

Primer on International Copyright and Related Rights

To Kirstine

Primer on International Copyright and Related Rights

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Preface

This book is an edited version in English of my contributions to the book *International ophavsret*, which I co-wrote with Peter Schønning and published in Danish in 2011. While the original book covered both European and international copyright and related rights, this English-language edition covers only international law on the subject matter. The book is primarily written for students and practitioners who need an introduction and an overview before possibly engaging in more in-depth studies in the existing and frequently much more detailed literature. This also explains the thematic way in which the presentation is structured. The international norms are discussed in an order which readers with a basic knowledge of national copyright law hopefully will experience as familiar. Perhaps the book is slightly more radical in that it maintains throughout a parallel discussion of the norms of copyright and related rights, where in books on national law the latter are typically discussed only after finalizing the discussion of the former. I believe that the thematic grouping of both types of rights is well suited to the needs of practitioners who more often than not will have questions relating to numerous different categories of rights, say, for example, regarding rights in a film or television production. Furthermore this structuring of the discussion often leads to useful comparisons of the two regimes which will facilitate the student's understanding.

The text is not overly burdened by references to the sources where information may be confirmed or further studies done. Instead, at appropriate places, suggestions of suitable works for further study are offered. When possible, these suggestions concentrate on recent works in English, in order not to rely too much on works that may be out of reach for many readers.

The book deals with all the international multilateral treaties in the field, which are in force or otherwise can be considered of general interest, including the ACTA Agreement, the Beijing Treaty on Audio-visual Performances and the Marrakesh VIP Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. Purely regional instruments, however, are not

analyzed, and neither are such older treaties which have lost their practical importance, including notably the Universal Copyright Convention.

I am grateful to the Centre for Information and Innovation Law at the Faculty of Law, University of Copenhagen, for the excellent facilities for research and authorship, which they have granted me with the title of Honorary Professor, and to my colleagues at the Centre for their support and encouragement. I am also, and in particular, grateful to Professor Victor Nabhan, the President of ALAI, for gently pushing me into this publication project in the first place, and not least, to Dr Mihály Ficsor for teaching me the ropes of international copyright while he was my supervisor at the International Bureau of WIPO.

I also wish to express my deep appreciation for the able and helpful staff at Edward Elgar Publishing.

Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement, Tokyo 2011
The Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works, Paris Act 1971
BTAP	The Beijing Treaty on Audiovisual Performances, Beijing 2012
ICJ	The International Court of Justice
ILO	International Labour Organization (Office)
ITU	International Telecommunication Union
The Marrakesh VIP Treaty	The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled, Marrakesh 2013
The Phonograms Convention	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva 1971
The Rome Convention	The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome 1961
The Satellites Convention	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels 1974
The TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh 1994
UCC	The Universal Copyright Convention, Paris 1971
UN	The United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
USC	United States Code
The Vienna Convention	Vienna Convention on the Law of Treaties, Vienna 1969

WCT	WIPO Copyright Treaty, Geneva 1996
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty, Geneva 1996
WTO	World Trade Organization

PART I

Introduction and the general framework

1. Introduction

National copyright protection has been around since the late fifteenth century, when the first privileges to print specific books were issued, and not long ago those interested in copyright were able to celebrate the 300th anniversary of the world's first copyright statute, the 1710 Statute of Anne. With few exceptions, national legislation in the field protected only national works, and for many years most countries left foreign works unprotected, unless they had acquired a particular local affinity, for example by being first published in the country. This was a troublesome and unsatisfactory situation for the authors and their publishers, because by then music, fine arts, drama and texts already frequently crossed borders and were used abroad, whether in the original form or in translation, or otherwise in adapted versions.

In the nineteenth century some governments started to react to this situation, first by making bilateral agreements and later by adopting multilateral conventions for the purpose of securing mutual international protection of works from other contracting countries. As from the 1960s, the related (or neighbouring) rights of performers, producers of phonograms and broadcasting organizations were also included in this system of international protection through international conventions of their own. The historical development is further discussed in Chapter 2, but let it already here be noted that it has resulted in a complex situation with a large number of mutually supplementing, but also overlapping and sometimes inconsistent international agreements, treaties and conventions (in the following referred to as instruments, for lack of a better generic term). In this book regional and obsolete instruments are not discussed, but it still leaves ten different instruments for perusal and analysis.

Most commonly, the international instruments were built on, and to some extent codified, the preceding developments in the national law of the contracting states, but some instruments were taken a step further to show the way for future national law in their respective fields. An example is the 1961 Rome Convention, which at a time when only few countries had national protection of related rights, laid a foundation of such protection that still stands and carries an elaborate construction, continuously developed over the years.

Another example, which also negates the almost axiomatic assumption that law is always lagging way behind technology, is the WIPO Internet Treaties, the WCT and WPPT. In 1996 they established the basic norms for copyright and related rights on the internet, only a couple of years after the development of the World Wide Web kick-started the use of the internet outside narrow university and research circles. Obviously these norms have not solved all the problems linked to the internet, but neither were they were supposed to. Finding the appropriate business models has given daunting challenges to the right owners, and implementing the general and flexible rules of the Treaties has also been difficult for national legislators.

It is a fundamental element in international instruments, outside the field of regional and in particular European law, that they provide norms for relations among sovereign states only, and cover neither relations between private individuals nor those between such individuals and states. Accordingly, when the international instruments on copyright and related rights, for example, require national treatment or certain minimum rights, such provisions create no rights for the nationals of the contracting states. They are only binding on the national legislators whose task it is to transfer them into national law.

As discussed in Chapter 3, one way of doing this is by letting national law refer to the law under the international instruments, thereby making them a part of national law. This may be done at the level of the relevant specialized legislation on copyright and related right, but in some countries it is part of the constitutional system that international treaties, accepted by the country in accordance with the applicable constitutional procedures, automatically assume the character of national law. Sometimes they even take a higher rank than national statutes, so in case of incompatibility the international norm will prevail. When this happens, though, it is a national norm that subordinates national law to international norms; it is not imposed by any rule under international law.

Another way of incorporating international law into nationally applicable law is to re-write, in a more or less circumscribed form, the international norms in the relevant national legislation. In countries using this system, foreign nationals may only claim protection under national law. This does not exclude, though, that international law may be of significance when interpreting possibly unclear provision in national law.

Where a private individual feels that his or her internationally secured rights are not respected in a foreign country, it is a matter between his or her country of nationality or habitual residence and the country for which protection is claimed. If the former country decides to pursue such a matter, it is to be solved through negotiations at the diplomatic level or,

as far as the TRIPS Agreement is concerned, through the system for resolution of disputes institutionalized in that Agreement. Theoretically dispute resolution under some instruments is also available under the ICJ. These systems are discussed further in Chapter 22.

