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Negotiating International Copyright Protection: The United States and European Community Positions

ANNE MOEBES*

I. INTRODUCTION

With the globalization of world media markets and the increase in piracy of copyrighted works, countries that export a substantial amount of copyrighted works, such as the United States and the European Community¹ ("EC"), have acquired a heightened interest in international copyright protection. In the United States, foreign sales account for over fifty percent of the distribution earnings of major films.² Until now, the EC has not had significant export earnings from the sales of films and television programs, due to linguistic differences and the small and fragmented nature of the EC. However, the EC members have deregulated and privatized these industries. The result has been an increased demand for audiovisual programming in the EC, much of which will be exported.³ Further, many other industries concerned with copyright protection, such as the computer and publishing industries, will experience an increase in demand upon the formation of the European single market program, referred to as "1992."⁴

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The views expressed by the author do not necessarily reflect those of the National Telecommunications and Information Administration.

1. The EC is currently comprised of 12 member states: France, the United Kingdom, Ireland, Germany, Belgium, Denmark, the Netherlands, Luxembourg, Italy, Spain, Portugal, and Greece. *Common Market in Profile*, Common Mkt. Rep. (CCH) ¶ 101, at 111 (1987).

2. ROBERT B. COHEN, *THE U.S. POLICY RESPONSE TO EUROPE'S CHANGING TELEVISION AND FILM MARKET 5* (Economic Policy Inst., U.S. Dep't of Commerce Reply Cmt. No. 900241-0041, 1990).

3. It is estimated that European earnings from film, television broadcasting, and home video rentals combined could grow from \$28 billion to \$58 billion over the next ten years. *Id.*

4. The EC was established in 1957. *TREATY ESTABLISHING THE EUROPEAN ECO-*

To combat piracy, and thereby reduce the trade deficit as it relates to such piracy, the United States and EC governments have engaged in a series of negotiations aimed at strengthening copyright laws and their enforcement. However, there are certain areas of copyright law in which the two governments disagree. This is complicating efforts to present a united front in international copyright negotiations.

This Article describes the present status of international copyright protection, as well as the status of various multilateral, bilateral, and unilateral activities in which the United States is engaged. This Article then addresses which forum or combination of fora presents the best alternative for protecting United States copyrights internationally. Because the EC figures prominently in the ongoing negotiations, the Article emphasizes the United States' relations with the EC, in the context of various negotiations currently underway.

The specific international copyright agreements and negotiations that are explored in this Article include the Berne Convention for the Protection of Literary and Artistic Works⁵ ("Berne Convention"); the talks involving Trade Related Aspects of Intellectual Property ("TRIPs"), which are being conducted by one of the multilateral working groups in the pending Uruguay Round of the General Agreement on Tariffs and Trade⁶ ("GATT") negotiations; the ongoing harmonization talks undertaken by the World Intellectual Property Organization⁷ ("WIPO"), including the Dispute Settlement Treaty and the Model Copyright/Berne Protocol; and the bilateral and unilateral efforts by the United States and the EC.

NOMIC COMMUNITY [EEC TREATY]. Its goal was the removal of internal trade barriers within 12 years by harmonizing laws and standards. In July 1987, the Single European Act ("SEA") became effective. 1 TRAITES, INSTITUANT LES COMMUNAUTES EUROPEENNES 801 (1987). The SEA intends to create a single market. Its goal is to assure the free movement of persons, goods, services, and capital throughout the EC by the end of 1992. This is to be achieved by the mutual recognition of minimum standards, which are prescribed in directives issued by the EC Commission, the law-making body that drafts all proposals for EC legislation. If a directive is adopted by the EC Council, all member states must implement the directive into their own legislation, even if they did not approve of a given directive.

5. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

6. See *Ministerial Declarations on the Uruguay Round*, GATT MIN. DEC. 7-8 (Sept. 20, 1986), cited in R. Michael Gadbaw & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT* 38 (R. Michael Gadbaw & Timothy J. Richards eds., 1988).

7. "WIPO is a specialized agency within the United Nations system. Its central role is to conduct studies and provide services designed to facilitate protection of intellectual property." MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 348 n.21 (1989).

II. THE BERNE CONVENTION

Any discussion of international copyright protection begins with the Berne Convention. In this regard, it is useful to outline some of its basic provisions. The members of the Berne Convention constitute a union designed to protect the rights of authors in their literary and artistic works.⁸ The union's aim is to extend the copyright protections available in one member country to all other member countries.⁹ A copyrighted work is protected by the national legislation of the country in which it was originally published; that is, by the country of origin, and not by the Berne Convention's provisions themselves.¹⁰ Thus, while any country may join the Berne Convention, it must be prepared to implement national legislation to conform to the minimum standards set forth in the Berne Convention.¹¹ Member countries may sign separate agreements among themselves if those agreements meet the minimum standards of, and do not contradict, the Berne Convention.¹² The Berne Convention dictates three types of standards: (1) substantive standards;¹³ (2) standards or definitions referred to in competent national laws;¹⁴ and (3) administrative stan-

8. Berne Convention, *supra* note 5, art. 1.

9. *See id.* art. 2.

10. M.M. BOGUSLAVSKY, COPYRIGHT IN INTERNATIONAL RELATIONS: INTERNATIONAL PROTECTION OF LITERARY AND SCIENTIFIC WORKS 90 (David Catterns ed. & N. Poulet trans., 1979). For work published for the first time in a country that is a member of the Berne Convention, the country of origin is considered the country of first publication. Berne Convention, *supra* note 5, art. 5(4)(a). If the work is published simultaneously in several member countries granting different terms of protection, the country of origin is that country granting the shortest term of protection. *Id.* If it is published simultaneously in a country outside the union and a country of the union, the latter is considered to be the country of origin. *Id.* Country of origin is also defined for certain special cases. For example, a cinematographic work's country of origin is considered to be the country of the union in which the maker resides or has its headquarters. *Id.* art. 5(4)(c)(i).

11. Berne Convention, *supra* note 5, art. 36.

12. BOGUSLAVSKY, *supra* note 10, at 75. In addition to multilateral conventions, such as the Berne Convention, countries may make specialized agreements, such as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which involves the protection of neighboring rights. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]. The United States is not a member of this convention, although several EC countries are, including Great Britain and Denmark. BOGUSLAVSKY, *supra* note 10, at 77-78.

