

Session II: The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*

Karyn Temple Claggett

Great. Thank you. First, I want to thank Columbia Law School and the Kernochan Center for this invitation. It is always a pleasure to return to my *alma mater*, so thank you for having me here today. The first panel discussed the current landscape for free trade agreements and treaties. I wanted to take a step back and go back almost 100 years to review the background, history, and context of how those particular treaties and trade agreements developed.

Since adoption of the first federal U.S. domestic copyright law in 1790, the United States has had a very interesting and somewhat complicated history with treaty and trade development in the copyright space.¹ Initially, the United States viewed international harmonization suspiciously.² Thus, while the United States' counterparts in Europe and elsewhere eagerly worked toward the development of international norms at the end of the nineteenth century, the United States arrived extremely late to the party.³ European countries signed the first multilateral copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works, back in 1886 with nearly a dozen of the world's most prolific copyright producing countries on board, including Belgium, Canada, France, Germany, Spain, Italy, Switzerland, and the United Kingdom.⁴ Berne set critical minimum standards for the international protection of copyrighted works through requirements such as national treatment and greatly influenced the development of copyright laws in Berne Union countries.⁵ The United States attended the 1885 Berne Convention diplomatic conference, but took more than a century to fully implement it.⁶ In fact, at the time of the Berne Convention's adoption in 1886, the

* These remarks are a transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. *Copyright Act of 1790*, UNITED STATES COPYRIGHT OFFICE, <https://perma.cc/WZ9V-V66A>.

2. See SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* ¶ 2.19 (2d ed. 2005).

3. See *id.* at ¶¶ 2.01–2.50 (discussing the origins of the Berne Convention).

4. See Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 828 U.N.T.S. 221; *Contracting Parties: Berne Convention*, WIPO – WORLD INTELLECTUAL PROPERTY ORGANIZATION (last visited Feb. 6, 2017), <http://perma.cc/BFN4-QBGE>.

5. Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 739–41 (2001). Moreover, “the Berne Union has always influenced copyright progress not only in member countries, but in nonmember countries as well.” Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 51 (1988).

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

United States representative to the convention cautioned that “[t]he United States “cannot afford to stand before the world as the only important and deeply concerned power persistently refusing to do common justice to foreign authors . . .”⁷

But the United States did not heed that caution. In the words of former Register of Copyrights Barbara Ringer, in the early years of international copyright harmonization, “[w]ith few exceptions, [the United States’] role in international copyright law was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest.”⁸ So, the United States may now posit itself as the shining beacon on the hill in terms of IP protection, yet it wasn’t always the good guy. For many years, the United States failed to protect foreign authors at all and violated or ignored many other Berne provisions.⁹ The United States’ influence on international standards was minimal, as was international influence on the U.S. domestic copyright regime. For example, while other countries were protecting foreign authors and loosening formalities, the United States went its own way.¹⁰

Our efforts to join the international copyright regime were particularly difficult because we did not have a seat at the table in Berne’s initial development. We were observers but not participants in the negotiation. Its adherence therefore required numerous fundamental changes to United States law.¹¹ As a result, the United States spent, to quote Barbara Ringer again, “a century as an outlaw, a half-century as an outsider, and fifteen years as a stranger at the feast.”¹² From 1886 to 1989, the United States struggled to adopt laws that would help and allow us to ratify Berne. The process began as far back as the early 1900s, with several bills introduced to begin Berne implementation after World War I.¹³ The 1976 Act then

7. UNITED STATES DEPARTMENT OF STATE, PAPERS RELATED TO THE FOREIGN RELATIONS OF THE UNITED STATES 854 (1887).

8. Barbara A. Ringer, *The Role of the United States in International Copyright – Past, Present, and Future*, 56 GEO. L.J. 1050, 1051 (1968).

9. See Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1–2 (1988).

10. The United States offered limited protection to foreign copyright holders from select countries starting with the Chace Act in 1891, Act of March 3, 1891, ch. 565, 26 Stat. 1106 (1891), and later through membership in the Buenos Aires Convention and the Universal Copyright Convention, which the United States joined in 1911 and 1955, respectively. The United States did not significantly loosen formalities until enacting the Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 405-10 (rev. 4th ed. 2007) (discussing the history of copyright formalities in the United States).

11. Indeed, not including technical and non-substantive amendments, at least 31 provisions of U.S. copyright were amended 46 times to reach Berne compliance.

12. Ringer, *supra* note 8, at 1078; see also Ginsburg & Kernochan, *supra* note 9, at 3 (“Nonmembership in the Berne Convention was embarrassing not only because the U.S. was the only non-Unionist Western country, but also because nonmembership offered one ground of resistance to U.S. trade negotiators seeking to encourage greater respect for U.S. copyrights abroad.”).