Despite these important limitations to their applicability, there is still considerable interest in studying the international instruments on copyright and related rights, because most states endeavour to fulfil their international commitments in good faith and because the instruments set up the framework for international protection. The concepts, wording and overall system of the international instruments may be important sources for the understanding of national law. In many countries it is a general rule of interpretation that absent proof to the contrary the national legislator is presumed to have attempted to correctly implement international obligations in national law. Furthermore the international instruments command important interest in their own right, as norms stipulating the obligations and flexibilities resting on and available to the national legislator when balancing the differing interests and formulating an appropriate national law, adapted to the conditions of its own country.

It is also useful to understand the international instruments when dealing with rights in works or objects of related rights which may be exploited in a multitude of countries because they give a general feel of the level of protection one may expect abroad, even if it frequently may become necessary to investigate foreign law in detail to get the full picture.

Structurally speaking, one may say that most international instruments in the field of copyright and related rights share certain common elements, even if exceptions occur. There is a provision regulating which national law applies when a foreign work or object of related rights is exploited in the territory of a country, or a rule regulating this may be more or less explicitly presupposed. In accordance with the principle of territoriality which is broadly applied in many fields of international law, this applicable law will normally be the national law of the country in which the infringing act takes place, and for which the protection therefore is claimed. This is normally referred to as 'the law of the country of protection'. This rule is discussed further in Chapter 6.

In addition there is a main rule, which is not without exceptions, that works and objects of related rights from other countries party to the same instruments as the country of protection should enjoy the same protection as the latter country grants its own works or objects of related rights. This is the principle of national treatment. National treatment and its exceptions and variations among the different instruments are discussed in Chapter 7.

In order to obtain a reasonably balanced international system, where levels of protection do not vary too much, national treatment has to be supplemented by certain minimum demands to the level of protection. They are formulated in a more or less specific and detailed way in the various instruments, and constituted as certain rights which under all circumstances must be granted for foreign works or objects of related rights, regardless of whether they have also been granted for national works and objects. One may well say that this ‘exchange’ of national treatment and minimum obligations is the basic *quid pro quo*, or bargain, on which the international instruments are based. The minimum rights of the various instruments are presented and discussed in Chapters 9 to 19.

It must be kept in mind that the international instruments on copyright and related rights do not deal with the protection granted by countries for their own works and objects of related rights. In practice it is rare, but not unknown, that countries choose to protect foreigners better than their own nationals. National law is also, apart from the specific requirements under the Marrakesh VIP Treaty, free to grant a higher level of protection, exceeding the minimum requirements of the treaties.

The instruments typically also contain provisions regarding who is eligible to benefit from the protection; these so-called ‘points of attachment’ are discussed in Chapter 5.

SUGGESTIONS FOR FURTHER STUDY

There are several books giving a more or less comprehensive coverage of international copyright and related rights, even though most were published before the adoption of ACTA, the BTAP and the Marrakesh VIP Treaty and therefore do not cover those instruments. Among the books giving an overall coverage one might point to *Ricketson and Ginsburg 2006*, which in two volumes contains a very thorough commentary, starting with the Berne Convention and continuing through the subsequent instruments, even though most comprehensive coverage is given to the Berne Convention. Shorter, but still comprehensive is *Stirling 2008*. More recent and with a fine referencing of the commentary to both US and EU law is *Goldstein and Hugenholtz 2013*, which includes some discussion of the ACTA Agreement. Another general presentation coupled with a thorough illumination of the underlying policies, including those which eventually crystalized into the ACTA Agreement, the BTAP and the Marrakesh VIP Treaty, is *von Lewinski 2008*. A broad coverage of both copyright and related rights and other intellectual property rights is available in the WIPO Intellectual Property Handbook, which can be

accessed and downloaded free of charge at www.wipo.int. Another useful WIPO publication is *Ficsor 2004*, which is a WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, written by the former Assistant Director General of the organization, Mihály Ficsor. It contains article-by-article comments to the substantive provisions of all the WIPO-administered instruments, up to and including the WCT and the WPPT.

2. An historical overview of the instruments

The origin of international copyright and related rights protection can be found in bilateral agreements, rather than the multilateral instruments which are predominant today. Beginning in the 1820s and 1830s a system of mutual protection through bilateral treaties was established within the German Confederation, as it was then. This inspired bilateral treaties between countries of different languages, beginning with the Treaty of 22 May 1840 between Austria and Sardinia, countries which at the time both had important interests in the Italian speaking part of Europe. The treaty was open for accession by other Italian language countries. The idea caught on and between 1840 and 1886 altogether 84 bilateral treaties entered into force or were renewed in Europe, an impressive number which to a high degree was made up of the many individual treaties with and among each of the individual states of Germany; only after 1868 could these be converted into a single treaty with the North German Federation and later the German Empire, or replaced by national law. So eventually the number dropped somewhat. In 1886 when the first multilateral convention on copyright was adopted, the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention), 33 bilateral treaties were in force.¹

The Berne Convention was prepared at three international conferences which took place in Berne, Switzerland, at the invitation of the Government of the Swiss Confederation, but based on an initiative taken by the International Literary Association, the chairman of which was Victor Hugo. The organization still exists under the name of the International Literary and Artistic Association (ALAI). The final Convention, the Berne Act, was adopted on 9 September 1886, and later the Convention was regularly supplemented and revised. This took place at diplomatic conferences in Paris (1896), Berlin (1908), Berne (1914), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971). Through these revisions the level of protection was adapted to the technological

¹ Cavalli 1986 69–75.

development that had taken place, formality requirements were abolished, the term of protection was prolonged, and so on. As far as the main part of the substantive provisions on protection is concerned, the Stockholm Act was the final step in the development. That Act, however, turned out to be politically unacceptable to many developed countries, due to the accompanying Protocol containing special provisions laying down less strict requirements for developing countries. It was only when those rules were renegotiated at the Paris conference and the present Appendix to the Convention was adopted that it could enter into force in its present form (apart from some very minor later adjustments of the administrative provisions).

As regards the accession of states to the Convention, for many years the development was a slow, but consistent, growth, even though important states such as the USA, the Russian Federation (the USSR never joined the Convention) and China did not join until between 1989 and 1996. During the 1990s and since, a significant number of countries have joined the Convention, not least as a consequence of the incorporation through reference of all its economic rights in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement), which is discussed below.