13. BOGUSLAVSKY, *supra* note 10, at 88-89.

14. *Id.* For example, the Berne Convention grants rights to "authors" and their "assignees," but does not define these terms. *Id.* at 89. Rather, individual countries decide these definitions. *Id.* To further illustrate, the United States may legislate a work-for-hire doctrine, which protects the right of employers as authors, while other Berne countries, such as those in the EC, may not consider an employer an author.

dards of the Berne Convention itself.¹⁵

The persons entitled to rights under the Berne Convention include: (1) authors who are nationals of member countries and have published their works for the first time in one of the member countries, or in any country according to the Paris text, or are nationals of member countries and are authors of unpublished works; (2) persons without citizenship who reside in member countries; (3) authors who are nationals of non-member countries, but usually reside in a member country; and (4) authors who are nationals of non-member countries, but whose works were originally published in a member country or were published simultaneously in a member country and a non-member country.¹⁶ The Berne Convention also provides for reciprocity between individual members so that member countries may restrict the rights of authors from non-member countries who do not reside in a member country.¹⁷

The Berne Convention includes an illustrative list of protected works, which generally fit into two groups. The first group includes books, pamphlets, dramatic and dramatico-musical works, choreographic and musical compositions, with or without words, cinematographic works, painting, sculpture, and architectural works.¹⁸ The majority of these works enjoy full unconditional protection defined in the Berne Convention itself. The second group is protected by the domestic legislation of member countries, and includes official texts of a legislative, administrative, or legal nature, as well as the official translations of such texts and political speeches.¹⁹

The Berne Convention also provides that the enjoyment and exercise of copyright in the member countries shall not depend on any special conditions or formalities.²⁰ Thus, when the United States joined the Berne Convention in 1988, its implementing legislation eliminated all formalities previously required to obtain a copyright.²¹

Further, under the Berne Convention, the minimum term of protection is the duration of the author's life plus fifty years.²² Where a

15. *Id.*

16. Berne Convention, *supra* note 5, art. 3.

17. *Id.* art. 6.

18. *Id.* art. 2(1); see also BOGUSLAVSKY, *supra* note 10, at 93.

19. Berne Convention, *supra* note 5, art. 2^{bis}; see also BOGUSLAVSKY, *supra* note 10, at 93.

20. Berne Convention, *supra* note 5, art. 5(2).

21. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

22. Berne Convention, *supra* note 5, art. 7. For further discussion of terms of protection under the Berne Convention, see BOGUSLAVSKY, *supra* note 10, at 98-100.

member country's national legislation sets a longer period, the law of the country where protection is sought controls.²³

III. BEYOND THE BERNE CONVENTION

Currently, the Berne Convention provides the broadest multilateral basis for international copyright protection. However, in its present form, the Berne Convention leaves many questions unresolved. Some of these questions relate to the structure of the Berne Convention itself. Other gaps exist in its settlement dispute mechanisms. The application of the Berne Convention's existing substantive standards, coupled with the omission of vitally important standards, provides still more complications.

While different fora may be appropriate for resolving different issues, international copyright protection is best achieved through simultaneous employment of several mechanisms. For this reason, the United States is pursuing several different activities designed to go beyond the Berne Convention. In determining which combination of methods will achieve the United States' goals most effectively, it is important to understand how each method operates, as well as to understand the issues involved.

A. WIPO

One option is to have WIPO prepare treaties and protocols, based on input from the international community, in areas unaddressed by the Berne Convention. This proposal would give WIPO the broadest authority to decide conflicting interpretations of the Berne Convention and to establish new policies in international copyright protection.

1. The WIPO Model Copyright Law as a Berne Protocol

To resolve substantive gaps in the Berne Convention, WIPO's interpretive protocol would cover new substantive areas of concern, such as computers, including software protection and rental rights, as well as provide an exception for reverse engineering.²⁴ Currently,

23. BOGUSLAVSKY, *supra* note 10, at 99.

24. Reverse engineering is the cloning of computer products. See *Events of Note*, 7 COMPUTER LAW., Nov. 1990, at 38. The Berne Convention currently does not deal with computer programs. See generally Berne Convention, *supra* note 5; *Intellectual Property, House Panel Holds Second Oversight Hearing on Software Protection*, DAILY REP. FOR EXECUTIVES, Mar. 9, 1990, available in LEXIS, Nexis Library, DREXEC File.

WIPO is evaluating these and other issues in its attempt to draft a model copyright law.²⁵ The model law would accomplish several goals. First, the information gathered would be useful in preparing a Berne Protocol. In addition, the WIPO model law would provide an example for countries to emulate in creating their own copyright legislation.²⁶ Furthermore, it would help countries to modernize and upgrade their copyright laws to conform to generally accepted international norms.²⁷

2. Dispute Settlement Treaty

WIPO also plans to prepare a Dispute Settlement Treaty to remedy what many believe are the impractical dispute settlement mechanisms in the Berne Convention.²⁸ For example, the Berne Convention's mechanism for referring disputes to the International Court of Justice²⁹ is long, cumbersome, and complex. One WIPO dispute settlement proposal calls for a two-tiered system whereby WIPO would review alleged violations of a TRIPs agreement and decide whether a violation exists.³⁰ The violation would then trigger the involvement of GATT members in resolving the dispute.³¹ The GATT members' sole function would be to consider the economic harm caused by the violation.³²

B. *The TRIPs Talks—GATT Uruguay Round*

A TRIPs agreement would provide another alternative for international copyright protection. The TRIPs talks include a proposed intellectual property code within the GATT.³³ In the Uruguay

25. *State Department Panel Examines Proposal by WIPO for International Copyright Laws*, 6 Int'l Trade Rep. (BNA) 77 (Jan. 18, 1989).

26. *Id.*

27. *Id.*

28. *WIPO Committee to Move Ahead with Dispute Settlement Treaty*, 37 Int'l Trade Rep. (BNA) 1370 (Sept. 18, 1991).

29. Berne Convention, *supra* note 5, art. 33.

30. See Chakravarthi Raghaven, *Trade: Chile for Complementary WIPO and GATT Roles in TRIPs*, INTER PRESS SERV., Feb. 5, 1990, available in LEXIS, Nexis Library, IN-PRES File.

31. *Id.*

32. *Id.*

33. Yvan Chemla, *EC Farming Policy Suicidal: Thai Premier*, AGENCE FRANCE PRESSE, July 12, 1991, available in LEXIS, INTNAT Library; *Limited Intellectual Property Code Expected From Talks, PMA Official Says*, DAILY REP. FOR EXECUTIVES, Aug. 16, 1990, available in LEXIS, Nexis Library, DREXEC File; Jack Robertson, *USTR: Japan CPU Buys Too Low; U.S. Trade Representative Includes a Related Article on the Push for a 20 Percent Share of*

Round, the United States will seek to develop a GATT model of rulemaking and dispute settlement to be applied in the intellectual property area.³⁴ These efforts would identify internationally recognized minimum standards for the protection of intellectual property rights, enforcement procedures, consultation and dispute settlement mechanisms for resolving intragovernmental disputes regarding interpretation and enforcement of model norms, and protection of intellectual property rights as a fundamental part of GATT concessions.³⁵ A failure to honor international standards would constitute grounds for withdrawal of GATT concessions.³⁶ The United States and EC differ, however, with respect to some of the substantive standards that should be included in a GATT intellectual property code.

