

HITCHCOCK'S "REAR WINDOW" & INTERNATIONAL COPYRIGHT LAW: AN EXAMINATION OF STEWART V. ABEND & ITS AFFECT ON INTERNATIONAL COPYRIGHT RENEWAL AND EXPLOITATION

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The first thing to be said about works of authorship is that by nature they elude confinement to a fixed locale. At the moment of creation they become international, floating, or having the capacity to do so, across national borders, across oceans, and potentially from one medium to another as the world's most cosmopolitan product. Being incorporeal, they are unbounded by walls and fences. Only the law defines their boundaries.¹

I. INTRODUCTION

With a worldwide revenue exceeding \$500 billion,² the entertainment industry is a major player in the global economy. It is no wonder that worldwide protection for the rights of authors and copyright owners of artistic works has been a chief concern of national governments and international trade organizations for well over a century.³ The treatment of copyright owners in foreign countries is governed by numerous agreements, which when boiled

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¹ RICHARD WINCOR, *COPYRIGHTS IN THE WORLD MARKETPLACE, SUCCESSFUL APPROACHES TO INTERNATIONAL MEDIA RIGHTS* 3 (Prentice Hall Law & Business 1990).

² AL LIEBERMAN & PAT ESGATE, *THE ENTERTAINMENT MARKETING REVOLUTION: BRINGING THE MOGULS, THE MEDIA, AND THE MAGIC TO THE WORLD* at xix (Financial Times Prentice Hall 2002).

³ The first international treaties concerning international intellectual property rights were the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, both created in the 1880's. Both conventions are overseen by the World Intellectual Property Organization, an agency of the United Nations. See generally <http://www.itds.treas.gov/ipr.html> (last visited Mar. 1, 2005); William Belanger, *Article: U.S. Compliance with the Berne Convention*, 3 *GEO. MASON L. REV.* 373, 373 n.2 (1995).

down to their core “require a member country to grant nationals of another member country rights at least as good as those granted to its own nationals.”⁴ With the world’s insatiable “appetite for American books, computer software, records, movies, and other copyright material,”⁵ the international protection of American copyrights is a major world issue. In the motion picture industry alone the U.S. market share of the world motion picture market has doubled since 1990, while today the European market share in the American motion picture market is only about three quarters of one percent.⁶ With such an enormous global market share it is imperative that the protection of these copyright materials does not hinder their creation, dissemination, and exploitation.

A vast majority of the copyrighted works exploited around the world are derivative works⁷ of preexisting material.⁸ It is in the relationship between the assignees of the author of the preexisting work and the copyright owners of a derivative work based on that

The Berne Convention was established September 9, 1886, and entered into force on December 5, 1887. The Berne Convention was supplemented by: (1) the Additional Act of Paris, signed May 4, 1896, and entered into force on December 9, 1896; (2) the Berlin Revision, signed November 13, 1908, and entered into force on September 9, 1910; (3) the Additional Protocol of Berne signed March 20, 1914, and entered into force April 20, 1915; (4) the Rome Revision, signed June 2, 1928, and entered into force August 1, 1931; (5) the Brussels Revision, signed June 26, 1948, and entered into force on August 1, 1951; (6) the Stockholm Revision, signed July 14, 1967, with only administrative provisions entering into force in 1970; and (7) the Paris Revision, signed July 24, 1971, and entered into force October 10, 1974.

⁴ Belanger, *supra* note 3, at 385; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1980 U.N.T.S. 31, at art. 5(1) [hereinafter Berne Convention] (“Authors shall enjoy, in respect of works for which they are protected under th[e] [Berne Convention], in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals.”); *Id.* at art. 19. (“The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”)

⁵ 134 CONG. REC. S14549-01 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy).

⁶ Akbar Marvasti, *Cultural and other Barriers to Motion Pictures Trade*, ECONOMIC INQUIRY, Jan. 1, 2005, at 39.

⁷ 17 U.S.C.A. §101 (1976) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a . . . musical arrangement, . . . motion picture version, [or] sound recording.”).

⁸ The two most lucrative types of artistic works, motion pictures and musical recordings, are very often derivative works of preexisting works such as a literary work, screenplay, or musical composition; MELVILLE B. NIMMER & DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT §2.10, n. 8 (2004) (hereinafter NIMMER ON COPYRIGHT) (“A sound recording is a derivative work in relation to the musical work recorded therein, just as a motion picture is a derivative work in relation to the novel or screenplay upon which it is based.”).

preexisting work where the waters of international copyright are muddied and rife with dispute.

American jurisprudence has seen two opposing treatments of derivative work autonomy,⁹ and with international conventions giving great deference to the way a work of authorship is protected in its country of origin, disputes regarding both the national and international exploitation of derivative works have arisen. This note will help shed light on the problems of international derivative work protection, specifically in the wake of the 1976 overhaul of the United States Copyright Act, conflicting circuit decisions, and the subsequent U.S. Supreme Court ruling in *Stewart v. Abend*.¹⁰ In *Abend*, the Supreme Court addressed the ability of the owner of a copyright to a derivative work to exploit that derivative work without permission from the heirs of the author of the underlying work, who received the copyright after the author's death but before the renewal period began.¹¹ This note will also look at the implications of foreign nations not accepting the Supreme Court's view of copyright renewal terms and derivative work exploitation. While there are numerous types of works of authorship that are protected by copyright laws worldwide, this note will focus on the protection of motion pictures.¹²

Part two of this note will discuss the birth of copyright law both in the U.S. and abroad, and examine relevant U.S. case law. Part three will discuss the Supreme Court ruling in *Abend* and the problems posed by this ruling in the realm of international copyright law, followed by a legal discussion illustrating that the legal implications of the *Abend* decision are not restricted to U.S. territory and must be adhered to by all foreign nations who are parties to treaties protecting international exploitation of intellectual property. This note will conclude by emphasizing the importance of

⁹ Clark L. McCutchen, *Stewart v. Abend: Derivative Work Users Beware*, 68 DENV. U. L. REV. 297, 298-9 (1991) ("The renewal and derivative work dichotomy reflect two deeply rooted policies of American copyright law. The first of these policies is that an author who copyrights his work should have two chances at exploiting the work. . . . The second of these policies is to give independent copyright protection to a derivative work.").

¹⁰ *Stewart v. Abend*, 495 U.S. 207 (1990).

¹¹ 17 U.S.C. §24 (1909) (amended 1976) (Prior to the U.S. Copyright Act of 1976, copyright owners were given two terms of protection for their work, an initial term followed by a renewal term.).

¹² Since most motion pictures are derivative works of an underlying literary work, the positions taken in this note can also be used for musical sound recordings, as they are derivative works of musical compositions.

adherence to the *Abend* ruling, and offer suggestions to the international bodies which preside over international protection of intellectual property on how to ensure that the market is not hindered by copyright protection enforcement mechanisms. Only in an unhindered market will creativity, ideas, and the dissemination of useful art flow without impediment.

II. BACKGROUND

American copyright law has seen two different structures since the advent of a national copyright law in 1790. The first such structure gave authors a dual term of protection, while the later structure, adopted in 1976, gave authors a single term of protection.¹³ Prior to 1976, copyright owners were required to take affirmative steps to renew their copyright prior to the end of their copyright's initial term.¹⁴ Today, copyright owners are entitled to a single term of copyright protection with a right of termination; nevertheless, there are copyrights that still exist under the two term regime. The Copyright Act of 1976 gave the copyrights existing in their first term as of January 1, 1978, a first term subsisting of twenty-eight years following the date at which the copyright was originally secured.¹⁵ Following the expiration of the first term these copyrights were given an extension for another sixty seven years. It is true that *Abend* only applies to copyrights subsisting under the older dual-term regime; nevertheless, with the ability of a copyright under the dual-term regime to last until December 31, 2072,¹⁶ roughly sixty-eight years from the writing of this note, it is important to reconcile any disputes that might arise with regard to these copyrights.

There are two diverging policies present in American copyright law. On the one hand, Congress has mentioned its intention to allow authors a second bite at the apple, and has given authors a chance through both a renewal term and a termination right present in the Copyright Acts of 1790 and 1976.¹⁷ Through the Copy-

¹³ See 17 U.S.C. §302 (1909) and 17 U.S.C. §302 (1976).

¹⁴ 17 U.S.C. §24 (1909).

¹⁵ 17 U.S.C. §304(a) (1976).

¹⁶ The first term of a copyright secured on December 31, 1977 will expire on December 31, 2005 (1977 + 28 = 2005). When the copyright is renewed, the term of protection will last until December 31, 2072 (2005 + 67 = 2072).