Not being willing to join the Berne Convention, the USA and a significant number of Latin American countries established a string of Pan-American Conventions establishing a lower level of protection, notably the 1910 Buenos Aires Convention, which today has very little or no practical significance. Generally, relations between the USA (and to some extent Latin America) and the countries of Europe were governed by bilateral agreements. In 1951, however, the *Universal Copyright Convention* (UCC) was adopted under the auspices of UNESCO. Featuring a lower level of protection, and allowing formal requirements as a precondition for protection, it aimed at bridging the Pan-American Convention and the Berne Convention. Furthermore, it required a more modest level of minimum rights and was thereby aimed at enabling developing countries to join and obtain international protection, even if they considered themselves unable to fulfil the higher demands posed by the Berne Convention. A safeguard clause was inserted to prevent countries of the Berne Union being tempted to leave the Union and benefit from protection solely under the UCC. Between countries party to both the Berne Convention and the UCC, the former applies. The latter Convention was also revised in Paris in 1971 with a strengthening of the minimum rights and the addition of an Appendix on developing countries, but in later years it has, in practical terms, lost its importance. By the end of 2013 only one country remained party to the UCC and not the

Berne Convention. That country, Cambodia, is, however, party to the TRIPS Agreement and thereby covered by the substantive provisions of the Berne Convention as far as economic rights are concerned. For this reason, the UCC is not addressed in substance in this book.

In the field of related (or ‘neighbouring’) rights, the governments negotiating the 1928 Rome Act of the Berne Convention expressed a ‘wish’ (a resolution of political rather than legal significance) that protection of performing artists would also be addressed at international level. Certain countries already protected producers of phonograms under copyright, as they were seen as authors of adaptations of the recorded musical works. In addition, certain countries applied the concept of ‘radiophonic works’ which enabled a certain level of protection for broadcasting organizations under copyright. It was only in 1961, through the adoption of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) that international protection in this field was established. At the outset the Rome Convention was built on a rather modest base of national legislation, and initially its acceptance was slow, but over the years it has obtained significant international importance. This has materialized not only through ratifications and accessions, but also indirectly by establishing the basis for the level of protection and the subsequent development thereof through the TRIPS Agreement, the WPPT and the BTAP.

In view of the limited number of accessions to the Rome Convention in its early years, it was supplemented through the adoption in 1971 of the *Phonograms (or Geneva) Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms* (the Phonograms Convention). The intention behind the Convention was that, while waiting for the Rome Convention to gain a broader international acceptance, there was a need to secure phonogram producers internationally against piracy, which by then, was already widespread. This explains why it is a highly targeted convention which by and large only obliges the joining countries to prohibit in one way or another unauthorized reproduction and distribution of copies of phonograms.

Where the Phonograms Convention essentially just replicates the protection requirement of the Rome Convention regarding phonograms, and even in a watered-down form, the 1974 *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (the Satellites Convention), sometimes also referred to as the Brussels Convention, deals with an otherwise unregulated field, that is, the distribution of signals carrying content from so-called ‘communication’ or ‘fixed-service’ satellites. It targets the signals exchanged among broadcasting

organizations or among such organizations and other programme producers and distributors, in principle through closed connections. Broadcasting satellites, the signals of which are designed to be received directly by members of the general public are not covered. They constitute broadcasts and are therefore already protected by virtue of the Rome Convention. In this way, the Convention stands isolated as it has not been carried on through the TRIPS Agreement; but it continues to play a role, notably in relation to unauthorized cable distribution of pay-TV, transmitted via satellite.

Following the adoption of the Satellites Convention, the international normative process entered a new and different phase. The revision of the Berne Convention a few years earlier had caused significant difficulties, necessitating an additional diplomatic conference to resolve the question of preferential treatment for developing countries. This was accentuated by the requirement for unanimous adoption of new acts of the Convention and made it difficult to believe that another revision would be possible, at least for the foreseeable future. At the same time, the slow acceptance of the Rome Convention in a similar way meant that there was no significant pressure for initializing a revision. International activities instead entered a less formal phase, aptly described by the Australian scholar Sam Ricketson as 'the period of guided development'² during which the international community abstained from adopting new binding norms. Instead the various technological developments such as reprography, sound and visual recordings, cable and satellite TV, the protection of databases and computer programs, and so on were discussed at meetings, typically jointly convened by UNESCO and WIPO, and when appropriate covering both copyright and related rights. Typically what came out of the meetings was nothing more tangible than reports, analytically summarizing the discussions, which were then noted by the governing bodies of the various instruments. In reality, however, those discussions often outlined an international consensus, or at least certain tendencies that national legislators could navigate within. For example, this was clearly seen in connection with the 1985 discussions on the protection of computer programs, where a marked preference for protection under copyright very soon led to corresponding legislation in a significant number of important countries.

It did, however, soon become clear that new binding international rules were required, not least to avoid the potential watering down of the established consensus regarding the protection of computer programs

² *Ricketson 1986 919.*

under the Berne Convention by some countries choosing to categorize them as works of applied art and thereby justifying a shorter protection, based on reciprocity, rather than national treatment. Together with other intellectual property rights, copyright and related rights were therefore included in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement), which was adopted on 15 April 1994 in Marrakesh as part of the closing of the so-called Uruguay Round of free trade agreements. These agreements also entailed the reorganization of the GATT (General Agreement on Tariffs and Trade) Secretariat into the World Trade Organization (WTO) and make up a comprehensive complex of agreements on trade and services. By becoming a member of the WTO, a country or territory becomes party to the TRIPS Agreement. As far as copyright and related rights are concerned, the Agreement builds on the substantive norms of the Berne and Rome Conventions, although it does not address all issues dealt with in those Conventions, and it adds a number of substantive provisions, mainly regarding issues that had been subject to discussions during the period of guided development. In addition, it adds comprehensive provisions about the enforcement of rights and about resolution of disputes between states.

In the second half of the 1980s there was also a growing acceptance at WIPO that new binding international norms were required, and in 1991 negotiations on what, at the time, was referred to as a protocol to the Berne Convention were initiated. Contrary to generally accepted concepts, these negotiations also included the protection of phonogram producers who in certain countries following the common law tradition enjoy protection under copyright proper, rather than related rights. The following year, however, it was decided to leave the protection of phonogram producers out of the Berne Protocol discussions and initiate parallel negotiations on an international instrument on the protection of phonogram producers and performing artists. In principle these two sets of negotiations went on side by side, but after a while the Committees began meeting in joint sessions. The discussions gained momentum after the adoption of the TRIPS Agreement in 1994. At that time it was also decided to give a prominent position in the negotiations to issues relating to copyright and related rights on the internet and other digital use of works and recordings. The negotiations led to the adoption of the *WIPO Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT)*, often referred to as the ‘WIPO Internet Treaties’, at a diplomatic conference in Geneva in 1996.

The protection of performing artists under the WPPT is limited to performances fixed in phonograms and does not cover performances fixed in audiovisual media, such as film or video recordings. A broader

scope to the protection was negotiated during the preparation of the Treaty but to no avail, and as the similar protection under the Rome Convention is quite rudimentary, actors and musicians were without effective international protection in this ever more important field. Attempts were therefore made to establish an international instrument granting such protection of what is, strictly speaking, incorrectly referred to as 'audiovisual performances' (what is at stake is really the rights in any performance that is fixed in an audiovisual medium). Eventually they led to the convening of a diplomatic conference in Geneva in 2000. The conference was inconclusive, even though it succeeded in obtaining agreement on most clauses in an international instrument, because one remaining issue blocked the necessary full consensus: the issue of transfer of rights from performers to producers of films or other fixations of their performances. Only in 2012 had the issue ripened sufficiently through informal contacts and discussions between the main stakeholders and governments to enable the adoption of the *Beijing Treaty on Audiovisual Performances* (BTAP).