1. TRIPs Incorporation of Substantive Standards

The GATT is a contract among its members, and thus can be extended to cover any subject, including the protection of intellectual property rights, provided a consensus decides that the failure to protect these rights inhibits international trade.³⁷ For example, the GATT rules currently authorize members to enforce intellectual property rights at their borders.³⁸

In the TRIPs negotiations, the EC will seek to incorporate by reference the obligations of the Berne Convention and add obligations to protect computer programs as literary works; provide rental rights for cinematographic works, computer programs, and sound recordings; and provide so-called "neighboring rights,"³⁹ which are the rights of performers, phonogram producers, and broadcasting organizations guaranteed by the Rome Convention for the Protection of

the Japanese Semiconductor Market for US Companies, ELECTRONIC NEWS, Apr. 1, 1991, available in LEXIS, Nexis Library, ELCNWS File.

34. Gadbow & Gwynn, *supra* note 6, at 39-40.

35. *Id.* at 40; see also Ernest H. Preeg, *The GATT Trading System in Transition: An Analytic Survey of Percent Literature*, 12 WASH. Q., Autumn 1989, at 199.

36. Gadbow & Gwynn, *supra* note 6, at 40.

37. *Id.* at 43.

38. Article XX(d) of the GATT provides in pertinent part: "[N]othing in this Agreement shall be construed to prevent the adoption or enforcement . . . of measures . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices." General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(d), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

39. *Draft Agreement on Trade-Related Aspects of Intellectual Property Rights*, pt. 1, art. 1, GATT Doc. MTN.GNG/NGII/W/68 (March 27, 1990) (special distribution by the delegation of the European Communities) [hereinafter *EC TRIPs Proposal*].

Performers, Producers of Phonograms and Broadcasting Organizations⁴⁰ ("Rome Convention"). The United States TRIPs proposal, in contrast, would require contracting parties to provide authors and their successors in title the economic rights provided in the Berne Convention.⁴¹ However, the United States proposal would not include the "moral rights"⁴² provisions of the Berne Convention.⁴³

Assessing the positions of the EC and the United States on adding substantive standards to the Berne Convention, or otherwise, within TRIPs, requires an examination of the EC's recent policy papers and the United States' response. In June 1988, the EC Commission began looking at various copyright issues in its *Green Paper on Copyright and the Challenge of New Technologies*⁴⁴ ("Green Paper") to determine what areas of copyright law might require minimum EC standards to complete "1992." The *Green Paper* encompasses, among other things, home copying, rental rights, and protection of computer programs and databases.⁴⁵ On May 5, 1990, the EC Commission issued a communication intended as a follow-up to the *Green Paper*, entitled *Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*⁴⁶ ("Follow-up Paper"). The *Follow-up Paper* outlines the steps the Commission will take with respect to copyright and neighboring rights covering the period up to December 31, 1992.⁴⁷

In the *Green Paper*, the EC Commission set forth alternatives for resolving home copying problems, which allegedly result in economic

40. Rome Convention, *supra* note 12. Because the United States is not a member of this convention, it is not obligated to recognize neighboring rights.

41. *Draft Agreement on the Trade-Related Aspects of Intellectual Property*, Annex J, pt. 1, United States Trade Representative (May 1, 1990) (unpublished draft, on file with the *Loyola of Los Angeles International & Comparative Law Journal*) [hereinafter *U.S. TRIPs Proposal*].

42. The Berne Convention provides as follows:

[I]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention, *supra* note 5, art. 6^{bis}.

43. See *U.S. TRIPs Proposal*, *supra* note 41, pt. 2A, art. 1.

44. *Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, COM(88)172 final [hereinafter *Green Paper*].

45. See *id.*

46. *Follow-up to the Green Paper: Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*, COM(90)584 final [hereinafter *Follow-up Paper*].

47. *Id.* at 1.

harm to rights-owners.⁴⁸ One option, proposed by some member and non-member states, was to put a levy on blank tapes.⁴⁹ Another option followed a "pay at the source" approach, under which rights-owners would be remunerated for private copying out of the sales proceeds of the original recording.⁵⁰ Other suggested measures involved mandatory technical solutions, such as equipping recording machines with technical features to inhibit or prevent copying.⁵¹ To prevent digital copying from digital audio tape ("DAT") recorders, the EC Commission, in the *Follow-up Paper*, favored the general use of the Serial Copy Management System ("SCMS") method for DAT equipment.⁵²

Although the United States also favors the SCMS approach, it did not include this approach in its TRIPs proposal. However, the United States proposal contains a special provision for sound recordings, requiring contracting parties to provide sound recording producers all of the rights specified for the authors of copyrighted works, excluding the public performance right.⁵³ In contrast, the EC TRIPs proposal gives sound recording producers the right of public performance as part of their protections under the Rome Convention.⁵⁴ However, the United States is not a member of the Rome Convention, and thus is not obligated to recognize neighboring rights.

The fact that the United States and the EC are among the largest computer software exporters in the world underscores their interests in computer software protection.⁵⁵ The EC Commission proposed a directive on computer program protection, which the EC Council adopted in October 1990.⁵⁶ The EC Council, in turn, issued a directive on May 14, 1991⁵⁷ ("Computer Directive"), calling for the protection of computer programs as literary works under copyright

48. Green Paper, *supra* note 44, at 100, 132.

49. *Id.*

50. *Id.* at 125, 135.

51. *Id.* at 119, 129.

52. Follow-up Paper, *supra* note 46, at 13. The SCMS method allows unlimited first-generation digital copying, but prohibits second-generation copying, so that rights-owners keep at least partial control over the exploitation of their works. *Id.*

53. U.S. TRIPs Proposal, *supra* note 41, pt. 2A, art. 9.

54. EC TRIPs Proposal, *supra* note 39, pt. 2A, art. 7.

55. Michelle Osborne & John Hillkirk, *Looking Ahead: USA Has Bright Future, But Is "Wounded Giant,"* USA TODAY, Nov. 21, 1990, at 15A.

56. Amended Proposal for a Council Directive on the Legal Protection of Computer Programs, COM(90)509 final [hereinafter Amended Proposal].

