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# **Breakout Session: International Treaties, Copyright Law, and the Future of the U.S.A. Presented by Kenneth D. Crews, attorney, Gipson Hoffman and Pancione**

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## **International Treaties, Copyright Law, and the Future of the U.S.A.**

In this informative session, international law expert Dr. Kenneth D. Crews led the audience through a brief history and overview of the international copyright system, which directly shapes U.S. copyright law, and then outlined recent developments in international copyright.

U.S. laws originate in Congress, with interpretations established through court rulings. Although copyright law is domestically created, applied, and enforced by individual nations, the international copyright system exerts a broad influence. As Dr. Crews explained, the system is designed to “achieve harmonization of the law” for the predictability and comparability of participating nations’ copyright provisions. For some agreements, member nations must collectively agree on international-level provisions and individually revise local laws as necessary to reflect the agreements. Because of this, changes at all levels can take time to adopt and subsequently enact.

The development of copyright laws in individual nations may be shaped by several factors, including their histories and political agendas, as well as the legislative actions of nations in close geographic proximity. It is not unusual for nations to adopt legal provisions similar to those of their neighbors. French and British customs and laws have been particularly influential in copyright law, both in their former colonies and in other countries around the world.

A single worldwide standard of copyright protection for works does not exist. However, the Berne Convention for the Protection of Literary and

Artistic Works, enacted in 1886, established some important international copyright standards for its nation members. As acceding to the Berne Convention required substantial changes to U.S. copyright law, the United States did not ratify the treaty until enactment and implementation of the U.S. Berne Convention Implementation Act of 1988. In the interim, the United States and other nations conformed to some Berne Convention principles under the Universal Copyright Convention of 1952. The United States first offered copyright protection to some non-U.S. citizens through the International Copyright Act of 1891. Today, the Berne Convention is administered by the World Intellectual Property Organization (WIPO), which has 191 member countries—nearly every nation in the world.

In addition to setting minimum standards of copyright protection, the Berne Convention calls for protection the moment a work is created and allows countries to require that it be fixed in a tangible medium. Berne also requires that members recognize a work's copyright status as determined by the nation in which it is created or published and requires recognition of copyright without registration. "National treatment" provides a scope of protection that establishes reciprocal copyright protection for member nations' works. When physically located in the United States, works published in other member countries are protected under U.S. copyright law and are subject to domestic limitations, including fair use. Similarly, U.S. works physically located in another country are protected under that country's copyright law.

Harmonization of copyright law is also achieved through standardized copyright protection duration, which the Berne Convention stipulates in general will remain in effect for at least 50 years following an author's death. Historically, the United States was resistant to this requirement, as U.S. law did not contain a similar provision. The concept originated in France prior to enactment of the Berne Convention and evolved to a duration of life plus 70 years after death when the powerful European Union issued a directive in 1993 binding in its 28 member nations. The directive ultimately proved a significant influence on other nations, including the United States, which adopted the same extension in 1998.

The international copyright system is not limited to the Berne Convention, nor is it limited to multinational cooperative agreements. International copyright agreements may be enacted through treaties, national executive orders, regional agreements, and other legally binding instruments between two or more participants. Copyright and intellectual property provisions may be embedded in agreements that cover topics tangential to copyright, such as free trade agreements. This bundling of provisions forces a nation member to accept the collective terms or to exit the treaty altogether.

Most treaties include various copyright provisions but do not explicitly address exceptions to copyright law. A “three-step test” in several international instruments, including the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, broadly governs members’ ability to create exceptions to copyright, allowing them only: “(a) in certain special cases, provided that (b) such reproduction does not conflict with a normal exploitation of the work and (c) does not unreasonably prejudice the legitimate interests of the author.”

Many nations have enacted copyright law exceptions similar to fair use. Ambiguity in the three-step test makes it challenging to determine whether a nation’s copyright exceptions violate the rule. The World Trade Organization (WTO) oversees copyright exception complaints brought against its members and may require them to change or retract their national law. However, this does not guarantee that the conflicting laws will be changed. One 2001 WTO ruling only resulted in U.S. payment of penalties and royalties to international companies, not any changes to the law. This development supports the notion that when nations are out of compliance with treaty provisions, enforcement can be difficult to achieve.

WIPO’s landmark 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) specifically addressed limitations and exceptions to copyright law to benefit print-disabled individuals. The treaty was under development for nearly 10 years prior to its adoption and underwent numerous iterations. Although this treaty addresses only one important issue, it may set a precedent for specifying exceptions to copyright law in future international instruments.

The U.S. Copyright Act includes copyright exceptions that allow libraries and archives to make copies for preservation, research, and study; provide self-service copying machines; and lend and borrow materials from other libraries (interlibrary loan). Section 108 embodies these provisions for libraries and archives, and it was enacted in the U.S. Copyright Act of 1976, 20 years after Britain first established a similar provision.

In 2008, Dr. Crews was commissioned by WIPO to review worldwide copyright law exceptions, including those related to libraries and archives. To date, Dr. Crews has completed three reports detailing his findings.<sup>1</sup> Although his research is ongoing, Dr. Crews shared some interesting recent findings: 188 WIPO nations have statutes that address copyright ex-

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1. The most recent and most complete study was completed in 2017 and is available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=389654](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=389654). The second study, published in 2015, is available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=306216](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216). The first study, from 2008, includes an extensive introduction and explanation of the issues that remain relevant: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192).

ceptions. Of those, 156 have provisions that explicitly address exceptions for libraries and archives, including many Latin American nations. A handful of nations—including Canada, Russia, the United Kingdom, Japan, and France—have innovative statutes for library and archives exceptions. Fifty-six WIPO nations, including several countries in Africa that are former British or French colonies, have more general, nonspecific provisions that focus mainly on preservation and copies for research and study. Thirty-two nations have no library and archive exception provisions at all.

Dr. Crews emphasized that for now, there is no international consensus for creating a standardized instrument to govern copyright exceptions for libraries and archives. Although some member nations are in favor of creating a treaty on par with Marrakesh, others prefer a non-treaty approach. The United States has not taken a strong position. Dr. Crews feels certain that whatever the solution may be, it will take time.