Concurrently since the adoption of the Internet Treaties several attempts have been made at WIPO to adopt other additional international norms as well, notably regarding the protection of non-original databases and the protection of broadcasting organizations, but for several years these endeavours have been unsuccessful. The idea of a database treaty has been completely abandoned, whereas attempts to move forward on a treaty on broadcasting organizations' rights continue. Overall an increasingly tense political situation at the international level has caused difficulties for the international normative work in the field of intellectual property, and probably as a kind of reaction to this a number of (mainly developed) countries negotiated and on 3 December 2010 adopted the *Anti-Counterfeiting Trade Agreement* (the ACTA Agreement). It expands and clarifies the enforcement rules of the TRIPS Agreement, but it also contains additional provisions concerning the protection of copyright and related rights on the internet. This Agreement has not yet entered into force and it has been met with such strong resistance in many quarters, including in the European Union, that its future is uncertain.

Meanwhile the international norm-setting endeavours at WIPO took another turn, focusing on limitations and exceptions to the minimum rights granted under the existing treaties. Issues in that respect had been discussed on several occasions during the period of guided development, but most importantly the problems of obtaining access to protected works for persons with visual impairments were raised by representatives of the World Blind Union during the inconclusive diplomatic conference on audiovisual performances in December 2000. In the following years,

discussions on that issue, and other areas of limitations and exceptions as well, slowly gained momentum and they led to the adoption in June 2013 of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled* (the Marrakesh VIP Treaty). That Treaty is conceptually different from the other international instruments in the field of copyright and related rights, because it does not define a minimum level of protection, based on national treatment and minimum rights, but rather obliges the contracting states to introduce particular limitations and exceptions and to ensure that special format copies made for visually impaired persons in one country may also be imported into and used in other countries. Thus within its field of application the Treaty establishes a highest permitted level of protection, rather than minimum rights.

Next to the multilateral instruments mentioned above, there are also a significant number of regional instruments, which are not discussed in this book. That is also the case for the increasingly comprehensive and complex regulation of copyright and related rights in the European Union (EU), which applies not only in the Union itself but also in the enlarged European Economic Area (EEA)³ as well as, indirectly, in a number of countries which have made bilateral agreements to that effect with the EU. It also goes for the Cartagena Agreement between the member states of the Andean Community (Colombia, Ecuador, Peru and Venezuela); the Asuncion Treaty and Ouro Preto Protocol on the Mercosur Community between Argentina, Brazil, Paraguay and Uruguay; and the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the USA. Furthermore, there are a large number of bilateral free trade and investment treaties that contain provisions regarding copyright and related rights protection. None of those treaties are discussed in this book, but interested readers will find most of those agreements in the collection of laws and treaties on the website of WIPO.⁴

SUGGESTIONS FOR FURTHER STUDY

The historical background for the Berne Convention, its development over the subsequent diplomatic conferences and the continued development of the WCT and the TRIPS Agreement is described in much detail

³ The EEA consists of, apart from the EU member states, Iceland, Lichtenstein and Norway. Switzerland is not member of the EEA, but enjoys a similar position based on bilateral agreements.

⁴ www.wipo.int, accessed 23 January 2014.

in *Ricketson and Ginsburg 2006* 3–175. *von Lewinski 2008* 261–557 also describes the path from the traditional conventions towards the TRIPS Agreement and the continuing developments thereafter. The early provisions on international protection in national law and the situation leading to the adoption of the UCC are described by *Dubin* in 42 *Cal L Rev* (1954) 89, 89–100.

Ricketson and Ginsburg 2006 is also renowned as a leading authoritative commentary, notably to the Berne Convention. There are also important monographs commenting and describing the background and negotiations of certain treaties, notably *Bogsch 1968* on the UCC; *Ficsor 2002* and *Reinbothe and von Lewinski 2002* on the WCT and the WPPT; *Correa 2007* and *Gervais 2012* on the TRIPS Agreement; and *Blakeney 2012* on the ACTA Agreement. The background and making of the Rome Convention is described by *Davies* in (2012) 2 *QMJP* 206–24 and by *Ulmer* (1962–1963) 10 *Bull Copyright Soc’y USA* 90–101, 165–78 and 219–48. On the Rome and Phonograms Conventions see also the WIPO Guide *Masouyé 1981*. On the BTAP see *von Lewinski* in (2001) 189 *RIDA* 3–65, the same author in (2012) 6 *Auteurs & Media* 539–46, and *Ficsor 2012*. Regarding the Marrakesh VIP Treaty, see *Ficsor 2013* and *Band 2013*.

For research purposes, the records of the diplomatic conferences which adopted and later revised the Convention are essential tools, but only the Records of the Stockholm and Paris Conferences are published in English; the earlier publications were in French only. However, on the occasion of the centenary of the Berne Convention in 1986, WIPO published *1886 – Berne Convention Centenary – 1986*, a commemorative publication containing English translations of the records of the diplomatic conferences which prepared and eventually adopted the Berne Act, and of the reports of the general rapporteurs of the subsequent conferences.

As regards the Rome Convention, the Phonograms Convention, the Satellite Convention and the WCT and the WPPT, records of the diplomatic conferences are published in English. Eventually similar publications regarding the BTAP and the Marrakesh VIP Treaty are to be expected, but the documents of the diplomatic conferences that adopted those instruments are also available on WIPO’s website: www.wipo.int.

3. Implementation of international agreements in national law

The first and basic rule to keep in mind whenever international relations are discussed is that it is the law of the land that rules. Thus the primary source of law in any country is the national legislation as adopted and promulgated in accordance with the constitutional arrangements of that country. As a starting point international treaties are agreements between states and therefore do not have the force of primary or secondary legislation in individual countries. Whether such force is granted to them will depend on whether they are formally accepted by the constitutional bodies of the country in question and how they are implemented. Much can be said about these topics, but let it suffice here to note that any international instrument discussed in this book must have been signed and ratified or acceded to by a country before it has any legally binding effect on that country. Furthermore even when such binding effect has been established, whether the treaty will have any legally binding effect on the subjects of that country, its citizens, authorities, enterprises and other corporate entities, will depend on how such treaties are incorporated into national law under the national constitutional system.

Two different systems dominate. Either there is no direct legal effect of such treaties in national law at all: thus in order to implement an international treaty, the national legislator needs to replicate all relevant provisions in the national legislation. Or national law lends binding effect to the international agreements that the country has accepted to submit itself to. In the former case, national statutes are normally the only source of law in the area, whereas in the latter case both national statutes and the international agreements to which the country is party are sources of law. In some of the latter countries international treaties are even granted a higher order as source of law than national legislation, thus, if a discord emerges between an international treaty and a national statute, the treaty will prevail.

