive piracy and slow international legal development must be factored into initial Commonwealth trade decisions.

Commonwealth leaders, therefore, must move to develop strong international copyright protections thus demonstrating their goodwill and protective intents. The development of domestic legislation which establishes firm standards in keeping with Berne Convention requirements will take time. However, without this goodwill firmly established, the door to Western technology will slowly open — a phenomenon which Commonwealth States cannot survive.

The Commonwealth States face an interesting alternative to the slow development of domestic copyright legislation. Commonwealth leaders must recognize that Soviet Law was poised for accession the Berne Convention. In light of the time needed to create new domestic copyright legislation, Commonwealth leaders must consider the possibility of relying on Soviet law and adhering to the Berne on its foundations. Reliance on Soviet law need only serve as a transitory body until conforming domestic legislation can be constructed.

In either case, reliance on Soviet copyright law or new legislation, it is important for the new State to begin its march into the global free-market economy and international free marketplace of ideas with the goodwill and protective tools necessary to deal with other Nations. Survival cannot be accomplished with short-term patch work solutions.

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195. See Frame, *supra* note 162, at 217.