¹⁷ H.R. REP. NO. 222 (1909) ("It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lies beyond the term of twenty eight years, your committee felt that it

right Act of 1831, Congress also "gave the author's widow and children that which theretofore they did not possess, namely the right of renewal to which the author would have been entitled if he had survived the original term."¹⁸ On the other hand, Congress has given the preparers of derivative works a right to obtain a copyright in those works since "in a broad sense almost all works are derivative works in some degree [since] they are derived from pre-existing works."¹⁹ For some time American case law has been struggling with how to best balance these two competing ideas.²⁰ How do we ensure that an author's interests and rights are sufficiently protected while allowing the exploitation of derivative works based on the author's original work? Only when this dispute is reconciled by American case law can we apply its principles to the realm of international copyright protection.

To reconcile these differences it is helpful to look at the history of national copyright law, the creation of international treaties providing for worldwide copyright protection, and the Supreme Court decision in *Stewart v. Abend*.

A. National Copyright Statutes

Anglo-American copyright law was born in England in 1709 with the enactment of the Statute of Anne, which gave authors and their assigns a copyright over written works for a period of fourteen years following publication, and a renewal term of fourteen additional years if the author survived the initial term.²¹ This statute was the first to recognize the rights of authors rather than the booksellers and printers over their works or authorship.²² The Statute of Anne was silent regarding the assignment of the renewal interest, but the English courts determined that the author was

should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.").

¹⁸ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 651 (1943).

¹⁹ 1-3 NIMMER ON COPYRIGHT §3.01 ("In truth, in literature, in science and in art, there are, and can be, few, if any things which, in an abstract sense, are strictly new and original throughout. Every book. . . borrows and must necessarily borrow, and use much which was well known and used before."); *Id.* at §3.01 (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 No. 4436 (C.C.D. Mass. 1845)).

²⁰ See generally *Fred Fisher Music*, 318 U.S. at 643; *Miller Music Corporation v. Charles N. Daniels, Inc.*, 362 U.S. 373, 80 S. Ct. 792 (1960); *Rohauer v. Killiam Shows, Inc.* 551 F.2d 484 (1977); *Abend*, 495 U.S. at 207.

²¹ *Fred Fisher Music*, 318 U.S. at 647.

²² ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT*, 2. (Foundation Press, 6th Ed. 2002)

bound by any assignment of the renewal interest he had made if he survived the original term.²³

Copyright law in America was first mentioned in the Constitution. In order “[t]o promote the progress of science and useful arts” the Framers gave Congress the right to “secur[e] for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²⁴ Prior to enacting a national copyright act, the Continental Congress passed a resolution calling for the States to adopt copyright legislation benefiting authors and publishers “for a certain time, not less than fourteen years from the first publication and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years.”²⁵ Prior to the resolution, three States had already adopted copyright laws, and in response to the resolution, nine other States adopted copyright laws, with Delaware being the only State without any copyright laws on its books.²⁶

In May of 1790, Congress exercised its Constitutional powers and enacted the first United States Copyright Act (the “1790 Act”).²⁷ Mirroring its “historical antecedent,” the Statute of Anne, the 1790 Act granted authors a fourteen year protection term, with a renewal term of an additional fourteen years.²⁸ The extension period, which could be carried out by the author’s executors, administrators, or assigns, was contingent upon the author surviving the initial term.²⁹

The U.S. Copyright Act was amended on February 3, 1831 (the “1831 Act”) to place American authors on equal footing with authors in other countries.³⁰ Although the renewal term was kept at fourteen years, the 1831 Act allowed the copyright to pass to the author’s widow if the author did not survive the initial twenty-eight

²³ *Fisher*, 318 U.S. at 647-8.

²⁴ U.S. CONST. art. I, §8, cl. 8.

²⁵ *Fred Fisher Music*, 318 U.S. at 648-49 (citing Journals of the Continental Congress, 1774-1789 (1922), vol. XXIV, pp. 326-27).

²⁶ *Id.* at 649.

²⁷ *Id.* at 650.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 650-51 (In 1814 the Statute of Anne was amended to give authors an initial protection term of twenty eight years).

year term.³¹ The 1831 Act also provided copyright protection to musical compositions.³²

The Copyright Act of 1870 (the "1870 Act") further expanded copyright protection to "paintings, statues, and other works of fine art."³³ While the 1870 Act did not change the terms of protection, it transferred the responsibility of registering copyright from individual district courts to the Library of Congress Copyright Office.³⁴

The renewal term was finally lengthened by the Copyright Act of 1909 (the "1909 Act"). Congress gave authors and their successors two terms of twenty-eight years each, provided that the "application for such renewal and extension. . .[was] made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."³⁵ The renewal provisions of the 1909 Act rested on three premises. "First, the entire term of the copyright – twenty-eight years each for the initial term and the renewal term – should be relatively long."³⁶ Second, unless an author or an author's statutory successors take affirmative actions to renew the copyright of their work, the work would fall into the public domain and lose its commercial value.³⁷ Third, a work that was commercially valuable following the twenty-eight year initial term owed its success to the abilities of the author rather than those of a licensee, assignee, or the derivative work, and therefore the author was entitled to earn the profits from the work during the renewal term.³⁸

In 1976, the U.S. Copyright Act was revised yet again ("1976 Act"). The 1976 Act does away with the dual term regime and grants a copyright owner a single term of protection "consisting of the life of the author and 70 years after the author's death."³⁹ Moreover, the 1976 Act retains the 1909 Act's renewal mechanism

³¹ *Fred Fisher Music*, 318 U.S. at 650-51.

³² 3 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 239 (West Group 1998).

³³ *Id.*

³⁴ Association of Research Libraries, Timeline: A History of Copyright in the United States, <http://www.arl.org/info/frn/copy/timeline.html> (last visited Mar. 1, 2005).

³⁵ *See supra* note 22.

³⁶ 1 PAUL GOLDSTEIN, COPYRIGHT 448 (Aspen Law & Business, 2nd ed., 1996).

³⁷ *Id.*

³⁸ *Id.*

³⁹ 17 U.S.C. §302(a) (1976) (Upon the enactment of the 1976 Act the term of copyright "endure[d] for a term consisting of the life of the author and fifty years after the author's death."); Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, 112 Stat. 2827 (§302(a) of the 1976 Act was amended by the Sonny Bono Copyright Term Extension Act to increase the term of a copyright to seventy years after the death of the author.).

for works in their first copyright term as of January 1, 1978, and gave these works a renewal term of sixty-seven years.⁴⁰

To give authors a chance to exploit their work without the two-term regime, the 1976 Act introduced a new mechanism where authors and their statutory successors are given a nonwaivable right to terminate a grant of rights after a certain amount of time.⁴¹ This right of termination is vested in the author, and if the author is deceased this right is exercisable by the author's next of kin or statutory successor.⁴² These measures were deemed necessary "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."⁴³

B. *International Agreements*

The lack of adequate worldwide protection of intellectual property became apparent in 1873 "when some foreign exhibitors refused to attend the International Exhibition of Inventions in Vienna. . . because they were afraid their ideas would be stolen and exploited in other countries."⁴⁴ This led to the enactment of the Paris Convention for the Protection of Industrial Property (the "Paris Convention") on March 20, 1883, which granted that "[n]ationals of any country of the Union. . . [shall] enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals."⁴⁵ Under the Paris Convention only industrial property rights such as rights to inventions, patents, trademarks, and industrial designs were protected.⁴⁶ However, the main drawback of the Paris Convention was that it made no guarantees of minimum levels of protection. It only required member nations to protect foreign intellectual

⁴⁰ 17 U.S.C. §304 (1976). The original 1976 Act as enacted gave these works an extension term of forty-seven years, which was increased to sixty-seven year by the Sonny Bono Copyright Term Extension Act.

⁴¹ 17 U.S.C. §203 (1976).

⁴² 17 U.S.C. §203(2) (1976).

⁴³ H.R. REP. NO. 94-1476, at 125 (1976).

⁴⁴ James Bourne, Background: Intellectual Property Rights, http://www-1.gsb.columbia.edu/ipd/j_ipr.html (last visited Mar. 3, 2005).

⁴⁵ Paris Convention for the Protection of Industrial Property, Sept. 5, 1970, art. 5, 21 U.S.T. 1629, 1636-37, 828 U.N.T.S. 305, art. 2(1) [hereinafter Paris Convention]; *Id.* at art. 1(1) ("The countries to which this Convention applies constitute a Union for the protection of industrial property.").

⁴⁶ World Intellectual Property Organization, General Information, http://www.wipo.int/about-wipo/en/gib.htm#P29_4637 (last visited Mar. 3, 2005).

properties to the extent that that particular member nation protected the intellectual property of its own nationals. "Thus, a member nation [was] free to provide as much or as little. . . protection as it wished, so long as it guarantee[d] equal treatment for [a] domestic and [a] foreign claimant."⁴⁷

Transnational protection of copyrights entered the international realm three years later with the 1886 enactment of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention" or "Berne").⁴⁸ The aim of the Berne Convention was to ensure that nationals of its signatory states receive international protection for their right to control and receive royalties for the international use of their creative works.⁴⁹ Under the Berne Convention all copyright holders in signatory nations "enjoy, in countries of the Union other than the country of origin, the right which their respective laws do now or may hereafter grant to their nationals."⁵⁰ Now, the holder of a Belgian copyright who exploited his copyrighted work in France was afforded the same protection that a French national would receive under French law.