While in most countries international affairs are a government prerogative and thus can be dealt with by the government rather than the legislator, there are normally important safeguards regarding the ability of the government to ratify or accede to treaties, not least if they entail a

need to change national legislation or otherwise have implications for the applicable law of the country. Typically, such acts require the approval of the national legislator before they can take effect. What in any case needs to be kept in mind is that international instruments are not as such international ‘super laws’ of a higher order than national law. They are agreements between governments, and their influence on national law (which is really what counts) is solely a function of the legal and constitutional arrangements of each country.

An important consequence of this is that the international instruments only deal with international protection, such as how each country protects subjects of other countries. Contrary to classical human rights conventions and treaties, the international instruments dealing with copyright and related rights do not address the treatment that each country offers its own subjects.

One may very well argue that this does not chime well with the fact that copyright protection in itself is a human right, enshrined in Article 27(2) of the United Nations Declaration of Human Rights and Article 15 of the 1966 United Nations International Covenant on Economic, Social and Cultural Rights. Of those, the latter may be seen as the more important, because it is a legally binding instrument, whereas the former is rather a statement of political intentions. According to Article 15(1) of the Covenant ‘[t]he State Parties to the present Covenant recognize the right of everyone: [...] (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. Traditionally human rights are viewed as universal and therefore covering all human beings, both in their home country and abroad. This, however, hardly causes any practically significant incompatibility with the international instruments on copyright and related rights, because the latter grant much higher levels of protection than what may be assumed to be secured under the Covenant. It does not specify any level of protection of economic rights and its main importance seems to lie in granting certain, but again unspecified, protection of moral rights. It seems reasonable to assume that there is a fundamental human right to obtain at least some limited protection, both nationally and internationally, but it is very difficult to say anything sensible about what this minimum protection level actually is. On the other hand, it does not seem reasonable either to understand the provision as imposing obligations on states to grant protection for works, and so on, originating from countries that have chosen to remain outside the international system of protection instruments. As further discussed in Chapter 5, the international instruments generally offer good possibilities for rights

owners from non-instrument states to obtain protection under the instruments, such as by using the first publication as the point of attachment, and there are no examples of provisions that categorically exclude rights owners from non-instrument countries.

In order to understand the interface of the legislation of any given country with the international protection, two sets of rules must be identified. The first is the international scope of application of the national law. Typically, it is regulated in explicit statutory provisions defining who is (or which works or performances are) qualified to enjoy the protection granted under the statute, such as, among others, authors who are nationals of the country, or performers who have performed a work on the national territory. While these provisions are purely national law and in principle not affected by the provisions of the international instruments, they typically resemble quite closely the points of attachment of the various instruments, that is, the definitions of who in terms of nationality, and so on, should benefit from protection under each instrument.

Such provisions form the other set of rules defining the interface between national law and the international protection system, that is, the provisions that make the protection under the national statute applicable to persons who, without qualifying under the scope of the national statute, are entitled to protection by virtue of the obligations assumed by the country through its accession to international treaties. In its simplest form, this can be done in a single sentence stating that protection under the statute is also granted to such authors, and so on, who are entitled to claim protection under an international instrument to which the country is party. In that case, the detailed definition of the beneficiaries will hinge on the rules of the international instruments themselves. In practice, the rules are often more elaborate, sometimes established in secondary legislation such as executive orders or the like, and contain detailed information regarding the various international instruments involved and their various points of attachment.

In some countries, however, the principle of direct applicability of international treaties is axiomatic or to be found in a general clause in the national constitution. Admittedly, such cases may complicate practical life, because the otherwise excellent collections of national legislation which are available, including on the WIPO website, do not necessarily contain such provisions. A certain guideline as to which protection one might expect can also be found on the WIPO website in the lists of countries that have joined the various treaties, but this is only indicative because it only shows the obligations assumed by the various countries.

Whether they have actually fulfilled those obligations is in principle another matter, even though of course, significant aberrations are rare.

SUGGESTIONS FOR FURTHER STUDY

On the implementation of international law in national law, see, for example, *Boas* 2012 132–54, *Eileen Denza* in *Evans (ed.)* 2010 411–38, and *Wallace and Martin-Ortega* 2009 37–61. See also *Geller* (1988–1989) 13 Colum-VLA J L & Arts 435–76 with a very practical and detailed approach to the application of the Berne Convention. Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights is discussed at length in *General Comment No. 17* (2005).

4. The relations among the international instruments

The international conventions, treaties and agreements in the field of copyright and related rights have been adopted over a very long period of time, and it may be useful for the understanding of the relations among them to note that when the **Berne Convention** was adopted in 1886, it did not rule out the emergence of additional agreements in the future. Article 15 (now Article 20 in the Paris Act) provided that '[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention'.

This provision does not establish a categorical prohibition against international agreements with a lower level of protection than the Berne Convention, but it rules out that, for example, a group of Union countries could agree that amongst themselves they will constitute a 'safe haven' in which a lower level of mutual protection applies. Union countries, on the other hand, may well enter into agreements with third countries entailing lower protection requirements than the Convention, and several Union countries may join such agreements, as long as they maintain the Berne level of protection among themselves.

In 1951 this situation emerged through the adoption of the **UCC** which had a double purpose. It established a 'bridge' between, on the one side, the members of the Berne Union and on the other side, the USA and a number of Latin American countries which were linked through the Pan-American Copyright Conventions, of which two were ratified by the USA (the 1902 Mexico City Convention and the 1910 Montevideo Convention). The UCC established a mutual protection system at a lower substantive level than the Berne Convention as regards minimum rights, term of protection and permissibility of formalities as a precondition for protection. Furthermore the lower level of protection enabled access by developing countries. This way they could obtain international protection for the works of their nationals, and so on, even if they did not consider themselves able to fulfil the higher level demands of the Berne Convention.

The relationship between the two Conventions is regulated in Article XVII of the UCC, according to which that Convention 'shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention'. This is further safeguarded in an Appendix Declaration Relating to Article XVII, where those Berne Union member countries that have also signed the UCC declare that the latter will not apply in the countries of the Berne Union to any work which according to the Berne Convention has as its country of origin a country which has withdrawn from the Berne Union after 1 January 1951. To some extent, this is mitigated through special rules for developing countries, but in general it is stated in paragraph (c) of the Appendix Declaration that '[t]he Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union'.