13. See Abe A. Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, COPYRIGHT LAW REVISION (Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 86th Cong., 1st Sess.) Study No. 1, at 4–11 (1960) (discussing numerous bills aimed at Berne adherence that were introduced in Congress in the 1920s and 1930s).

went a long way toward achieving Berne compatibility: increasing term to life plus fifty, moving away from a renewal requirement, softening some of the harsh formalities of the 1909 Copyright Act,¹⁴ with final passage of the Berne Convention Implementation Act in 1989 going almost all the way to full Berne compliance.¹⁵ However, the United States would not achieve that full compliance with the Berne Convention until 1994 with the Uruguay Round Agreements Act (“URAA”) finally implementing the Berne Article 18 provision on protection for pre-existing foreign works—a full 108 years after Berne was initially adopted.¹⁶

It’s fair to say that the U.S. learned its lesson from the Berne Convention experience. Copyright isolationism doesn’t work, especially in an increasingly global world. So the trend, at least in the United States, is to have an early seat at the table and to encourage adoption of international agreements that reflect the high standards of the U.S. copyright system. Congress has explicitly encouraged this approach, often putting specific language directing the United States to maintain that objective in provisions granting negotiating authority for free trade agreements.¹⁷ For example, the previous panel talked about trade promotion authority for the TPP.¹⁸ As part of one of the principal negotiating objectives for the United States, Congress explicitly said “that the objective of the United States must be to ensur[e] that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law.”¹⁹ After Berne, the United States has often been at the forefront globally in strengthening its copyright law to address new developments so that it can lead the way in this regard.

Since the United States has been at the table early in the development of treaty and trade agreements, we have been able to influence international norms,

14. For example, notice was still required under the 1976 Act, but the requirements were much less stringent, including providing copyright owners with five years to correct the omission. These changes were made “with a weather eye on Berne.” Introductory Remarks of Rep. Robert Kastenmeier on the Berne Convention Implementation Act of 1987, H.R. 1623, 100th Cong., 1st Sess., 133 CONG. REC. 1293 (daily ed. Mar. 16, 1987).

15. Berne Convention Implementation Act of 1988 Pub. L. 100–568, Oct. 31, 1988, 102 Stat. 2853. Residual issues were shored up by the Architectural Works Copyright Protection Act (AWCPA) in 1990, Pub.L. No. 101–650, §§ 701–706, 104 Stat. 5089, 5133–34 (1990), the Visual Artists Rights Act (VARA) in 1990, Pub. L. No. 101–650, 104 Stat. 5089, and the Copyright Renewal Act in 1992, Pub. L. No. 102–307, §§ 101–02, 106 Stat. 264 (1992).

16. Uruguay Round Agreements Act (URAA) Pub. L. No. 103–465, Dec. 8, 1994, 108 Stat. 4809 (codified as amended at 17 U.S.C. § 104A (1994)).

17. See, e.g., Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107–210, 116 Stat. 933 (2002) (codified at 17 U.S.C. § 3802(b)(4)(A)(i)(II)); Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114–26, 129 Stat 319 (2015) (codified at 17 U.S.C. § 4201(b)(5)(A)(i)(II)).

18. Probir Mehta, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 311 (2017); Steven Metalitz, *Session I: Keynote Panel, Describing the Legal Landscape*, 40 COLUM. J.L. & ARTS 319 (2017).

19. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114–26, 129 Stat 319 (2015) (codified at 17 U.S.C. § 4201(b)(5)(A)(i)(II)).

including trends in terms of the generality or specificity of treaty/trade agreement language.

The United States' leading role as an international voice in copyright is reflected in the short amount of time it now takes for the United States to adopt copyright agreements and the relatively few number of changes implementation typically requires. For example, while the Berne Convention took more than 100 years and required changes to roughly thirty-one different provisions in Title 17, the United States ratified and implemented the WCT and WPPT before those treaties even went into effect, becoming one of the thirty countries counted toward entry into force.²⁰ The WCT and WPPT were both adopted in 1996, and the U.S. was able to pass implementing language, fully implementing them, a mere two years later in 1998, primarily through the DMCA.²¹ Notably, the changes enacted through the DMCA, while significant, were far fewer than those required for Berne implementation just ten years previously and mirrored the U.S. goals to address the digital age and the growing harms from Internet piracy.²²

Essentially the United States added provisions on TPMs and RMI, or rights management information, to implement both the WCT and the WPPT. Similarly, the United States was able to implement the TRIPS Agreement in 1994, the very same year it was adopted and the year before the agreement entered into force.²³

Notably, our WCT/WPPT seat at the table also reflected another trend in US international engagement on copyright law – that is, ensuring enough flexibility in treaty language to adequately support differences in the United States legal regime. A good example of this is the “making available” right. This right was first introduced in the WCT Article 8/WPPT Articles 10 and 14.²⁴ Of course, the U.S. Copyright Act did not have specific language reflecting a “making available” right at the time, so our domestic law influenced the ultimate outcome of this provision.²⁵ During negotiations, the United States became a key proponent of the