Perhaps learning from the shortcomings of the Paris Convention, the Berne Convention required signatory nations to adopt a set of minimum standards for copyright protection. Article 7 of the Berne Convention required that the minimum term of protection in a signatory nation be "the life of the author and fifty years after his death."⁵¹

The Berne Convention also set up an International Bureau ("Bureau"), similar to the bureau set up pursuant to Article 24 of the Paris Convention, as the Convention's administrative body.⁵² In 1893, the Bureau combined with the International Bureau set up under the Paris Convention to form the "United International Bureaux for the Protection of Intellectual Property."⁵³ Even though

⁴⁷ Robert J. Pechman, Note: *Seeking Multilateral Protection for Intellectual Property: The United State "TRIPs" over Special 301*, 7 MINN. J. GLOBAL TRADE 179,181 (1998), citing Anthony D. Sabatelli, *Impediments to Global Patent Law Harmonization*, 22 N. KY. L. REV. 579, 591-92 (1995).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Berne Convention, Art. 5.

⁵¹ *Id.* at art. 7.

⁵² *Id.* at art. 24.

⁵³ See *supra* note 46; Berne Convention, art. 24 ("Based in Berne, Switzerland, with a staff of seven, this small organization was the predecessor of the World Intellectual Property Organization of Today.").

the Berne Convention rectified many of the Paris Convention's shortcomings, it was widely criticized for its own shortcomings, especially its lack of provisions enabling intellectual property holders to enforce their rights in foreign nations.⁵⁴

The problems posed by the shortcomings of both Paris and Berne Conventions led to the enactment of the Stockholm Convention of 1967 which established the World Intellectual Property Organization ("WIPO").

The modern approach to the international protection of intellectual property was created during the Uruguay Round of the General Agreement in Tariffs and Trade ("GATT") which concluded in Marrakesh, Morocco on April 15, 1994. The Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs"), administered by the World Trade Organization ("WTO"), became effective on January 1, 1995 and is regarded as one of the most comprehensive multilateral agreements on the protection of intellectual property.⁵⁵

The goal of TRIPs is

to reduce distortions and impediments to international trade, tak[e] into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. . .[and] to establish a mutually supportive relationship between the WTO and. . .[WIPO] as well as other relevant international organizations.⁵⁶

⁵⁴ Naomi A. Bass, Note: *Implication of the TRIPs Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 *GEO. WASH. INT'L L. REV.* 191, 195 (2002) (citing Frank Roman, *International Conventions and Treaties*, 536 *PLI/Pat* 545, 557 (1998)).

⁵⁵ Overview: The TRIPs Agreement, World Trade Organization, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar. 3, 2005); Adrian Otten & Hannu Wager, Article: *Compliance with TRIPs: The Emerging World View*, 29 *V AND. J. TRANS-NAT'L L.* 391, 392 (1996) ("[TRIPs] deals with each of the main categories of intellectual property rights, establishes standards of protection as well as rules on enforcement, and provides for the application of the World Trade Organization dispute settlement mechanism to resolve disputes between member states.").

⁵⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round vol. 31, 33 *I.L.M.* 81 (1994), at pmb1. [hereinafter TRIPs]. Congressional approval of TRIPs may be found in 19 U.S.C. §3511-3513 (2000)).

In order to achieve these goals, TRIPs set out a minimum standard of protection to be adhered to by member nations. It requires that every member nation comply with the substantive obligations of the most current versions of both the Paris Convention and the Berne Convention, excluding the moral rights⁵⁷ provided for in Article 6^{bis}⁵⁸ of the Berne Convention.⁵⁹ Much like the Berne and Paris Conventions, TRIPs requires that “[e]ach member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . . .”⁶⁰ All members of the WTO are required to comply with all of TRIPs’ provisions even if they are not a party to any of the conventions administered by the WIPO.⁶¹

Regarding the inadequacy of the Berne and Paris Conventions, TRIPs rectifies those oversights and provides copyright holders the ability to enforce their rights, and to settle disputes through the WTO’s dispute settlement procedures.⁶² TRIPs also encompasses all aspects of intellectual property including copyright, trademark, geographical indications, industrial design, patents, the layout design of integrated circuits, and undisclosed information such as trade secrets and test data.⁶³

During the negotiations at the Uruguay round of GATT, the adequacy of Berne’s international protection of copyrights was recognized.⁶⁴ The Berne standard of protection was used as a point of departure,⁶⁵ and article 9.1 of TRIPs expressed that members are obligated to comply with the substantive provisions of the most recent version of the Berne Convention, except for the moral right as contained in the Berne Convention.⁶⁶ TRIPs also clarified and ad-

⁵⁷ BLACK’S LAW DICTIONARY (8th ed. 2004) (“The right of an author or artist, based on natural-law principles, to guarantee the integrity of a creation despite any copyright or property-law right of its owner.”).

⁵⁸ See *infra* note 74; Article 6^{bis} was added to the Berne Convention in 1928. Bis is defined in the Merriam-Webster Dictionary as “again,” and is used as a means of inserting a paragraph into the text without having to renumber the entire convention.

⁵⁹ See *supra* note 55.

⁶⁰ TRIPs art. 3.

⁶¹ See *supra* note 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*; TRIPs does not require that member nations bestow “authors, after the transfer of [economic rights]” the “right to claim authorship of the work and to object to any distor-

ded certain points, such as article 9.2, which confirmed that “[c]opyright protection shall extend to expressions and not ideas, procedures, methods of operation or mathematical concepts as such.”⁶⁷ Since TRIPs made up for the inadequacies of the previous WIPO intellectual property agreement, TRIPs has come to be known as a “Berne and Paris-plus agreement.”⁶⁸

C. *The United States as a Party to International Intellectual Property Agreements*

As of January 2003, the U.S. was engaged in forty bilateral treaties regarding the international protection of copyright.⁶⁹ However, no bilateral treaty is as efficient as a multilateral treaty in curbing copyright infringement worldwide.⁷⁰ As a member of the WTO, the U.S. is a signatory to the TRIPs agreement; nevertheless, the U.S.’s adherence to the Berne Convention was a recent development in the history of American copyright law.⁷¹

For the majority of the 19th century, American copyright law offered no protection for foreign works. Therefore, when a number of nations gathered in 1886 to create a multilateral treaty the U.S. did not participate.⁷² It was not until 1891 that the U.S. extended copyright protection to foreign works, and instead of joining the Berne Convention the U.S. sought bilateral agreements as a means of international copyright protection.⁷³ As the worldwide market for U.S. goods developed after World War I, U.S. businesses lobbied for American ratification of the Berne Convention so that U.S. copyright holders would acquire more remedies against for-

tion, mutilation or other modification of, or other derogatory action in relations to, the said work, which would be prejudicial to his honor or reputation.” Berne Convention art. 6 bis.

⁶⁷ TRIPs art. 9(2).

⁶⁸ See *supra* note 55.

⁶⁹ United States Copyright Office Circular 38a, International Copyright Relation of the United States, <http://www.copyright.gov/circs/circ38a.pdf> (last visited Mar. 3, 2005).

⁷⁰ In order to obtain the same level of international protection over copyrights as the U.S. obtained by becoming a signatory to the Berne Convention, the U.S. would have had to negotiate with 157 countries. These negotiations would require significant governmental resources. Furthermore, the enforcement of copyrights through 158 bilateral treaties would have to be done piecemeal. It is clearly more efficient to become a party to a multilateral convention where there is one negotiating partner, and one single enforcement mechanism.

⁷¹ The U.S. became a member of the Berne Convention on March 1, 1989. WTO: Berne Convention Contracting Parties, <http://www.wipo.int/treaties/en/documents/word/e-berne.doc> (last visited Mar. 3, 2005).

⁷² 134 CONG. REC. S14549-01(October 5, 1988) (statement of Sen. Hatch).

⁷³ *Id.*

eign copyright piracy.⁷⁴ However, the 1928 Rome revision of Berne added moral rights as a requirement for membership in the convention.⁷⁵ Due to the inclusion of moral rights, publishers and motion picture producers voiced their consensus that moral rights could disrupt existing copyright relations.⁷⁶ Moreover, the manufacturing clause of the U.S. Copyright Act, 17 U.S.C. 601, which raised tariff barriers to works published outside of the U.S. was incompatible with Berne.