The **Rome Convention** contains in its Article 20 a provision corresponding to Article 22 of the Berne Convention which should probably be interpreted in the same way, as discussed above. Furthermore, in Article 1, the Rome Convention explicitly states that '[p]rotection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection'. Implicitly, this provision refers to both the Berne Convention and the UCC, and it entails that the Rome Convention cannot be interpreted in a way contrary to Article 20 of the Berne Convention, something which probably follows already from the different objects of protection under the two Conventions. The relation to the UCC must be understood in the light of the requirement that a country has to be party to either the Berne Convention or the UCC before it can join the Rome Convention, according to its Article 24(2) which is discussed further in Chapter 24.

The provision in Article 1 of the Rome Convention, quoted above, does not require that the exercise of the rights granted under that Convention may not take place in a way which affects or is prejudicial to the exercise of copyright. A provision to that effect was proposed at the diplomatic conference in Rome, but it was turned down because the majority felt that it would render the protection of the related rights of performers, producers of phonograms and broadcasting organizations ineffective. If the owners of related rights could not prohibit the use of, for example, a recording of a musical work in a case where the composer of that work consented to the use, it would in the view of several delegations deprive

the Convention of any significance.¹ Having stated this, it may also be noticed that national legislation in practice most commonly aims at avoiding conflicts between these groups of rights, notably by generally avoiding related rights protection that is stronger than the protection under copyright. This practice, however, is not imposed by any international instrument.

The **Phonograms Convention** and the **Satellites Convention** were both adopted as supplements to the Rome Convention and both clarify in their Preambles that they do not aim at preventing a broader acceptance of the latter. Thus they are fully independent from the Rome Convention, and neither are there any links between the later adopted TRIPS Agreement, or the WPPT, and those Treaties, as discussed below.

The drafters of the **TRIPS Agreement** chose to make a more distinct statement by providing in Article 2(2) of the Agreement that ‘[n]othing in Parts II, III and IV of this Agreement shall derogate from existing obligations that Members may have to each other under [...] the Berne Convention, [or] the Rome Convention [...]’. This of course raises the question whether such derogation was intended in relation to Part V of the TRIPS Agreement which deals with dispute prevention and settlement. To some extent this question must probably be answered in the affirmative, because Article 33 of the Berne Convention prescribes that:

[a]ny dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement.

A similar provision is included in Article 30 of the Rome Convention.

In this respect the TRIPS dispute settlement system can be said to be an agreement to settle disputes in a different way, and it thereby modifies the rules of the Conventions between the parties, but hardly in such a way that it could be considered ‘contrary to’ the Berne or Rome Conventions and thus prohibited under their respective Articles 20 and 22. It would, on the other hand, be highly unusual and, indeed, inconceivable if the intention was to establish a level of protection that would be incompatible with the protection requirements under the Conventions. Accordingly it cannot be correct to deduce from the missing reference to Part V of the Agreement that protection in accordance with the requirements of the Berne and Rome Conventions can be

¹ *Records Rome 1961* 38.

denied, if this is a consequence of a sanction, applied in accordance with the provisions of the TRIPS Agreement, due to the absence of implementation of the Agreement, or of other WTO obligations, by a member state. If that had been the case, the TRIPS Agreement would be squarely incompatible with Article 20 of the Berne Convention and Article 22 of the Rome Convention, and that cannot be assumed to have been the intention.

In this respect reference can be made to the interpretation principle in Article 31(3)(c) of the Vienna Convention according to which interpretation of treaties shall take into account together with the context of the treaty 'any relevant rules of international law applicable in the relations between the parties'. WTO case law has authorized sanctions implying suspension of obligations under the TRIPS Agreement, for example in a case concerning cross-border gambling services, but the arbitration dealt with only the level of suspension, not its form, and it solely permitted suspension of obligations under the TRIPS Agreement and did not address obligations under other international instruments.² Such suspension may possibly be made in certain cases where the protection under the TRIPS Agreement exceeds that under the Berne Convention, such as regarding enforcement. In such cases, however, much care would be required to navigate the obligation to offer national treatment under Article 5(1) of the Berne Convention, the reach of which probably extends to enforcement provisions, as discussed in Chapter 7 (1).

The TRIPS Agreement goes even further than just not derogating from the obligations among the parties to the Berne and Rome Conventions. Its Article 9(1) incorporates through reference the substantive provisions of Articles 1 to 21 of the Berne Convention and the Appendix thereto, except for the rights conferred under Article 6*bis* and the rights derived therefrom, that is, the moral rights.³ With that exception, the substantive provisions of the Berne Convention thus also become obligations under the TRIPS Agreement and subject to the resolution of disputes under the specific system to that effect in the Agreement. The exception concerning the moral rights, however, does not suspend those rights which by virtue of the provisions of the Berne Convention remain applicable among those members of the WTO that are also members of the Berne Union.

In relation to the substantive protection under the Rome Convention, there is no similar general incorporation by reference in the TRIPS

² *United States – measures affecting the cross-border supply of gambling and betting services* WT/DS285/ARB of 21 December 2007, paras 5.9 and 6.1.

³ These rights are discussed in Chapter 17.

Agreement, but there is a reference in Article 1(3) to the points of attachment under the Convention; in Article 3 to the limitations of the Rome Convention as regards national treatment; in Article 4(b) to the possibilities under the Rome Convention of applying material reciprocity as regards its implications on most favoured nation treatment; and in Article 14(6) to the different conditions, limitations, exceptions and reservations permitted under the Convention regarding substantive protection. Furthermore, the minimum protection of related rights in Article 14 of the TRIPS Agreement by and large replicates the similar rights under the Rome Convention, even to such an extent that as far as their 'lower limit' is concerned they are identical (as follows from the reference to the Convention in paragraph (6)). The most important differences are that the TRIPS Agreement does not grant rights of equitable remuneration for broadcasting and other communication to the public of commercial phonograms, as granted in Article 12 of the Rome Convention, and that the protection of broadcasting organizations has been made optional in Article 14(3) of the TRIPS Agreement.

At the opening of the diplomatic conference which adopted the **WCT** (and the **WPPT**), the intention was that what eventually would become the WCT would have been a protocol to the Berne Convention, but the project developed into a self-standing treaty. It was therefore explicitly clarified in Article 1(1) of the WCT that it is a special agreement within the meaning of Article 20 of the Berne Convention, as regards contracting parties that are countries of the Union established by that Convention. In paragraph (2) it was further hammered out that '[n]othing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works'. This clearly indicates that the contracting parties only intended to grant authors more extensive rights than those granted by the Berne Convention or otherwise only adopt provisions that were not contrary to the Convention. They did, however, abstain from linking the Treaty so closely with the Berne Convention that only Union Members could join the Treaty. On the contrary, in Article 17 it was opened for accession by all member states of WIPO and certain inter-governmental organizations, a matter discussed further in Chapter 24.