57. Council Directive 91/250, 1991 O.J. (L 122) 42 [hereinafter Computer Directive].

law,⁵⁸ with a protection term of fifty years from creation.⁵⁹ Under the Computer Directive, the copyright for programs created under contract is held by the commissioning party, unless the contract provides otherwise.⁶⁰ The copyright owner has exclusive rights of reproduction, adaptation, and distribution.⁶¹ It also has exclusive rental rights.⁶² Those acquiring copies of programs legally can observe, study, or test them without further express authorization from the rights-owner.⁶³

The United States supports the Computer Directive because the directive favors largely non-European software firms over the interests of users and European competitors.⁶⁴ However, the Computer Directive differs from section 117 of the United States Copyright Act⁶⁵ in that section 117 authorizes a user to make a single backup copy of a computer program.⁶⁶

Issues relating to interoperability⁶⁷ and reverse engineering have emerged as well. Software manufacturers from the United States and the EC lobbied the EC Commission to include provisions providing that interfaces⁶⁸ are not subject to copyright protection, and permitting reverse engineering or decompilation⁶⁹ of existing computer programs.⁷⁰ Interoperability is desirable because vendors can offer products that comply with industry standard interfaces.⁷¹ If software can be monopolized by copyright, users will be forced to purchase it from primary vendors. While this would benefit most United States

58. *Id.* art. 1; see also *EC TRIPs Proposal*, *supra* note 39, art. 2.

59. Computer Directive, *supra* note 57, art. 8.

60. *Id.* art. 2(3).

61. *Id.* art. 4.

62. *Id.*

63. *Id.* art. 5.

64. See *European Parliament Gives Final Approval to EC Directive on Software Protection*, 17 Int'l Trade Rep. (BNA) 623 (Apr. 24, 1991) [hereinafter *European Parliament*].

65. 17 U.S.C. § 117 (1989).

66. *Id.*

67. Interoperable computer programs are those that can operate with or replace existing programs in computer systems. Amended Proposal, *supra* note 56, at C320/23.

68. Interfaces are the means of interconnection and interaction required to permit all elements of software and hardware to work with other software and hardware, and with users, in all of the ways they are intended to function. *Id.*

69. Decompilation is a process whereby a program's machine-readable object code is copied and converted to a source code, which can then be read by users. *Id.*

70. See Dean Takahashi, *Q & A: Stephen H. Lacount; A Harder Line on Software, Owners, Courts Getting with the Copyright Program*, L.A. TIMES (Orange County ed.), Jan. 7, 1991, at D6.

71. See *European Parliament*, *supra* note 64, at 623.

vendors who are dominant in their product lines,⁷² it would adversely affect the European software industry.

The EC is in favor of allowing reverse engineering or decompilation of existing programs, because copyright law has always permitted limited copying for purposes of research and study.⁷³ Additionally, this would enable European firms to develop new products.⁷⁴ The Computer Directive permits decompilation without a rights-owner's permission where reproduction of the code and translation of its form are indispensable to the interoperability of an independently created program.⁷⁵

The United States opposes both of these proposals because of the economic incentive for software developers to ensure interoperability for users.⁷⁶ In addition, it contends that allowing copying of interfaces would serve no purpose.⁷⁷ Moreover, as the United States is concerned primarily with piracy by developing countries, it has asserted that no country's copyright law expressly permits reverse engineering.⁷⁸

With respect to databases, the EC Commission proposed in the *Follow-up Paper* that a directive be drafted to harmonize copyright protection for databases.⁷⁹ The EC Commission concluded that databases are protected by copyright law.⁸⁰ The generally accepted term of protection originates in article 7 of the Berne Convention, which provides protection for fifty years from creation with the possibility of increasing the term to seventy years.⁸¹

The United States supports protection of databases regardless of whether the underlying data is copyrighted or uncopyrighted material.⁸² In addition, the United States supports the right to import and to authorize or prohibit the rental of computer programs after the sale

72. See Takahashi, *supra* note 70, at D6.

73. See generally Mark Powell, *Software Licenses and the Application of the EC Competition Rules*, 8 *COMPUTER LAW.*, July 1991, at 13.

74. See *id.*

75. Computer Directive, *supra* note 57, art. 6.

76. Powell, *supra* note 73.

77. *Id.*

78. *U.S. TRIPs Proposal*, *supra* note 41, pt. 2A, art. 2.

79. Follow-up Paper, *supra* note 46, at 13.

80. *Id.* at 18; see also Berne Convention, *supra* note 5, art. 7. A proposed definition of "database" would include the following elements: (1) collection, organization, and storage of data; and (2) information in a digital form that can be processed by means of a computer. Follow-up Paper, *supra* note 46, at 18.

81. Follow-up Paper, *supra* note 46, at 19.

82. *U.S. TRIPs Proposal*, *supra* note 41, pt. 2A, art. 2(b).

of an original or copy.⁸³ Furthermore, the United States favors a fifty-year term of protection from authorized publication, or if no publication occurs within fifty years of the work's creation, fifty years from creation.⁸⁴

2. Enforcement Measures

Another important issue in the TRIPs negotiations involves standards for enforcement of intellectual property rights, both internally and at the border. The United States and EC TRIPs proposals would impose substantial obligations on countries to establish procedures, provide "due process," ensure adequate penalties to compensate intellectual property owners for infringement of their rights, and deter infringement suits.⁸⁵ However, the issue of "transparency,"⁸⁶ which is the requirement that countries provide some means for rights-owners to obtain the information needed to present their case, might be viewed as an attempt by the United States to force signatories to adopt its discovery procedures. At the same time, the United States contends that the majority of EC members, which are mostly civil law countries, make litigation more difficult because sufficient information is not made available before trial.⁸⁷

Border enforcement is another contentious issue. In 1989, a GATT panel found that section 337 of the Tariff Act of 1930, as amended,⁸⁸ is inconsistent with the national treatment provisions of the GATT.⁸⁹ The EC disfavors section 337 and may make it an issue

83. *Id.* pt. 2A, art. 2(2)(a)-(b).

84. *Id.* pt. 2A, art. 5.

85. *See id.* pt. 3, sec. 1, art. 1; *EC TRIPs Proposal*, *supra* note 39, pt. 3, sec. 1, art. 1.

86. *See EC TRIPs Proposal*, *supra* note 39, pt. 5, art. 2. *Cf. U.S. TRIPs Proposal*, *supra* note 41, pt. 1, art. 3.

87. *Hearing of the Oversight and Investigations Subcomm. of the House Energy and Commerce Comm.*, FED. NEWS SERV., Sept. 24, 1990, available in LEXIS, Nexis Library, FEDNEW File, continued in FED. NEWS SERV., Sept. 25, 1990, available in LEXIS, Nexis Library, FEDNEW File [hereinafter *Subcommittee Hearing*].