Due to its inability to join Berne, the U.S. created a new international copyright protection agreement under the auspices of the United Nations Educational, Scientific and Cultural Organization ("UNESCO").⁷⁷ In 1954 the Universal Copyright Convention ("UCC") was ratified, setting a lower standard of copyright protection than Berne. The U.S. eventually withdrew from UNESCO and lost its voice⁷⁸ within the UCC secretariat.⁷⁹

With its withdrawal from UNESCO and its refusal to become a member of Berne, the U.S. was regarded as not fully committed to the international protection of copyrights.⁸⁰ Nevertheless, as the world's leading exporter of copyrighted works with a trade surplus by U.S. copyright industries of \$1.2 billion in 1982, and a loss of \$1.3 billion in 1984 due to piracy in only ten foreign countries, the U.S. had much to gain from adequate protection for its copyrights worldwide.⁸¹

In 1988, Congress began to examine the feasibility of becoming a member of the Berne Convention.⁸² After the Copyright Act revision of 1976, the expiration of the manufacturing clause on July 1, 1986, and the Congressional belief that some sort of moral right had developed in the U.S.,⁸³ U.S. law was seen as more compatible

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See supra* note 72.

⁷⁷ *Id.*

⁷⁸ Once the U.S. withdrew from UNESCO, the umbrella organization of the UCC, the U.S. lost its ability to affect change within the UNESCO and any conventions they oversaw.

⁷⁹ Hamish R. Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM. J.L. & ARTS 89, 100-01 (1986).

⁸⁰ *See supra* note 72.

⁸¹ *Id.*

⁸² *Id.*

⁸³ S. REP. NO. 100-352, at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15 (While moral rights are not specifically provided for under U.S. law, protection has been inferred under "[e]xisting U.S. law [such as] various provisions of the Copyright Act and

with Berne.⁸⁴ With a major incentive for establishing comprehensive worldwide protection of U.S. copyrights, the U.S. enacted the Berne Convention Implementation Act of 1988, and officially became a member of Berne on March 1, 1989, thereby securing protection for U.S. copyrights in other signatory nations.

D. *Relevant U.S. Case Law*

The conflict of interests between the assignability of a renewal right in an underlying work and the right to exploit a derivative of that underlying work where the assignee of the copyright has not granted a license, has been a source of litigation for well over half a century.⁸⁵ An early case in this area was *Fred Fisher Music v. M. Witmark & Sons*.⁸⁶ This dispute arose over the rights to the song "When Irish Eyes Are Smiling," written in 1912 by three songwriters under contract with music publishing firm M. Witmark & Sons ("Witmark").⁸⁷ Pursuant to agreements with each songwriter, Witmark applied for and received a copyright in the song.⁸⁸ On August 12, 1939, the first day of the twenty-eighth year of the copyright in the song, Witmark, using their contractually established power of attorney over one of the songwriters, registered a renewal in the copyright and assigned to itself the renewal copyright.⁸⁹ Eleven days later the songwriter applied for a renewal copyright in his own name and assigned that renewal to another music publisher, Fred Fisher Music Co. ("Fisher").⁹⁰ Relying on the validity of its assignment, Fisher published and sold copies of "When Irish Eyes Are Smiling," and was subsequently sued by Witmark.⁹¹

The District Court granted Witmark a preliminary injunction which was affirmed by the Second Circuit Court of Appeals. The court held that the exploitation of the song was an infringement on Witmark's copyright.⁹² The Supreme Court granted certiorari to

Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.").

⁸⁴ *Id.*

⁸⁵ See generally *Fred Fisher Music*, 318 U.S. at 643; *Miller Music*, 362 U.S. at 373; *Rohauer*, 551 F.2d at 484; *Abend*, 495 U.S. at 207; *Fred Fisher Music*, 318 U.S. at 647.

⁸⁶ *Fred Fisher Music* 318 U.S. at 643.

⁸⁷ *Id.* at 645.

⁸⁸ *Id.*

⁸⁹ *Id.* at 646.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Fred Fisher Music*, 318 U.S. at 646-7.

decide "whether an agreement to assign his renewal, made by an author in advance of the twenty eighth year of the original term of copyright, is valid and enforceable."⁹³ The Supreme Court carefully considered congressional intent, and the difficulties Mark Twain encountered after selling "Innocents Abroad" for a very small sum.⁹⁴ It was also "asked to recognize that authors are congenitally irresponsible, that frequently they are sorely pressed for funds that they are willing to sell their work for a mere pittance."⁹⁵ The Court eventually held that as a matter of law authors' renewal rights were assignable.⁹⁶

In the later case of *Miller Music v. Charles N. Daniels*⁹⁷ the Supreme Court considered a similar fact situation as in *Fisher* with one slight but very important wrinkle. In *Miller*, the co-author of the song "Moonlight and Roses" assigned his renewal interest to Miller Music ("Miller").⁹⁸ The author then died prior to the commencement of the renewal period without a surviving spouse or child, and left a will that was silent as to the renewal copyright to "Moonlight and Roses."⁹⁹ As executor of his will, the author's brother renewed the copyright and assigned it to Daniels.¹⁰⁰ Miller then sued Daniels for infringing its copyright in the song.

The lower court granted Daniels a summary judgment which was affirmed on appeal.¹⁰¹ The Supreme Court held that, while the assignment by the author was valid, the assignment only gave Miller an expectancy interest. The death of the author prior to the commencement of the renewal period terminated Miller's expectancy interest in the renewal, which then vested in the named class under Section 24 of the 1909 Act.¹⁰²

⁹³ *Id.* at 647.

⁹⁴ *Id.* at 653.

⁹⁵ *Id.* at 656.

⁹⁶ *Id.* at 659.

⁹⁷ *Miller Music*, 362 U.S. at 375.

⁹⁸ *Id.* at 373-74.

⁹⁹ *Id.* at 374.

¹⁰⁰ *Id.*

¹⁰¹ See *Miller Music v. Charles N. Daniels*, 158 F.Supp.188 (D.C.N.Y. 1957); *Miller Music v. Charles N. Daniels* 265 F.2d 925 (2nd Cir. 1959).

¹⁰² *Miller Music*, 362 U.S. at 375 (citing SAMUEL SPRING, RISKS AND RIGHT IN PUBLISHING TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER (94-95) (2d rev. ed. 1956)); HORACE G. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY (1944), s. 243; STEPHEN P. LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, Vol. II, p. 772, (1938); 17 U.S.C. §24 (1909) (The named class being "the widow, widower, or children of the author, if the author be not living, or if [they] be not

Fisher and Miller held that the critical factor in determining who owns the renewal copyright is the vesting of that interest.¹⁰³ When the author survives beyond the initial term the renewal interest vests in him and any assignment of the renewal interest he has made is valid and enforceable. However, if the author dies prior to the commencement of the renewal period, the renewal interest does not vest in the assignee and the assignment is terminated.

While the main issue in this line of cases was the ownership of the renewal rights, there was an underlying issue of whether a new property right¹⁰⁴ was created through the making of a derivative work based on the copyright in question. If a new property right was created through the creation of a licensed derivative work then the exploitation of that derivative work would not infringe the copyright holder of the underlying work even after the license was rescinded or the copyright changed hands. This new property right found support in the 1918 Second Circuit decision of *Edmond v. Stern*.¹⁰⁵ However, the new property doctrine was repudiated by the Second Circuit thirty-three years later in *G. Ricordi & Co. v. Paramount Pictures, Inc.*,¹⁰⁶ and further rejected in 1976 in *Gilliam v. American Broadcasting Companies, Inc.*¹⁰⁷

The Second Circuit revived the new property right doctrine in the context of renewal rights¹⁰⁸ in the case of *Rohauer v. Killiam*

living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work. . .").

¹⁰³ See *supra* note 9, at 303.

¹⁰⁴ 1-3 NIMMER ON COPYRIGHT § 3.07[A][1] (citing *Edmonds v. Stern*, 248 F. 897 (2d Cir. 1918))

It has been suggested that once a derivative work is created pursuant to a valid license to use the underlying material, a new property right springs into existence with respect to the entire derivative work, so that even if the license is thereafter terminated, the proprietor of the derivative work may nevertheless continue to use the material from the underlying work as contained in the derivative work.

¹⁰⁵ See *Edmonds v. Stern*, 248 F. 897 (2d Cir. 1918) (holding that an orchestral score prepared by appellant based on a musical composition was considered a new work, and appellant had the right to create and copyright the score).

¹⁰⁶ See *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir. 1951), *cert denied*, 342 U.S. 849 (1951) (holding that the creator of the derivative work did not have any rights to the underlying work once his license expired).

¹⁰⁷ See *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976) (holding that the editing of a Monty Python television program, a derivative work of the underlying script, by a licensee without consent of the licensor infringed the copyright in the underlying script).

¹⁰⁸ 1-3 NIMMER ON COPYRIGHT § 3.07[A][2].