As regards other international instruments, the WCT contains a statement in Article 1(1), second sentence, according to which '[t]his Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties'. It is probably fair to say that at first sight the provision appears superfluous, if not mysterious when analyzed in relation to the Vienna Convention on the Law of Treaties, or the WIPO Convention for that

matter. However in the historic context it makes sense. The intention from a number of developing countries was to make clear that the dispute prevention and resolution system under the TRIPS Agreement should not apply to the WCT, and no country contested that view.

In addition the WCT incorporates by reference a number of provisions from the Berne Convention, primarily in Article 1(4) according to which '[c]ontracting parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention'. Contrary to the TRIPS Agreement this reference contains no reservations for moral rights. Furthermore the Treaty provides in Article 3 that '[c]ontracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty'. This incorporation by reference covers the provisions of the Berne Convention dealing with the protected works (Article 2); exception of certain categories of works from protection (Article 2*bis*); the points of attachment for protection (Articles 3 and 4); the rights guaranteed in the country of origin and in other Convention countries, including national treatment, formalities, the principle of the law of the country where protection is claimed and the definition of the country of origin (Article 5); and the retaliation rule (Article 6). Since these provisions are covered by the reference in WCT Article 1(4) as well, the latter reference must be understood as covering the application of these 'framework provisions' to the protection taken over from the Berne Convention, whereas the reference in WCT Article 3 makes them applicable to the WCT as such, including in particular the protection which that treaty guarantees in excess to that which applies under the Berne Convention.

In comparison to this, the **WPPT** and the **BTAP** theoretically could have a different formal relationship to the Rome Convention, because those treaties are not explicitly declared to be special agreements under Article 22 of the Rome Convention. In reality, however, it seems most doubtful whether this actually makes any difference. As was expected at the adoption of the WPPT, several countries party to the Rome Convention have joined the Treaty and it was obvious that Article 22 of the Rome Convention under all circumstances would apply in the relations between those countries and not in relation to such third countries that certainly would join the treaty as well. The same must also have been clear at the adoption of the BTAP, which repeats the rules of the WPPT. Furthermore, it is stated beyond any doubt in Article 1(1) of the WPPT (and repeated at the same place in the BTAP) that '[n]othing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the [Rome Convention]'.

As to the relationship with other treaties, including the TRIPS Agreement, Article 1(3) of both the WPPT and the BTAP declare in the same way as the WCT that '[t]his Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties'. Regarding copyright protection of literary and artistic works, and thereby indirectly concerning the relation to the Berne Convention, Article 1(2) of the two treaties further declare that '[p]rotection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection'.

Added to this is, in the WPPT only, an agreed statement of the following wording:

[i]t is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

This way the WPPT cuts short the discussion, which took place in relation to Article 1 of the Rome Convention, as to whether related rights could only be exercised in a way that would not affect or prejudice the exercise of authors' rights. Such a rule obviously does not apply.

Contrary to the relationship between the WCT and the Berne Convention, the WPPT contains no general incorporation by reference of the provisions of the Rome Convention, but solely a reference to the rules of the latter regarding points of attachment, contained in WPPT Article 3(2) and discussed in Chapter 5 (3). On the other hand, the WPPT follows the pattern of the WCT in that all WIPO member states and certain intergovernmental organizations can join the WPPT regardless of whether they are party to the Rome Convention (WPPT Article 26).

Specifically for the BTAP there is an agreed statement regarding its relationship to the WPPT, according to which:

nothing in [the BTAP] affects any rights or obligations under the [WPPT] or their interpretation and it is further understood that [BTAP Article 1(3)] does not create any obligations for a Contracting State to [the BTAP] to ratify or accede to the WPPT or to comply with any of its provisions.

As regards the relationship between the BTAP and the TRIPS Agreement, an agreed statement concerning Article 1(3) of the former clarifies that:

[c]ontracting Parties who are members of the World Trade Organization (WTO) acknowledge all the principles and objectives of the [TRIPS Agreements] and understand that nothing in [the BTAP] affects the provisions of the TRIPS Agreement, including, but not limited to, the provisions relating to anti-competitive practices.

The BTAP also differs from the WPPT in that it does not incorporate by reference any of the provisions of the Rome Convention, not even those dealing with the points of attachment for the determination of beneficiaries of the protection.

The **ACTA Agreement** denominates itself a trade agreement (and it is closely linked to the TRIPS Agreement), partly by declaring in Article 1 that '[n]othing in [the] Agreement shall derogate from any obligations of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement', partly by applying *mutatis mutandis* the objectives and principles set forth in Part I of the TRIPS Agreement, in particular in its Articles 7 and 8. The former of these provisions states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. According to Article 8 of the TRIPS Agreement, members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of that Agreement. Furthermore appropriate measures, provided that they are consistent with the provisions of the Agreement, are permitted to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

The ACTA Agreement, on the other hand, only deals with enforcement and does not incorporate the substantive protection norms from other treaties, including the Berne and Rome Conventions. Indirectly this is emphasized by Article 3(1) according to which the Agreement 'shall be without prejudice to provisions in a Party's law governing the availability, acquisition, scope, and maintenance of intellectual property rights'.

The **Marrakesh VIP Treaty** declares in its Article 1 that '[n]othing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties, nor shall it prejudice any

rights that a Contracting Party has under any other treaties'. Its relationship to other international instruments is, however, somewhat more complicated than the other treaties here discussed. In the first paragraph of its Preamble, the Treaty already refers to overall principles on non-discrimination, equal opportunity and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities. Later, the tenth paragraph of the Preamble reaffirms the obligations of contracting parties under the existing international treaties on the protection of copyright and the importance and flexibility of the three-step test in the Berne Convention and other international instruments. This test is discussed in Chapter 18 (4).

On the other hand, the Treaty does not designate itself a special agreement in the sense of Article 20 of the Berne Convention, even though it obviously falls under that provision, as far as the Union members are concerned. By dealing with limitations and exceptions to the minimum rights granted, *inter alia*, under the Berne Convention, the Treaty clearly is a special agreement circumscribing the level of protection, and it is therefore constrained to grant authors more extensive rights than the Berne Convention or otherwise contain provisions not contrary to the Convention.

It appears from several provisions in the Treaty that this was, indeed, the intention of the contracting parties. Thus Article 5, which deals with cross-border exchange of accessible format copies, clarifies in paragraph (4)(a) that when such copies are received from abroad by an authorized entity (that is, a governmentally recognized or approved institution that is a beneficiary under the Treaty) in a country not bound by Article 9 of the Berne Convention, that country will ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that contracting party's jurisdiction. In other words, it is ensured that copies that may be made in excess of what would be permitted under the Berne Convention must remain in the countries where they are made and not risk being disseminated in other countries, including such countries where they would be unlawful.

As regards the distribution of such copies, paragraph (4)(b) further states that cross-border distribution of accessible format copies shall only be permitted to countries that are either party to the WCT or who limit exceptions and limitations concerning the distribution right and the right of making available to what is permitted under the three-step test.