88. Pub. L. 98-573, 98 Stat. 2948 (codified at 19 U.S.C. § 1337 (1988)). Under section 337, a plaintiff, foreign or domestic, may bring an action for infringement of an intellectual property right. Previously, a plaintiff had to show that the defendant engaged in an unfair act or method of competition, and that importation of the articles affected a domestic industry. Under section 337, there are two different procedures for foreign and United States plaintiffs. *See id.*

89. The GATT panel found significant procedural differences between a federal district court patent infringement action available to foreign plaintiffs and an International Trade Commission investigation and proceeding based on allegations of patent infringement involving an imported product available to United States plaintiffs. *United States Section 337 of the Tariff Act*, GATT Doc. L/6439 (Nov. 7, 1989) (report by the panel).

during the TRIPs negotiations. However, the United States Congress has indicated that it will not repeal section 337.

3. Dispute Settlement

If the TRIPs agreement becomes an amendment to the GATT, the existing provisions for dispute settlement will apply in GATT member disputes. However, if TRIPs becomes a separate annex of the GATT, the United States and the EC will want dispute settlement provisions that at least follow those in the GATT, particularly the ability of a party to the TRIPs agreement to withdraw trade concessions negotiated under the GATT if another party fails to correct a violation.⁹⁰ Under the GATT, if one party believes another party has failed to comply with a GATT obligation, the first party serves notice on the party allegedly in breach, who must then give the matter sympathetic consideration.⁹¹ If a satisfactory settlement is not reached within a reasonable time, a GATT panel may consider the matter.⁹² The panel may make recommendations, give a ruling, or, if serious enough, authorize a party to suspend its obligations under the GATT.⁹³ If its obligations are suspended, the party may advise the Secretary-General within sixty days of its intention to withdraw from the proceeding.⁹⁴ Such withdrawal would take effect upon the expiration of sixty days from the date of written notice. This process is referred to as "blocking a proceeding."⁹⁵

C. Bilateral and Unilateral Activities

In 1984, the United States Congress enacted section 301 as an amendment to the Trade Act of 1974.⁹⁶ The amendment authorized the president of the United States to impose trade sanctions against any country that inadequately protects United States' intellectual property rights and engages in "unreasonable or unjustifiable" trade practices.⁹⁷ This authority was strengthened by the Omnibus Trade

90. *U.S. TRIPs Proposal*, *supra* note 41, pt. 3, sec. 1, art. 1; *see also EC TRIPs Proposal*, *supra* note 39, pt. 5, art. 8.

91. GATT, *supra* note 38, art. XXIII(1).

92. *Id.* art. XXIII(2).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Trade and Tariff Act of 1984*, Pub. L. No. 98-573, §§ 301-304, 98 Stat. 2948, 3000 (codified as amended at 19 U.S.C. §§ 2111-2487 (1988)).

97. *Id.*

and Competitiveness Act of 1988,⁹⁸ which created the "Special 301" provision.⁹⁹ Under "Special 301," the United States Trade Representative ("USTR") must identify "priority foreign countries" that do not provide adequate and effective intellectual property protection to United States rights-owners.¹⁰⁰ The list of such countries is published in the Federal Register, and a six-month investigation follows.¹⁰¹ If the USTR finds that a particular country on the list is engaged in "unjustifiable, unreasonable or discriminatory" trade practices, the USTR must recommend trade sanctions to the president.¹⁰² After that, the president must take retaliatory action.¹⁰³

The USTR has created two subsidiary lists to avoid designating the United States' trading partners as "priority foreign countries" in all cases demanding negotiations. First, the "Priority Watch List" is comprised of countries in which United States rights-owners suffer from lack of protection.¹⁰⁴ A six-month timetable for bilateral negotiations with these countries was established.¹⁰⁵ Second, the "Watch List" is comprised of countries that also present problems for United States rights-owners, but of a less immediate nature than the Priority Watch countries.¹⁰⁶ A one-year timetable for bilateral negotiations with Watch List countries was established.¹⁰⁷

The 1990 Watch List included the three member states of Greece, Italy, and Spain.¹⁰⁸ The USTR, Carla Hills, decided that successful completion of the TRIPs negotiations in the GATT was a priority, and therefore did not designate any priority countries in 1990.¹⁰⁹

IV. NEGOTIATING THE BEST UNITED STATES RESULT

In order to negotiate the most beneficial international copyright

98. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified in scattered sections of 19 U.S.C.).

99. *Id.* § 1303 (codified at 19 U.S.C. § 2242 (1988)).

100. 19 U.S.C. § 2242 (1988).

101. *Id.*

102. *Id.*

103. *Id.*

104. Statement on United States Action Against Foreign Trade Barriers, 25 WEEKLY COMP. PRES. DOC. 777 (May 26, 1989).

105. *Id.*

106. *Id.*

107. *Id.*

108. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, HILLS ANNOUNCES RESULTS OF SPECIAL 301 REVIEW 1 (Apr. 17, 1990) (Press Release).

109. *Id.*

protection policy, the United States must prioritize its own objectives and determine which mechanism will best accomplish those objectives. At the same time, because the EC is likely to be its greatest ally, the United States cannot formulate its own proposals without considering the objectives of the EC as well. Fortunately, the United States and the EC seek generally similar objectives. However, there are certain areas of copyright law in which the United States differs from the EC and must maintain a firm position.

When the United States joined the Berne Convention in 1988, it did not agree with all of the Berne Convention's provisions, which appeared to reflect the civil law approach practiced in the majority of the EC countries.¹¹⁰ However, the United States gained certain advantages by joining the Berne Convention. First, other countries would not criticize the United States during trade and intellectual property negotiations for not being committed to the international protection of copyright.¹¹¹ Nor would other countries retaliate against the United States under article 6(1) of the Berne Convention by restricting protection of United States works when United States authors use the back-door method of protection by simultaneous publication, which can be expensive to prove in foreign courts.¹¹² Second, foreign piracy of United States works has mushroomed. Consequently, the Universal Copyright Convention,¹¹³ of which the United States is a member, is inadequate because it provides only for national treatment, and does not grant specific minimum rights.¹¹⁴ Third, because revision of the Berne Convention requires a unanimous vote, the United States could veto decisions that would injure its interests.¹¹⁵ Fourth, United States law is now more compatible with the Berne Convention because it provides some degree of "moral rights" protection.¹¹⁶ Finally, and perhaps most importantly, the United States' negotiating position in the TRIPs talks is strengthened by its

110. SENATE JUDICIARY COMM., BERNE CONVENTION IMPLEMENTATION ACT OF 1988, S. REP. NO. 352, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3706, 3714.

111. National Committee for the Berne Convention, Why the United States Should Join the Berne Convention 3 (July 2, 1987) (unpublished, on file with the *Loyola of Los Angeles International and Comparative Law Journal*) [hereinafter National Committee Statement].