*Shows, Inc.*¹⁰⁹ In 1925, Edith Maude Hull wrote a novel entitled "The Sons of the Sheik," which was published in the U.S. by Small, Maynard & Co. who held the U.S. copyright to the novel through an assignment from Ms. Hull.¹¹⁰ Ms. Hull then assigned the motion picture rights to the novel, including the motion picture rights in the renewal period, to Joseph H. Moskowitz.¹¹¹ Through this assignment a silent motion picture based on the novel was produced and released in the U.S. in 1926, and it was registered and eventually assigned to Killiam Shows, Inc. in 1968.¹¹² However, Ms. Hull died in 1943, prior to the commencement of the renewal period, and the copyright was renewed in the name of her daughter in 1952.¹¹³ In 1965, the daughter assigned the television and motion picture rights to "The Son of the Sheik. . .throughout the world and in all languages" to Rohauer.¹¹⁴ On July 13, 1971, the motion picture owned by Killiam was broadcast on television, and Rohauer subsequently sued Killiam for infringing his rights in the underlying work.¹¹⁵

The Second Circuit conducted a balancing test, weighing the equity of the copyright holder of the underlying work with the equity of the copyright holder in the derivative work.¹¹⁶ Holding that the exploitation of the motion picture did not infringe on the rights of the underlying work, the court stated that since "a person who with the consent of the author has created an opera or a motion picture will often have made contributions literary, musical and economical, as great as or greater than the original author. . .the equities lie preponderantly in favor of the proprietor of the derivative copyright."¹¹⁷ The court reasoned that if they ruled against the derivative copyright holder the derivative copyright holder has no way "to protect himself," even through contract, "against the eventuality of the author's death before the renewal period since there is no way of telling who will be the surviving [heir]."¹¹⁸ Under the *Rohauer* doctrine, derivative work owners were free to exploit

¹⁰⁹ *Rohauer*, at 484.

¹¹⁰ *Id.* at 486.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Rohauer*, at 486.

¹¹⁶ See generally *Id.*

¹¹⁷ *Id.* at 493.

¹¹⁸ *Id.*

their works with no regard for the rights of the copyright holders of the original or underlying work.

The U.S. Court of Appeals was once again presented with the issue of renewal rights assignment and their effect on derivative work autonomy in the 1988 Ninth Circuit case of *Abend v. MCA, Inc.*¹¹⁹ Rejecting the Second Circuit's *Rohauer* doctrine, the Ninth Circuit ruled for the holder of the rights to the underlying work.¹²⁰ To resolve the conflict between the Second Circuit and the Ninth Circuit the Supreme Court granted certiorari.¹²¹ In their appeal to the Supreme Court, the defendants placed Jimmy Stewart's name in the first position of the caption, apparently to "elicit sympathy in order to attain an advantage with respect to the underlying substantive legal issues."¹²²

III. *STEWART V. ABEND*

A. *Facts*

In February of 1942, the short story "It Had to Be Murder," by Cornell Woolrich, was first published in *Dime Detective Magazine*.¹²³ Three years later, Woolrich assigned the motion picture rights to six of his stories, including "It Had to Be Murder," for \$9,250 to B.G. De Sylva Productions.¹²⁴ Woolrich also agreed to renew the copyrights in his stories and to assign the motion picture rights in the renewal period to De Sylva Productions.¹²⁵ In 1953, De Sylva's successors assigned the motion picture rights to "It Had to Be Murder" to Patron Inc., a motion picture production company formed by actor Jimmy Stewart and director Alfred Hitchcock, for \$10,000.¹²⁶ One year later, Paramount Pictures, along with Patron Inc., produced and distributed "Rear Window," the motion picture version of "It Had to Be Murder," directed by Alfred Hitchcock and starring Jimmy Stewart and Grace Kelly.¹²⁷

¹¹⁹ *Abend v. MCA, Inc.*, 863 F.2d 1495 (9th Cir. 1988).

¹²⁰ *Id.*

¹²¹ *Abend*, 495 U.S. at 216.

¹²² Elliot S. Blair, *Was Hollywood's Reaction to 'Abend' Ruling Justified?*, *NEW YORK LAW JOURNAL*, Feb. 28, 1992, at 5.

¹²³ *Abend*, 495 U.S. at 211.

¹²⁴ *Id.* at 212.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Elliot S. Blair, *Behind-the-Scenes Look at the 'Rear Window' Case*, *NEW YORK LAW JOURNAL*, Feb. 21, 1992, at 5.

Woolrich died in 1968 without a surviving spouse or child, and prior to renewing his rights to "It Had to Be Murder."¹²⁸ In his will, Woolrich left all of his property to a trust administered by his executor, Chase Manhattan Bank, for the benefit of Columbia University. On December 29, 1969, the copyright to "It Had to Be Murder" was renewed by Chase.¹²⁹ Chase then assigned the renewal rights to Sheldon Abend.¹³⁰

In 1974, "Rear Window" was broadcast on the ABC television networks without Abend's permission.¹³¹ Abend notified Hitchcock, Stewart, and MCA, Inc., the owners of "Rear Window," that he owned the renewal rights to the underlying material and that any unauthorized distribution of the motion picture was an infringement of his copyright. Nonetheless, the owners of the motion picture entered into a second license with ABC to broadcast the motion picture once again.¹³² Abend brought suit in the Southern District of New York against the owners of "Rear Window" and eventually settled out of court.¹³³

Several years later, relying on the Second Circuit's *Rohauer* decision of three years prior, the owners of "Rear Window" re-released the motion picture for theatrical and cable television exhibitions and on VHS and videodisc.¹³⁴ Abend brought suit against Stewart, Hitchcock, MCA, and Universal Film Exchanges (hereafter "petitioners") in the Southern District of California alleging that the "re-release of the motion picture infringes his copyright in the story because petitioners' right to use the story during the renewal period lapsed when Woolrich died before he could register for the renewal and transfer his renewal rights to them."¹³⁵ The Supreme Court eventually granted certiorari, and heard the case on January 9, 1990.¹³⁶

B. Supreme Court Opinion

Ruling for Abend, the Supreme Court flatly rejected petitioners' reliance on the Second Circuit's ruling in *Rohauer*, stating that

¹²⁸ *Abend*, 495 U.S. at 212.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 213.

¹³⁴ *Abend*, 495 U.S. at 213.

¹³⁵ *Id.*

¹³⁶ *Id.*

the rule in *Rohauer* is considered to be an “interest-balancing approach” and “would make little sense when applied across the derivative work spectrum.”¹³⁷ The Supreme Court gave great deference to the Congressional intent and Congressional history of the renewal provision of the 1909 and 1976 Copyright Acts, finding that Congress clearly intended “to give [an author] fair remuneration for his creative efforts and to provide his family, or his executor absent surviving family, with a ‘new estate’ if he died before the renewal period.”¹³⁸

Petitioners had contended that any right that Abend had to sue for infringement had been extinguished by their creation of a new work. However, the Court stated that “absent an explicit statement of congressional intent that the rights in the renewal term of an owner of a pre-existing work are extinguished when his work is incorporated into another work. . . [it] is not the role of [the Supreme Court] to alter the balance [that] Congress has labored to achieve.”¹³⁹ Petitioners had further contended that their exploitation of “Rear Window” constituted fair use authorized under 17 U.S.C. §107.¹⁴⁰ However, the Court rejected that argument because the motion picture did not fall into any of the fair use categories enumerated in 17 U.S.C §107 (1988 ed.)¹⁴¹

C. Implications of the Abend Rule

The ruling in *Abend* followed the previous Supreme Court ruling in *Miller*, which forbade the creation and exploitation of a derivative work absent the permission of the statutory successor of the author who died before the renewal period commenced. However, the *Abend* decision will only have implications until December 31, 2072.¹⁴² In the U.S., this ruling had great significance because it protected the interests of widows, heirs and successors of deceased authors against the unauthorized creation and exploitation of derivative works based on their underlying work.¹⁴³ How-

¹³⁷ *Id.* at 209.

¹³⁸ *Id.* at 208.

¹³⁹ *Abend*, 495 U.S. at 208.

¹⁴⁰ *Id.* at 210.

¹⁴¹ *Id.* (“Criticism, comment, new reporting, teaching, scholarship, or research. . . [n]or does it meet any of the nonexclusive criteria that §107 requires a court to consider.”).

¹⁴² *See supra* note 16.

¹⁴³ *See supra* note 116.

ever, the debate regarding the exploitation of these derivative works abroad is still raging.

IV. THE POST-*ABEND* DICHOTOMY IN NATIONAL AND TRANSNATIONAL COPYRIGHT LAW

In the aftermath of *Abend* the motion picture studios accepted their defeat in the U.S. However, they contend that this decision does not prevent them from creating motion pictures that are derivatives of other literary works, such as "Rear Window," and then exploiting those works in foreign countries.¹⁴⁴ Sheldon Mittleman, counsel for Universal Pictures, stated that *Abend* only limited the exploitation of such derivative works within the U.S. but allowed their exploitation abroad.¹⁴⁵ For obvious reasons, authors and other copyright owners disagreed and argued that *Abend* applied at home and abroad.