20. The United States deposited its instruments of ratification of the WIPO Copyright Treaty (WCT) and WIPO Performances & Phonograms Treaty (WPPT)—collectively known as the WIPO Internet Treaties—on September 14, 1999. World Intellectual Prop. Org., *Notifications of WIPO Copyright Treaty*, WIPO-ADMINISTERED TREATIES, <https://perma.cc/D6UJ-RTSE> (last visited Feb. 28, 2017); World Intellectual Prop. Org., *Notifications of WIPO Performances and Phonograms Treaty*, WIPO-ADMINISTERED TREATIES, <https://perma.cc/9HD7-C8G9> (last visited Feb. 28, 2017).

21. Digital Millennium Copyright Act, Pub. L. No. 105-304, Oct. 28, 1998, 112 Stat. 2860.

22. *Id.* at §§ 1201, 1202.

23. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); *TRIPS Agreement Contracting Parties/Signatories*, WIPO, (last visited Feb. 5, 2017), <https://perma.cc/NG3F-D8DH>.

24. See WIPO Copyright Treaty art. 8, Dec. 20, 1996, 112 Stat. 2860, 2186 U.N.T.S. 154 [hereinafter “WCT”]; see also WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 112 Stat. 2860, 2186 U.N.T.S. 250-251 [hereinafter “WPPT”].

25. When implementing the WIPO Internet Treaties in 1998 with the DMCA, Congress made no express changes regarding the making available right but instead concluded that the exclusive rights enumerated in section 106 of the Copyright Act are sufficient to support the relevant treaty provisions. See H.R. REP. NO. 105 - 551, pt. 1, at 9 (1998); see also *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 27 (1997) (statement of Rep. Howard Coble, Chairman, Subcomm. on Courts & Intellectual Prop.) (“The treaties

umbrella solution, which expressly allowed flexibility in how treaty parties could implement the “making available” right and allow for the United States to implement the right, basically through the existing § 106 exclusive rights the United States already had in place in its copyright law.²⁶

Now I can’t say that this is a perfect solution, quite frankly, because it has sometimes led to domestic confusion in terms of how to acknowledge and implement a provision that is not reflected verbatim in domestic law. So the United States was able to influence the outcome of the actual treaty language to empower flexibility in our domestic regime, but because courts actually didn’t have specific domestic language for the right, sometimes that has caused confusion in terms of how the courts actually analyze and interpret this treaty provision. You can see this sometimes with different courts’ decisions – one saying, “Yes, there’s a ‘making available’ right,” and another saying, “No, actually there isn’t,” even though the U.S. is bound to have a “making available,” or has a “making available” obligation, not only in two treaties, but also in about sixteen different FTAs.²⁷

The trend toward reflection of domestic norms in international agreements rather than the other way around does have some potential downsides. In some instances, this approach may create the possibility of entrenching what people might view as non-positive or negative aspects of U.S. law, and have a perverse effect of potentially disincentivizing the U.S. to reach a higher global standard if we are not the leading voice on a specific issue. An obvious example of this is the public performance right for over-the-air broadcasts of sound recordings, which some sources note that in the United States deprives copyright owners of between \$70 million to \$100 million in foreign royalties each year.²⁸ The U.S. is basically alone among developed countries in failing to recognize this right; our partners in this regard are North Korea, Iran, and China.²⁹ But because our objective typically is to negotiate to U.S. law, we were able to negotiate carve-outs for the United States or reservations for the United States in Article 15 of the WPPT, as well as in all of our

do not require that the United States change the substance of our domestic copyright rights or exceptions.”).

26. See generally UNITED STATES COPYRIGHT OFFICE, *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES* (2016), <https://perma.cc/BF6G-ATRV>. See also SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY* ¶ 17.80, at 458 (2008) (“[S]ince the Treaties allow implementation of the making available right by any suitable right . . . its relation to the communication right under the Treaties has no bearing on the choice of its systematic classification under national law.”).

27. UNITED STATES COPYRIGHT OFFICE, *THE MAKING AVAILABLE RIGHT IN THE UNITED STATES* 2, 17-18 (2016), <https://perma.cc/C2UU-HNGJ> (“The courts of the United States have been less consistent in their analyses and decisions . . . The United States also has reaffirmed its obligation to recognize the making available right in numerous bilateral and multilateral free trade agreements (‘FTAs’) entered into with other nations.”).

28. UNITED STATES COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* 90 n.446 (2015), <https://perma.cc/R5RC-HQQ2>.

29. *Id.* at 138 n.756.