112. *Id.*

113. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised, Paris, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

114. National Committee Statement, *supra* note 111, at 3.

115. See Berne Convention, *supra* note 5, art. 6^{bis}(1)-(3); see also National Committee Statement, *supra* note 111, at 4.

116. National Committee Statement, *supra* note 111, at 6.

membership in the Berne Convention.¹¹⁷ The United States would rather have copyright protection enhanced through the GATT rather than WIPO, because the United States believes the GATT would provide stronger protection.¹¹⁸ However, by joining the Berne Convention, the United States placed itself in a stronger position to advocate the abandonment of the Berne Convention in favor of GATT protection.¹¹⁹

There are several other reasons why reliance on the Berne Convention alone would not afford the United States the benefits of other multilateral fora. Not only does the Berne Convention offer a considerably lower level of protection than other current mechanisms, but far fewer countries are members of the Berne Convention than the GATT.¹²⁰

One of the most important provisions of the Berne Convention is the national treatment provision of article 5. Under article 5, persons entitled to Berne Convention protection have in all the member countries "the rights which their respective laws do grant or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."¹²¹ Thus, if the Berne Convention does not specify otherwise, the laws of the country where protection is sought apply. The drawback of the national treatment clause is that one member country may not give as high a degree of protection to its nationals as other member countries give to their nationals. Hence, this member country will give a lower degree of protection to the nationals of other member countries. However, because the Berne Convention sets minimum standards, it alleviates this problem to some extent.

An especially contentious issue between the EC and the United States is the issue of moral rights. When the United States joined the Berne Convention, Congress did not amend the Copyright Act¹²² to include moral rights. Rather, it averred that the "totality" of existing United States law, including section 43(a) of the Lanham Act,¹²³ state

117. *Id.* at 5.

118. *Id.*

119. *Id.*

120. Approximately 76 countries are members of the Berne Convention, whereas more than 90 countries are members of the GATT. See Marshall A. Leaffer, *Protectiong United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 293 (1991); SIDNEY GOLT, *THE GATT NEGOTIATIONS 1986-90: ORIGINS, ISSUES, AND PROSPECTS* 2 (1988).

121. Berne Convention, *supra* note 5, art. 5(1).

122. 17 U.S.C. §§ 101-914 (1988).

123. Lanham Act, § 43(a), 15 U.S.C. 1125(a) (1988).

law rights of privacy and publicity, and the torts of defamation and contract, were sufficient to comply with the Berne Convention.¹²⁴ The question of whether moral rights can be waived is not resolved by the Berne Convention. If common law countries were to provide moral rights protection, they would insist that such rights be waivable for consideration in a contract. The civil law countries, which include all of the EC member states except for the United Kingdom and Ireland, maintain that moral rights cannot be alienated or waived.¹²⁵

Article 11 of the Berne Convention, which protects the right of public performance, is also noteworthy. It states that authors of dramatic, dramatico-musical, and musical works shall enjoy the exclusive right of authorizing the following: (1) the public performance of their works by any means; and (2) any communication to the public of the performance of their works.¹²⁶ However, the term "public performance" is not defined in the Berne Convention. Under article 11*bis*, authors enjoy exclusive rights to authorize the broadcasting or communication of their works to the public.¹²⁷ However, under article 11*bis*(2), each country has the right to determine the circumstances under which that exclusive right should be exercised, as long as the authors' economic or moral rights are not prejudiced.¹²⁸ Because United States copyright law required a compulsory license in this instance, the United States Congress, in its legislation implementing the Berne Convention, was forced to adopt a modified compulsory license provision, pursuant to which parties must first try to negotiate a royalty before obtaining a compulsory license, in order to comply with the Berne Convention.¹²⁹

The United States government must insist that the GATT, rather than the Berne Convention, be the focus of United States' efforts to improve intellectual property protection. Because the GATT contains rules governing international trade, intellectual property standards are embodied in different international agreements administered by WIPO. However, there is a growing awareness that international trade and intellectual property protection are linked inextricably. The basic GATT framework was premised on the idea that "the only legit-

124. S. Rep. No. 352, *supra* note 110, at 9-10, *reprinted in* 1988 U.S.C.C.A.N. at 3714-15.

125. DR. ADOLF DIETZ, COPYRIGHT IN THE EUROPEAN COMMUNITY 182-84 (1978).

126. Berne Convention, *supra* note 5, art. 11.

127. *Id.* art. 11^{bis}.

128. *Id.* art. 11^{bis}(2).

129. See Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

imate tool to regulate international trade was the tariff, and that tariffs would be subject to negotiation."¹³⁰ If one country's trade was injured by another country's trade measure that violated the GATT, the injured country could claim that the benefits to which it was entitled had been nullified or impaired.¹³¹ The same would be true if the offending country's action was not proscribed specifically by the GATT, but nonetheless nullified or impaired the benefits of another country.¹³² Thus, the GATT concept of nullification or impairment provides the link between intellectual property rights and international trade.

The ability of the United States to succeed in world markets stems from its ability to develop new technology and to promote innovation.¹³³ On the other hand, developing countries would like to obtain technology without paying for its development. Because more developing countries are members of the GATT than the various WIPO-administered agreements, the United States and the EC would be in a better position to protect technology and copyrighted works in developing countries by using the GATT as a protection tool.¹³⁴ In this regard, an important function of the GATT is its role as a forum to address interpretation, resolve disputes, and focus economic pressure on countries to respect GATT principles in their national laws.¹³⁵ GATT protection would also encourage countries that already provide strong protection to join together to enforce broader measures against infringing products.¹³⁶ Further, countries that do not protect intellectual property rights would be motivated to sign a GATT intellectual property code so that they could obtain economic concessions beyond the intellectual property area.¹³⁷

It appears from a review of the TRIPs proposals of the EC and the United States that the United States' strategy in negotiating copyright protection in the TRIPs talks may be to adopt the EC's format and as much of its language as possible, keeping the United States' positions only when they differ significantly from the EC's positions. This may be because the EC's alliance with the United States is vital

130. Gadbow & Gwynn, *supra* note 6, at 44.

131. *Id.*

132. *Id.*; see also GATT, *supra* note 38, art. XXIII.

133. Gadbow & Gwynn, *supra* note 6, at 41.

134. *Cf.* Berne Convention, *supra* note 5, signature pages; GATT, *supra* note 38.

135. Gadbow & Gwynn, *supra* note 6, at 42.

136. *Id.* at 46.