The confusion that *Abend* has caused in the realm of international copyright needs to be settled. Without one recognized rule on the creation and exploitation of derivative works, a person or entity might have the right to exploit a literary work and create a motion picture for exploitation in a foreign country, while the same action in the U.S. would result in a copyright infringement action. Clearly, the dichotomy regarding how to apply *Abend* needs to be addressed and a solution must be offered.

V. *ABEND* IS NOT IN CONFLICT WITH TRANSNATIONAL COPYRIGHT LAW

Much to the chagrin of the motion picture studios, *Abend* and the select conventions governing transnational copyright law are not in conflict. In fact, the creation and exploitation of works in foreign countries must adhere to the settled principles in *Abend*. To settle this rift in legal understanding, the relevant transnational copyright treaties need revisiting.

¹⁴⁴ Elliot S. Blair, *The Effect of 'Abend' Ruling on U.S. and Foreign Studios*, NEW YORK LAW JOURNAL, Mar. 6, 1992, at 5.

¹⁴⁵ *Id.* ("the Supreme Court's interpretation of the copyright law applies only in the United States. . . [i]nterestingly enough that is not the law in the rest of the world. . . [t]he studio can distribute 'Rear Window' in every country in the world – in Canada, England, anywhere – except in the U.S.").

A. *The Berne Convention*

With 159 contracting parties, the Berne Convention has the largest reach of any intellectual property protection agreement.¹⁴⁶ Furthermore, with all of the major English speaking territories as contracting parties, it is of great importance how Berne interacts with the U.S. Supreme Court holding in *Abend*.¹⁴⁷

Berne states that the protection of a copyrighted work “in the country of origin is governed by domestic law.”¹⁴⁸ This means that a work copyrighted in Country A is governed by the law of Country A. Berne also states that “the works mentioned [in this convention] shall enjoy protection in all countries of the Union. . . [and] this protection shall operate for the benefit of the author and his successors in title.”¹⁴⁹ The Berne Convention does not contain any provisions that specify who an author’s successors may be. Therefore, under the language of Berne one must defer this determination to the “domestic law” of the “country of origin” of the copyright.¹⁵⁰ Using any other method to determine who the proper rights holder might be would yield inconsistent results. It is unthinkable that someone who is regarded as the rights holder in the U.S. would not be deemed to be the rights holder in Belgium.

Applying this reasoning to the facts of *Abend*, if petitioners intended to license “Rear Window” for broadcast on BBC One in England, the BBC would have to examine the chain of ownership through the eyes of the Supreme Court’s ruling in *Abend*. After doing so, the BBC could only conclude that under the domestic law of the U.S., the successor in title and true copyright holder to the underlying story of “Rear Window” is Sheldon Abend.

Berne specifically mentions motion pictures in Article 14 and Article 14^{bis}. However, Article 14^{bis} (2)(a) appears to go against the claim that *Abend* protects motion pictures that are copyrighted in the United States and exploited both at home and overseas. Arti-

¹⁴⁶ WIPO, Treaty Statistics, http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en (last visited Mar. 8, 2005).

¹⁴⁷ See Blair *supra* note 144 (“[I]t is recognized in the industry that the major English-speaking territories (and Spain) taken collectively with the other countries, such as France, Italy, Germany, Sweden and Japan, comprise what is generally considered the most important foreign territories for exploitation and which produce significant income sources for motion pictures produced in the United States.” All of these countries are contracting parties to Berne.).

¹⁴⁸ Berne Convention, art. 5(3).

¹⁴⁹ Berne Convention, art. 2(6).

¹⁵⁰ See *supra* note 148.

cle 14^{bis} (2)(a) provides that "ownership of a copyright in cinematographic work shall be a matter for legislation in the country where protection is claimed."¹⁵¹ Nevertheless, Berne states that "in the country of origin [the exploitation of motion pictures] is governed by domestic law."¹⁵² In other words, it is only in the country of origin of a copyrighted work that the true rights holder to a motion picture can be determined. Protection under Berne is predicated on the copyrightability of a work in the country of origin. Therefore, the true owner to a work can only be dictated by the laws of the country of origin. Even though the protection of a cinematographic work is governed by the law of the country where protection is being sought, those laws can only inure to the benefit of the rights holder as dictated by the law of the country of origin.

B. *The Rule of the Shorter Terms*

One of the main features of Berne, and one of the reasons its adoption by the U.S. was so contentious,¹⁵³ is that it requires all contracting states to offer a term of protection of at least fifty years plus the life of the author.¹⁵⁴ However, the contracting states have the ability to offer a lengthened term of protection.¹⁵⁵ Many countries, including the U.S., have increased the term of their protection.¹⁵⁶

When a copyrighted work is exploited in a territory other than its country of origin the default rule under Berne is that the term of protection for that work "shall be governed by the legislation of the country where protection is claimed."¹⁵⁷ For instance, absent any legislation or bilateral agreement to the contrary, a work copy-

¹⁵¹ Berne Convention, art. 14^{bis}(2)(a).

¹⁵² See *supra* note 148.

¹⁵³ See *supra* Section II(C).

¹⁵⁴ Berne Convention, art. 7(1) ("The term of protection granted by this Convention shall be the life of the author and fifty years after his death.").

¹⁵⁵ *Id.* at art. 7(8) ("The countries of the Union may grant a term of protection in excess of those provided.").

¹⁵⁶ 17 U.S.C.A. § 302(a) (1976) (Currently copyrights registered in the U.S. "endure for a term consisting of the life of the author and seventy years after the author's death."). Belgium, Denmark, Finland, Germany, Ireland, Italy, Spain, Sweden, and the United Kingdom have all lengthened their copyright terms which now "run for the life of the author and for seventy years after his death." A28 E.C. Directive Harmonizing The Term of Protection of Copyright and Certain Related Rights, Council Directive 93/98/EEC of 29 October 1993 (hereafter E.U. Directive), reprinted in PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE (Oxford University Press 2001).

¹⁵⁷ Berne Convention, art. 7(8).

righted in Country A, where the term of protection is fifty years plus the life of the author, will be protected in Country B, where the term of protection is seventy years plus the life of the author, for seventy years plus the life of the author.¹⁵⁸ This is consistent with Berne's general operating principle of "national treatment, under which a foreign copyright claimant will receive in the protecting country the same treatment the country gives to its own nationals."¹⁵⁹

However, Article 7 of Berne sets out an exception to this principle of national treatment. Under Article 7(8), "the term [of copyright] shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."¹⁶⁰ Called the rule of comparison of terms, or more commonly the rule of the shorter term, it "permits countries with longer terms to limit protection of foreign works to the shorter term of protection granted in the country of origin."¹⁶¹ However, the rule of the shorter term needs to be affirmatively adopted by the country in which protection is claimed. Thus, only if Country A, where there term of protection is seventy years plus the life of the author, has adopted the rule of the shorter term, will a work which is copyrighted in Country B, where the term of protection is fifty years plus the life of the author, be protected in Country A for the shorter "life plus fifty" term.

On October 29, 1993, the European Union ("E.U.") issued a directive to all of its members in order to "harmonize their laws by adopting an author's life plus seventy year copyright term."¹⁶² In the directive, the Council of the European Communities explained that "the minimum term of protection laid down by. . . Berne. . . was intended to provide protection for the author and the first two generations of his descendents. . . [and] the average lifespan in the [c]ommunity has grown longer to the point where this term is no longer sufficient to cover two generations."¹⁶³ Included in the directive was the adoption of the rule of the shorter term. Now, if

¹⁵⁸ *Id.*

¹⁵⁹ GOLDSTEIN, *INTERNATIONAL COPYRIGHT* at 238-39.

¹⁶⁰ *See supra* note 157.

¹⁶¹ S. REP. NO. 104-315 at 7 (1996), available at LEXSEE 104 S.RPT. 315.

¹⁶² *See generally* E.U. Directive; Sue Ann Mota, Article: *Is the Copyright Term Extension Act Constitutional*, 12 ALB. L.J. SCI. & TECH. 167, 170 (2001).