FTAs so that we would not have to reach the global standard on this particular issue.³⁰

After TRIPS, there has also been a desire for more specificity in treaty and trade agreements that reflect U.S. domestic law even more closely; this was an issue that was discussed extensively in the previous panel.³¹ I think this can be traced, somewhat, to an increasing reliance on free trade agreements, which allows for the adoption of domestic norms more closely since negotiators are essentially only having to accommodate two sets of laws: the two negotiating partners in a bilateral agreement, as opposed to multiple countries and conflicting regimes that they may need to accommodate in a multilateral context. I would say one need only compare the TPM provisions of the WCT and the TPM provisions of recent FTAs to kind of see how that distinction has been reflected; on one slide you have the WCT provision on technological protection measures, which is essentially a couple of paragraphs, and then the next slide, which you can't read because it's so long, is the corresponding TPM language in our KORUS agreement.³²

After the DMCA's adoption of the ISP safe harbor regime, the vast majority of U.S. FTAs also incorporate very specific language on ISP safe harbors. And as I think was alluded to in an earlier panel, no multilateral agreements include similar provisions, but this again reflects the U.S. domestic influence. Adoption of these domestic norms allows the U.S. again to advocate for our gold standard in a way that benefits United States interests and raises global standards on IP as a whole. And of course, therefore, the United States typically does not need to make significant changes while its trading partners are tasked with raising their laws to the United States standard.³³ AUSFTA, the Australia free trade agreement, is a good example. I think the United States made zero changes to implement that particular free trade agreement, whereas Australia had about 100 pages of implementing legislation in order to implement that free trade agreement.³⁴

I think that the United States now basically has come full circle, from the outside looking in, to (I'm trying to paraphrase a Broadway show) being in the room where it happens—I had to get a *Hamilton* reference out there—and taking a leading role in international harmonization. The Supreme Court recently validated this approach, noting in the *Golan v. Holder* case in 2012 that, quote, “Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include

30. See, e.g., WPPT art. 15; United States-Australia Free Trade Agreement, U.S.-Austl. Art. 17.1:6, May 18, 2004, 43 I.L.M. 1248 [hereinafter “AUSFTA”].

31. Mehta, *supra* note 18; Metalitz, *supra* note 18.

32. Compare WCT art. 11 with United States-Korea Free Trade Agreement, U.S. - S. Kor. art. 18.4, June 30, 2007, 46 I.L.M. 642, <https://perma.cc/NN9A-5FK4>, and United States - Panama Trade Promotion Agreement, U.S.-Pan., art. 15.5, June 28, 2007, <https://perma.cc/8LQW-KZHB>.

33. 2016 *Special 301 Report*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (2016), <https://perma.cc/B4W4-45GM> (describing the ways in which, in dealing with its trading partners, “[t]he United States works to promote adequate and effective IPR protection and enforcement.”).

34. Compare United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-289, 118 Stat. 919 (2004), with U.S. Free Trade Agreement Implementation Act 2004 (Austl.), <https://perma.cc/G246-PW3B>.

ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad, and remedying unequal treatment of foreign authors.”³⁵ Accordingly, in *Golan*, the Court found that the URAA provision removing foreign works from the public domain was a permissible and rational policy choice, saying that it refused to “second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly.”³⁶

Now while the trend for the United States has been to advocate for our gold standard, some have, of course, raised legitimate questions, again an issue that seems to be a theme, I think, for this particular conference, about whether that gold standard is beginning to tarnish a bit. What happens if the United States law is not the most up-to-date, but nevertheless the United States advocates for implementation of its domestic regime at the international level? That question has been raised more recently and is a topic that has generated a lot of discussion in Congress and elsewhere. And there is some evidence that questions such as these may be contributing to a possible new trend that is turning away from more specificity in treaty/trade language back to a more flexible approach, and a willingness to accommodate or acknowledge that sometimes simply reflecting current domestic regimes, no matter how innovative you might think they are at the time, can itself be somewhat shortsighted, given the rapid change in technological advancement and the need to update our laws more frequently.³⁷ Thank you.

35. *Golan v. Holder*, 565 U.S. 302, 335 (2012).

36. *Id.* at 324.

37. See, e.g., Letter from Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary & Arlen Specter, Ranking Member, U.S. Senate Comm. on the Judiciary, to Susan C. Schwab, U.S. Trade Rep. (Oct. 2, 2008) (“ACTA, if not drafted with sufficient flexibility, could limit Congress’s ability to make appropriate refinements to intellectual property law in the future. . . .”); Letter from Ron Kirk, U.S. Trade Rep., to Ron Wyden, U.S. Senate (Jan. 28, 2010) (“[W]e are aware of concerns about retaining flexibility to legislate in the future in this field, and have written our proposals with those concerns in mind.”).