137. *Id.*

in the TRIPs negotiations.¹³⁸ As noted above, the main controversy between the EC and the United States concerns the incorporation of Berne obligations into the GATT. The United States maintains that the GATT is intended to deal only with economic obligations affecting international trade, and that, therefore, the "moral rights" provisions of the Berne Convention should not be subject to GATT dispute settlement.¹³⁹ Copyright intensive industries, such as film producing and broadcasting, would be most vulnerable to GATT challenges by GATT members that recognized stronger moral rights protection. This is because these industries invariably edit or adapt copyrighted works in such a way that a GATT panel might find violative of an author's moral rights.

One way to resolve the Berne incorporation controversy is to provide that the TRIPs agreement will only create obligations and rights between contracting parties and not between individuals, as proposed in both the United States and the EC TRIPs proposals. With the inclusion of such language, even if moral rights are incorporated into the GATT, challenge by other nations will be unlikely because GATT members will probably not seek dispute settlement unless their economic interests are seriously injured. Moreover, many countries in the negotiations support the EC's position on the issue of moral rights incorporation. Therefore, the United States should concede the moral rights issue in favor of more important concessions from the EC.

Making an intellectual property code an annex to the GATT, rather than amending the GATT, would benefit the United States. An annex could be used in the overall GATT negotiations as leverage, perhaps to exact other concessions unrelated to intellectual property protection. However, an annex might be less effective in preventing piracy. This is because countries believed to inadequately protect United States copyrights could become members of the GATT, and thereby obtain most favored nation status¹⁴⁰ without joining the

138. The United States and the EC are the first and second largest exporters of copyrighted works, respectively, and together form a powerful and important block. See *U.S. Adheres to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 5 (1987) (statement of Senator Patrick J. Leahy).

139. See *Press Conference with United States Trade Representative Carla Hills*, FED. NEWS SERV., Apr. 27, 1990, available in LEXIS, Nexis Library, FEDNEW File.

140. Under the most favored nation clause of article I of the GATT, if one contracting country gives favored treatment to another contracting country, it must give that same treatment to all contracting countries. Article I states in relevant part: "[A]ny advantage, favour,

TRIPs annex. If TRIPs is made an amendment to the GATT, these same countries are not likely to forfeit the economic benefits provided by the GATT simply to avoid protecting other nationals' copyrights. Thus, both the EC and the United States would benefit from increased membership in a GATT-integrated intellectual property code that would effectively supplant the Berne Convention.

Another advantage of a GATT code, whether in the form of an annex or an amendment, is that the United States would have more input in crafting minimum standards for the protection of intellectual property rights, including copyright. In this regard, the model law discussions reveal the differing approaches of the EC, comprised primarily of civil law countries, and the United States and other common law countries. Civil law countries protect the rights of the author, rather than the author's employer, as in the United States.¹⁴¹ Unlike the United States, civil law countries provide clear moral rights protection and do not recognize "fair use"¹⁴² as a limitation on authors' rights.¹⁴³ Civil law countries also rely on collective administration of copyright royalties to a much greater extent than the United States, by providing more compulsory licensing circumstances than United States copyright law. Common law countries favor effective enforcement that includes civil and criminal penalties, access to courts, availability of adequate procedures and appropriate burdens of proof, and the ability to impose liability on sellers and other distributors.¹⁴⁴ They also favor transitional provisions permitting retroactive

privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT *supra* note 38, art. I.

141. See DIETZ, *supra* note 125, at 63.

142. "Fair use" is the privilege held by someone other than the owner of the copyright to use copyrighted material in a reasonable manner without consent. BLACK'S LAW DICTIONARY 538 (5th ed. 1979). Section 107 of the Copyright Act of 1976, as amended through July 15, 1990, provides the following four factors to consider when determining whether the use made of a work in any particular case is fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1990).

143. See DIETZ, *supra* note 125, at 181-84.

144. Gadbow & Gwynn, *supra* note 6, at 57.

copyright protection for pre-existing works.¹⁴⁵

The issue of home copying does not appear to present a major conflict between the United States and the EC. Both will probably adopt the SCMS method of protection. Japan, a major manufacturer of DAT recorders, can be expected to oppose the measure. If such a measure is left out of the TRIPs agreement altogether, which appears likely in light of the draft proposals, it can certainly be incorporated into other agreements. This is an especially viable option because of the dynamic nature of the technology used to inhibit recording, which makes agreement on the issue in the TRIPs negotiations elusive.

The EC and the United States will probably agree on the protection of computer programs. However, protection of interfaces and provisions for reverse engineering may create a conflict. While United States manufacturers have lobbied against the protection of interfaces, the United States government has favored their protection.¹⁴⁶ The EC will probably concur with the position favoring protection as interoperability would not be in the best interest of the fledgling European software companies.¹⁴⁷ Thus, the dispute may be limited to the issue of reverse engineering, which the EC desires and the United States opposes.¹⁴⁸ The United States should attempt to persuade the EC that it is in their best interest to protect the programs from reverse engineering, as this area may be particularly vulnerable to piracy from developing countries.

In the area of enforcement and dispute resolution, the United States should press for the GATT as the primary method of intellectual property protection. The GATT's enforcement procedures are more delineated than other multilateral agreements. As such, a GATT panel may deliver a more detailed and reasoned decision than would WIPO. Further, the GATT is a more effective moral persuader, due to its intrinsic ties to economics. As a result, every country seeks to be a member of the GATT in good-standing. Moreover, the TRIPs proposal requires each signatory country to incorporate enforcement measures into its national law.¹⁴⁹ Therefore, member countries should accept GATT panel rulings readily.

Further, because the dispute mechanism under the WIPO trea-

145. *Id.*

146. *See* Takahashi, *supra* note 70, at D6.

147. *See* European Parliament, *supra* note 64.

148. *Id.*

149. *U.S. TRIPs Proposal*, *supra* note 41, pt. 3, art. 1.

ties is currently inadequate, the United States must insist on panel reports, prompt decisions, removal of the right to block a panel decision, and a speedy mechanism for sanctions if the panel decision is not implemented. Perhaps the most important issue to be resolved, however, involves the United States' "Special 301" proceeding.

Nearly all of the United States' trading partners have indicated that they will not agree to the United States' proposed dispute resolution mechanisms unless it agrees to repeal "Special 301."¹⁵⁰ The United States' "Special 301" has been attacked vigorously around the world and has caused friction in the GATT dispute resolution process. This is unfortunate because the "Special 301" threat has been pivotal in persuading other countries to protect United States intellectual property rights. "Special 301" also encourages bilateral negotiation and resolution by a GATT panel. As noted previously, bilateral negotiations are an important element in resolving trade disputes and in improving the chances of reaching multilateral agreements. Once countries provide protection, they may become more amenable to a GATT or WIPO agreement. Thus, "Special 301" is an example of how bilateral negotiations, coupled with unilateral action, can result in increased intellectual property protection. Further, once a GATT panel has determined that a United States' right has been violated, the GATT provides a procedure for blocking the GATT panel's action.¹⁵¹ However, these actions occur only *after* a country has been designated an "unfair trader" by placing the country's name on the priority list and publishing it in the Federal Register.¹⁵² This process makes the GATT resolution more tenuous and exemplifies why other countries oppose it.