¹⁶³ *See* E.U. Directive at 5.

copyright protection in a work is claimed in an E.U. nation, and the country of origin only uses the Berne minimum term of fifty years plus the life of the author, the work will only be protected in that E.U. nation for the shorter term of the country of origin.¹⁶⁴

An analogous provision is found in the UCC,¹⁶⁵ to which the U.S. is a party. However, with its withdrawing from UNESCO on December 31, 1984,¹⁶⁶ the U.S. does not have any voice over the operations of the UCC.¹⁶⁷ The effect of the rule of shorter terms on international copyright protection was addressed by the French Supreme Court in their 1975 case of *Galba Films v. Friedman*.¹⁶⁸ *Galba* dealt with a number of Buster Keaton films that were in the public domain in the U.S., their country of origin. The court ruled that these films were no longer protected by copyright law in France because "French law does not recognize the exclusive rights to a work that is in the public domain in the country of origin where it was disseminated for the first time."¹⁶⁹ This ruling was a direct application of the rule of shorter terms. In an analysis of the *Galba* decision, French Law Professor Andre Francon examined the ruling and argued that even without the rule of the shorter terms present in the UCC the French court would have come to the same conclusion.¹⁷⁰ Applying the reasoning of the French Supreme Court, one can infer that the Court intended that the determination of the true copyright holder be dictated by the law of the country of origin. Applying this reasoning to *Abend* it is clear that in France the true rights holder to the underlying story of "Rear Window" is once again Sheldon Abend.

Professor Robert Plaisant supported this proposition and stated that following the *Abend* ruling, exploitation of a literary work such as "It Had to be Murder" without the consent of

¹⁶⁴ The E.U. Directive was adopted in 1993, five years before the adoption of the Sonny Bono Copyright Term Extension Act in the United States. Therefore, for five years, works protected under the U.S. Copyright Act only received a protection term of fifty years plus the life of the author in the E.U.

¹⁶⁵ See *supra* note 78.

¹⁶⁶ Jay M. Vogelsson, Article: *Section Recommendations and Reports*, 30 INT'L LAW. 676 (1996) (A resolution by the American Bar Association Committee on International Institutions urging the United States to rejoin UNESCO).

¹⁶⁷ See *supra* note 78.

¹⁶⁸ Paul Torremans, *The Law Applicable to Copyright* (citing S.A. Galba Films v. Friedman, (1975) 83 RIDA 106), http://www.blaca.org.uk/_forthcoming_meetings/Paul%20Torremans%2013012005.pdf (last visited Mar. 8, 2005).

¹⁶⁹ See *supra* note 144.

¹⁷⁰ *Id.*

Abend's successors would constitute infringement under French law.¹⁷¹ Copyright experts from numerous other countries agree that under the rule of the shorter term, once a person reacquires rights to a copyrighted work in the country of origin, those rights would revert in all countries where protection for that work or derivative works based on that work is sought.¹⁷²

With analogous provisions in the UCC and Berne, and the E.U.'s voluntary acceptance of the rule of the shorter term, it is clear that when an author, or the author's family or assignees, reacquires rights to a work in the country of origin, then those rights in all foreign nations are reacquired by the same party. Following *Abend*, when an author who assigns or licenses his or her work dies before the renewal period begins, the rights to that work vest with the family or legatees of the author; therefore, the rights in all foreign nations vest in the heirs of the author.

C. *TRIPs*

On the issue of copyright, TRIPs defers to the substantive provisions of Berne;¹⁷³ therefore the arguments posed in this note for the worldwide adherence to *Abend* through Berne hold true for TRIPs as well.¹⁷⁴

D. *North America Free Trade Agreement*

With two friendly countries bordering the U.S., Canada and Mexico, trade within North America is an important revenue stream for those that deal in intellectual property. Trade between the U.S. and Canada totals about \$1.4 billion per day,¹⁷⁵ while trade between the U.S. and Mexico amounted to more than \$250 billion per year in 2003.¹⁷⁶

While the majority of goods and services traded are tangible items, such as agricultural products, intellectual property comprises a significant portion of trade through the exportation of American

¹⁷¹ *Id.*

¹⁷² *Id.* (Robert Plaisant and Henri Debois of France, Professor Ugene Ulmer of Germany, Professor Svante Bergstrom of Sweden, Valerio DeSanctis of Italy, and Teruo Doi of Japan).

¹⁷³ TRIPs, art. 9 ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.")

¹⁷⁴ TRIPs refers to the "author" of a work only once in art. 11 regarding rental rights.

¹⁷⁵ *Saturday Mailbox*, THE BALTIMORE SUN, Dec. 18, 2004 at 14a.

¹⁷⁶ Tim Weiner, *A Nation at War: The Mexican Borders; U.S. and Mexico Coordinate Military Efforts for Mutual Protection Against Terror*, N.Y. TIMES, Mar. 23, 2003, at B13.

motion pictures, music, and television to Mexico and Canada. With the passage of the North American Free Trade Act ("NAFTA") in 1994, trade within North America flourished.¹⁷⁷ The framers of NAFTA saw intellectual property as an important commodity within North America and included a section on intellectual property in the final version.

Part Six of NAFTA deals exclusively with intellectual property, and provides that "[e]ach Party shall provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."¹⁷⁸ NAFTA further requires parties to "provide adequate and effective protection and enforcement of intellectual property rights, [and] each Party shall, at a minimum, give effect to. . .the substantive provisions of. . .the *Geneva Convention*. . .the *Berne Convention*. . .[and] the *Paris Convention*."¹⁷⁹ The protection afforded copyrights under NAFTA enables the free trade of ideas between the U.S., Mexico, and Canada and "foster[s] creativity and innovation, and promote[s] trade in goods and services that are the subject of intellectual property rights."¹⁸⁰

The provision of most importance to the protection of derivative works under NAFTA is Article 1705.5, which says that "[e]ach Party shall confine limitations or exceptions to the rights provided for in this Article to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the *right[s] holder*."¹⁸¹ NAFTA is silent as to how to properly determine the true rights holder. The only rational way to interpret the silence is that in order to determine the true rights holder of a work, one must defer to the laws of the country in which the copyright is registered. Interpreting this any other way would yield inconsistent results, and "greatly prejudice

¹⁷⁷ International Trade Canada, *Overview of the NAFTA*, <http://www.dfait-maeci.gc.ca/nafta-alena/over-en.asp> (last visited Mar. 8, 2005).

¹⁷⁸ North American Free Trade Agreement, Dec. 8-17, 1992, U.S.-Can.-Mex., ch. 11, 32 I.L.M. 605 (1992) [hereinafter NAFTA], Ch. 17, art. 1701.1 ; NAFTA art. 201 defines Party as "mean[ing] a national, or an enterprise of a Party." National is defined as "a natural person who is a citizen or permanent resident of a Party."

¹⁷⁹ NAFTA, ch. 17, art. 1701.2 (emphasis added).

¹⁸⁰ *Id.* at pmb1.

¹⁸¹ *Id.* at ch. 17, art. 1705.5 (emphasis added).

the legitimate interests of the right[s] holder”¹⁸² by allowing others to benefit from his or her work against his or her wishes. Under *Abend*, the author’s heirs properly hold the rights to a work assigned by the author to a third party where the author died before the renewal period commenced. It is clear that any other interpretation of international copyright law will unjustly “prejudice the legitimate interests of the right[s] holder.”¹⁸³

Canadian copyright law further bolsters the idea of an author’s second bite at the apple. In the Canadian Copyright Act there is a clear provision that supports the second chance theory enumerated by the U.S. Congress.¹⁸⁴ Canadian copyright law provides a “reversionary interest” in the copyright for the author’s legal representatives as part of his or her estate after a period of twenty-five years following the death of the author.¹⁸⁵ This reversionary interest is very similar to the non-waivable right that an American author or the author’s family has to terminate any transfers or licenses granted by the author after thirty-five or forty years.¹⁸⁶ Based on the Congressional intent that authors should have a second bite at the apple,¹⁸⁷ we can only infer that the Canadian government intended the very same thing. The inclusion of such a clause in the Canadian Copyright Act clearly exhibits Canadian support for the reversionary interest that both the U.S. Copyright Act and *Abend* reserved for the heirs of authors with copyrights registered in the U.S. Copyright Office.

E. *The Doctrine of Comity*

The doctrine of comity is defined as “the recognition that one sovereignty allows within its territory to the legislative, executive,

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See supra* note 17.

¹⁸⁵ Canadian Copyright Act, Chapter C-42, 14(1).

Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, other than by will. . . is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of the period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

¹⁸⁶ 17 U.S.C. § 203 (1976).