The United States should consider giving up "Special 301." First, some countries have questioned whether "Special 301" and the GATT are compatible.¹⁵³ Second, while the GATT does not permit the United States to retaliate unilaterally when other countries do not grant protection of intellectual property rights,¹⁵⁴ there are actions the United States can take in conjunction with the GATT. These include (1) conditioning all of its GATT concessions on the receipt of adequate protection of intellectual property rights from other countries;

150. See *Subcommittee Hearing*, *supra* note 87.

151. GATT, *supra* note 38, art. XXIII; see also *supra* notes 91-95 and accompanying text.

152. See 19 U.S.C. § 2242 (1988).

153. See *Trade Rows Distract Talks, GATT Chief Says*, REUTERS, May 18, 1989, available in LEXIS, Nexis Library, LBYRPT File.

154. Gadbow & Gwynn, *supra* note 6, at 45.

(2) negotiating concessions on intellectual property rights from other countries by attaching certain obligations to concessions granted on particular products; and (3) bringing nullification or impairment cases against other countries that violate United States intellectual property rights.¹⁵⁵ Thus, if a TRIPs agreement is adopted as an amendment to the GATT, giving up or greatly downplaying "Special 301" would not be a major United States concession.

However, Congress has not indicated that it will repeal "Special 301."¹⁵⁶ Thus, the USTR may have to persuade other countries that "Special 301" will be used conservatively, and be prepared to offer other incentives, such as the inclusion of a moral rights provision. If these measures are successful, the United States may have an increased chance of obtaining concessions on enforcement and dispute mechanisms, a more important objective for the United States.

Another alternative for protecting United States copyrights internationally is through WIPO. Generally, WIPO efforts have fallen short of the United States' objectives in the protection of intellectual property rights.¹⁵⁷ However, WIPO should complement the GATT. Although the TRIPs talks should be the United States' main focus, these talks should not be its only focus, because the United States may not be able to achieve all of its objectives in the GATT. Thus, the United States will have to continue to utilize WIPO to complement the GATT.

The WIPO model copyright law discussions could provide the United States with an opportunity to convince the international community that the United States' position is correct on a variety of controversial issues, such as computer software and databases, waivability of moral rights, recognition of employer authorship, and protection of sound recordings. The WIPO model copyright law provides a model for countries without a copyright law; provides an opportunity for countries to upgrade or modernize their copyright law; identifies new subject matters for copyright protection; and provides an alternative to amending the Berne Convention, which itself may be politically unsound. The EC recognizes WIPO's model provisions as indispensable to the strict and proper interpretation of the Berne Con-

155. *Id.* at 45-46.

156. *Press Conference with United States Trade Representative Carla Hills*, FED. NEWS SERV., Apr. 27, 1990, available in LEXIS, Nexis Library, FEDNEW File.

157. *State Department Panel Examines Proposal by WIPO for International Copyright Laws*, 6 Int'l Trade Rep. (BNA) 77 (Jan. 18, 1989).

vention.¹⁵⁸ The EC also turns to WIPO to provide satisfactory answers to traditional copyright questions, especially as they relate to new technologies.¹⁵⁹ The EC Commission concluded in the *Green Paper* that “[t]he further evolution of the Community’s role within WIPO in general is a matter of considerable importance given the likelihood of further Community legislation on copyright and related rights and, indeed, on other forms of intellectual property.”¹⁶⁰ If TRIPs fails and the model law is used as a Berne Protocol, the United States will have more input into the Berne Convention, because it was not a member when the Berne Convention was adopted initially.

While the United States must insist that the parties to a TRIPs agreement should decide all questions regarding disputes, the United States should also permit a provision allowing consultation with WIPO. Additionally, the United States should participate in the WIPO Dispute Settlement Treaty discussions in the event the United States is unsuccessful in obtaining a viable dispute mechanism through the GATT. Dispute resolution is an important enough issue that its inclusion should be sought through whatever mechanism possible.

Multilateral negotiations have proven to be more effective than bilateral copyright negotiations because of the considerable leverage that may be employed on the multilateral level. Further, bilateral negotiations may lead to inconsistent approaches. A danger also exists that the EC and other developed countries may get a “free ride” in the negotiations by allowing the United States alone to negotiate and contribute to the costs of improved protection, which will then benefit these other countries.

Having detailed the most important United States objectives, it should be reiterated that improved copyright protection must be achieved through a variety of means. By attempting to expand the scope of the GATT, the United States can consolidate those gains in copyright protection through WIPO or bilateral agreements. The United States and the EC will have to define their respective interests in terms of results, rather than through the text of any particular law or agreement.

Coordination of multilateral and bilateral activities may be difficult. Therefore, a close working relationship between key officials in

158. See Follow-up Paper, *supra* note 46, at 24.

159. *Id.*

160. Green Paper, *supra* note 44, at 220.

the United States government is crucial to the process. These officials include the USTR, the Department of Commerce, the Patent and Trademark Office, the Copyright Office, and the Department of State.

The EC's *Follow-up Paper* describes the role of the EC in multi-lateral and bilateral external relations. It recognizes the effects of the multilateral negotiations, especially the GATT Uruguay Round, on bilateral negotiations.¹⁶¹ In addition, it recognizes that international conventions have not yet achieved the objective of providing effective international copyright protection, and concludes that problems with individual countries need to be addressed in bilateral negotiations.¹⁶² The EC hopes that a TRIPs agreement will place bilateral negotiations on a more stable footing.¹⁶³ In anticipating bilateral negotiations, the EC will inventory the copyright laws of a majority of non-member countries. It will then assess the difficulties the EC is encountering in those countries, including a summary of legislation and regulations regarding copyright and neighboring rights. Because the United States and the EC agree on overall protection, they are more apt to use the multilateral forum. In this manner, the United States and the EC will take the lead in designing the international standards of copyright protection. Bilateral negotiations between developed and developing countries, which are seen as the primary copyright infringers, would necessarily continue.

V. CONCLUSION

As the world's leading exporter of copyrighted works, the United States has a vital interest in protecting those works abroad. As a result, international intellectual property protection has become a chief focus of the United States' trade negotiations. It is therefore no surprise that many fora have emerged for protection of these rights. All of these fora, including the GATT, should be utilized in order to assure the broadest protection possible. Only in this way can the United States hope to retain its share of the world market for copyrighted works.

161. Follow-up Paper, *supra* note 46, at 21.

162. *Id.* at 29.

163. *Id.* at 30.