¹⁸⁷ H.R. REP. NO. 222, 60th Cong., 2d Sess. 14 (1909).

or judicial act of another sovereignty, having due regard to the rights of its own citizens."¹⁸⁸ However, this doctrine is not an obligation placed upon nations, nor is it merely a matter of benevolence, but it is "the recognition which one nation allows within its territory to the legislative, executive, or *judicial* acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens or of other person who are under the protection of its laws."¹⁸⁹ Justice Joseph Story states that the doctrine of comity is a practice by the judiciaries of a territory, but the adoption of these acts is not simply an adoption by the court but an adoption by the entire nation.¹⁹⁰ Furthermore, nations should adopt acts of foreign territories and presume that their adoption is sanctioned by the government, unless there is a rule to the contrary, or the adoption of these rules is "repugnant to its policy, or prejudicial to its interest."¹⁹¹

The doctrine of comity, as stated above, should be applied to copyrighted works in the same situation as "It Had to Be Murder." Adopting the Supreme Court ruling in *Abend* would not prejudice the interest of any country; in fact it would be beneficial to that country. By applying the doctrine of comity, foreign nations would be benefiting from the certainty that it creates in the intellectual property market. Without *Abend*, the process of obtaining worldwide rights to a motion picture would be piecemeal, and one would have to negotiate with more than one party to obtain those rights. Taking into account the cost of legal fees, this would significantly raise the transaction costs and greatly hinder the creation, exploitation, and dissemination of creative works worldwide. With the identification of the true rights holder in the country of origin, and the recognition of the country of origin's ruling on who the proper rights holder is, anyone willing to exploit a work based on that underlying work would know exactly to whom to turn.

¹⁸⁸ Ryan Beard, Comments: *Reciprocity and Comity: Politically Manipulative Tools for the Protection of Intellectual Property Rights in the Global Economy*, 30 TEX. TECH L. REV. 155, 156 (1999) (citing *Nowell v. Nowell*, 408 S.W.2d 550, 553 (1966)).

¹⁸⁹ *Id.* at 165-66 (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)) (emphasis added).

¹⁹⁰ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAW, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENT, §38 (eds. Charles C. Little and James Brown, Boston, MA, 3rd Edition, 1846).

¹⁹¹ *Id.*

F. *Policy Argument*

The efficient, fair, and unhindered creation of and trade in intellectual property is a major concern of many international organizations. The preamble of the TRIPs agreement states that WTO members desire to “reduce distortions and impediments to international trade, and tak[e] into account the need to promote effective and adequate protection of intellectual property rights, and. . .ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”¹⁹² NAFTA requires that all parties to the agreement “ensur[e] that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade.”¹⁹³ Berne takes these goals a bit further, stating that the “countries of the Union. . .desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”¹⁹⁴ What better way to achieve these goals than to promote a degree of certainty in the market for intellectual property?

Without the international acceptance of the ruling in *Abend*, the misidentification of the true holder of rights in an intellectual property work might impede international trade in intellectual property.¹⁹⁵ An inconsistency in the identification of a work’s true rights holder would require producers, musicians, and any other parties wishing to create and exploit a derivative work to negotiate with more than one party to ensure that they are not sued for infringing on anyone’s rights. Due to the high cost of negotiations, people might be dissuaded from creating derivative works of older material for just this reason.

In the motion picture industry, movie distributors disseminate motion pictures both nationally and internationally. Before a distributor agrees to distribute a motion picture it requires proof that

¹⁹² See *supra* note 56.

¹⁹³ See *supra* note 178.

¹⁹⁴ Berne, at pmbl.

¹⁹⁵ Only works that were copyrighted under the old two-term copyright regime and were subsequently assigned by the authors would be affected by the discrepancy; *but see* David G. Savage, *Supreme Court Rules Against Classic Film Owners, Law: The Distributors of ‘Rear Window’ Must Share Earnings From the Film’s Re-Release with a Literary Agent. Some Claim the Ruling Could Limit the Availability of Old Movie. Thousands of Works Could be Affected*, L.A. TIMES, Apr. 25, 1990 at F1 (“Stephen A. Kroft, a Beverly Hills attorney who represented the major Hollywood studios in [*Abend*], said thousands of old movies, as well as records, plays based on novels and textbooks could be affected by the ruling.”).

the rights holders to any material contained in the final cut of the motion picture consented to the use of their material. If there is any inconsistency in the identification of rights holders, the distributor can withhold that motion picture from distribution. This is a clear example of "measures [meant] to enforce intellectual property rights. . .becoming barriers to legitimate trade."¹⁹⁶ If the international community accepts one consistent rule, *Abend*, then any work's true rights holder can be more easily identified and consent can be most efficiently obtained.

International acceptance of the *Abend* rule will also protect the "rights of authors in their literary and artistic works."¹⁹⁷ By accepting and following *Abend* and ensuring that authors and their families receive their deserved second bite at the apple, the rights of authors will be protected. By protecting these rights and ensuring that authors receive full compensation for uses of their works, authors will be given a further incentive to create and more creativity will be encouraged.

While encouraging creativity is beneficial, a balance must be struck between fostering creativity and stifling the use of these creative works in derivative works, such as motion pictures. The motion picture studios argue that adhering to *Abend* will stifle the creation of future motion pictures based on older works.¹⁹⁸ This will only hold true if the studios make it so. Ensuring that the proper rights holder receives due compensation for the use of their works *will not* cause the gears of Hollywood to grind to a halt as the studios would like the world to believe. The rights holder will just become another member of the royalty pool that is a feature of almost every deal made in Hollywood.¹⁹⁹ The motion picture studios should realize that abiding by *Abend*, both domestically and abroad, is the only way to ensure that trade in intellectual property remains unhindered, and the constitutional purpose of copyright be fulfilled by "promot[ing] the Progress of Science and useful Arts, by securing for limited times to *authors* and inventors the exclusive right to *their* respective writings and discoveries."²⁰⁰

¹⁹⁶ See *supra* note 192.

¹⁹⁷ See *supra* note 194.

¹⁹⁸ See *supra* note 195 ("The practical effect of [Abend] might be to keep a lot of old works on the shelf," Louis P Petrich, attorney for Stewart and Hitchcock's heirs, said.).

¹⁹⁹ The proceeds of all Hollywood films, as defined by the parties involved, are split between many of the parties involved in the production of the film.

²⁰⁰ U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

VI. SUGGESTIONS

While it is clear that *Abend* can be extended to the realm of international copyright, conclusive statements are needed by the international bodies that regulate the international intellectual property arena. Pursuant to Article 24 of Berne, the International Bureau is the entity to make such a conclusive statement. One role that Berne gives to the International Bureau is to “conduct studies, and . . . provide services, designed to facilitate the protection of copyright.”²⁰¹ Furthermore, the WTO also possesses a decision-making body where disputes can be settled pursuant to TRIPs Article 64.

The author of this note calls upon the decision-making bodies of both the WTO and WIPO to settle this dispute pursuant to the opinions stated in this article. While the facts of *Abend* might be very specific and rare, “thousands of old movies, as well as records, plays based on novels and textbooks could be affected by the ruling.”²⁰² With works copyrighted under the old two-term regime set to last until December 31, 2072,²⁰³ a single consensus must be reached. With the vast majority of worldwide intellectual property being traded between members of both Berne and TRIPs, a decision on the international issues brought up by *Abend* will ensure that trade in intellectual property will remain strong and unhindered.

VII. CONCLUSION

The disagreement between authors families and the motion picture studios comes down to a question of who is the true rights holder to the copyrighted work. On one hand, an authorized creation of a derivative work deserves its own copyright under the U.S. Copyright Act, and those who create derivative works should not be penalized. On the other hand, the Copyright Act did give a renewal provision that was intended “to give a work’s creator a second chance to benefit from the work and from any changes in its market value by renegotiating any contracts for derivative works.”²⁰⁴ Nevertheless, the U.S. Supreme Court, international

²⁰¹ Berne Convention, art. 24.

²⁰² See *supra* note 195.

²⁰³ See *supra* note 16.

²⁰⁴ Linda Greenhouse, Final Twist in ‘Rear Window’ Case, N.Y. TIMES, Apr. 25, 1990, at D1.

agreements governing copyright, and a sound public policy all clearly point to the conclusion that an author's heirs should oversee and consent to the dissemination and exploitation of the author's work. All entities wishing to exploit a work or a derivative work based on an underlying work that was assigned by an author who failed to live past the commencement of the renewal period must get the consent of the author's legal heirs. While this may increase the initial transaction costs, the benefit posed by the market certainty is of an extremely broad benefit. Now, motion picture studios that receive the consent of the author's family will be certain that they can exploit their motion pictures internationally without concern for copyright infringement suits brought by the author's heir or statutory successors.

When trying to bolster their position, the motion picture studios tend to vilify the families of authors who demand money for the rights to use their works. At its essence, the motion picture industry is arguably a money-making venture and everyone would like to see some financial remuneration for their contribution to a film. Following the *Abend* decision, experts believed that "novels, short stories, plays and songs created before 1978 would be worth less money as a result of the ruling because heirs of the original authors could demand a new fee for licensing rights. . .[and now] such copyrighted works are suddenly 'very risky works to incorporate into movies.'"²⁰⁵ While this may be true to some extent, it is a small price to pay for the "promot[ion of] the progress of science and useful arts."²⁰⁶ After all, shouldn't it be all about the art?

²⁰⁵ *Id.*

²⁰⁶ U.S. CONST. art. I, §8, cl. 8.