Article 10(3) of the Marrakesh VIP Treaty contains an additional emphasis that the implementation of the Treaty must be consistent with

the contracting parties' obligations under the Berne Convention, the TRIPS Agreement and the WCT, and Article 11 contains elaborate references to the three-step test as it occurs in the Berne Convention, the TRIPS Agreement and the WCT (both as regards the rights specifically granted under that Treaty and as regards the rights taken over from the Berne Convention). Finally Article 12, clarifying that limitations and exceptions other than those specifically dealt with in the Treaty may also be introduced, contains a general reference to the international rights and obligations of the contracting parties.

The increased complexity of these provisions reflects the growing political tensions in the area and of course also the fact that the Marrakesh VIP Treaty is the first international instrument obliging contracting parties to enact limitations and exceptions. It seems that the negotiators were very keen to ensure that there would be no loophole left where it could be argued that the Treaty implied a lower level of protection than the existing international instruments in the field. That the clarity and ease of understanding of the Treaty may have suffered under this aspiration is another matter.

Whether the drafters succeeded in reaching full compatibility with existing treaties, though, remains disputed. It has been claimed that by establishing mandatory limitations and exceptions, the Treaty is at odds with Article 19 of the Berne Convention, according to which '[t]he 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'.⁴ It is difficult to see, though, how that provision could be incompatible with another treaty establishing mandatory limitations and exceptions. The greater protection that can be claimed is one that 'may' be granted, and it is therefore clearly up to each state to decide whether it wishes to grant such protection beyond the minimum requirements. There is no language in the provision that amounts to preventing countries from undertaking binding engagements not to grant certain such rights in excess. The whole purpose of Article 19 clearly seems to be to ensure that the Convention's requirements of minimum protection are not in themselves interpreted as maximum protection as well. It does not address other issues and in particular not the relationship to other international instruments. That question should be understood as regulated exhaustively by the rules of Article 20.

⁴ See *Ficsor 2013* 63f and *ALAI 2010 Report*.

SUGGESTIONS FOR FURTHER STUDY

Article 20 of the Berne Convention is discussed by *Ricketson and Ginsburg 2006* 345–56. For comments on Article 2(2) of the TRIPS Agreement, see *Correa 2007* 46–51, *Gervais 2012* 185–9, and *Implications 1996*. For comments on the relations between the WCT and the WPPT and other treaties, see *Ficsor 2002* 417–57 and 590–4 and *Reinbothe and von Lewinski 2002* 26–44 and 237–44. As regards the relation between the Berne Convention and dispute resolution under the TRIPS Agreement see also *Henning Grosse Ruse-Khan 11 JIEL* (2008) 313, 360ff and *Abbott 2009* 22ff. For a discussion of the relations between the BTAP and the WPPT and the TRIPS Agreement, see *Ficsor 2012* 11ff, and regarding the relations between the Marrakesh VIP Treaty and other copyright instruments, *Ficsor 2013* 12ff, 28ff, 32ff, 47–55 and 63ff.

5. The points of attachment

1. INTRODUCTION

Almost all the international instruments on copyright and related rights contain provisions which determine their scope of application, that is, which foreign works or objects of related rights must be protected in the countries party to the instruments. In doing so they use a number of different so-called points of attachment such as the nationality of the author or his or her country of domicile, the country in which the performance took place, the work or phonogram was first published, or the broadcast transmitted, and so on. By means of such criteria, the works and objects that are subject to protection under the various instruments are determined in an exhaustive manner.

These provisions are not the same as the frequently identical criteria in national legislation which determine the scope of application of the national statute. The points of attachment of the international instruments are implemented in various different ways in national law. Sometimes they are reflected by a general principle of direct and immediate applicability in national law of international instruments to which the country is party; sometimes they are brought into force through explicit provisions in primary or secondary legislation which either repeat the provisions of the international instruments or refer to them in general terms. In some national legislation, secondary legal norms such as executive orders clarify from time to time the present situation as regards which countries are party to which international instruments, but to obtain an updated and precise picture it is advisable to consult the websites of the various international organizations which administer the treaties, including, not least, the website of WIPO at www.wipo.int.

2. THE BERNE CONVENTION

Article 3(1) of the Berne Convention provides that the protection of the Convention shall apply to authors who are *nationals* of one of the countries of the Berne Union for their works, whether published or not.

The term ‘published works’ is defined in Article 3(3) which is discussed below. The Convention equates habitual residence in a Union country with nationality (Article 3(2)). This implies that an actual domicile is not required. The revision conference in Stockholm rejected a proposed protocol to the Convention that would equate stateless persons and non-domiciled refugees with nationals and instead chose to use the term ‘having their habitual residence’ in order to clarify that such persons enjoy the protection.¹

The Convention does not provide an explicit answer to the question at which point in time the nationality or habitual residence is required, for example, if an author, who is not a national of a Union country, moves from outside the Union to a Union country between the first making publicly available, the publication and/or the enforcement of the rights. The report from Main Committee I at the Stockholm conference states that this question should be decided by the courts in the country where protection is claimed, but it adds that it is probable that the decisive date will be the date when the work, without being published, was first made available to the public.² For published works, the time of publication should probably be considered decisive.³ The same probably applies if the author changes nationality, but other solutions have also been proposed by distinguished commentators.⁴

In addition to this criterion of nationality, the Convention grants protection also for works of authors who are not nationals of one of the countries of the Union, which are *first published* in a Union country, or simultaneously published in a country outside the Union and in a Union country (Article 3(1)(b)). A work is considered simultaneously published in all those countries in which it is published within 30 days of its first publication (Article 3(4)).

The criterion of publication implies, on the other hand, that non-published works of authors who are neither nationals of nor habitually resident in a Union country enjoy no protection under the Convention, unless the works fall under one of the special criteria in Article 4. Nationals or habitually resident persons in Union countries, on their side, enjoy protection under the Convention not only for unpublished works but also for works first published outside the Union.

¹ *Records Stockholm* 1136ff.

² *Records Stockholm* 1136ff.

³ *Records Stockholm* 841.

⁴ For example, *Katzenberger GRUR Int* 1973 274, 278ff; *Ricketson and Ginsburg* 2006 241ff.

The points of attachment of the Berne Convention have changed over the years, but by virtue of the intertemporal provision in Article 18, the rules of earlier acts of the Convention do not apply in the relations among countries that have acceded to the Paris Act. Article 18 is discussed in more detail in Chapter 23.

The term ‘published work’ as applied in the Berne Convention is defined in Article 3(3). Fundamentally, but only indirectly written in the definition, it is required that the work has been reproduced and that copies have been made available (distributed) to the public. What actually constitutes a copy is left for national legislation to determine, and certain countries following the common law tradition do not include sound recordings in that respect. The reproduction and distribution, that is, the ‘publication’, of the work must have taken place with the consent of its author. Accordingly pirated copies distributed without consent, or copies lawfully made without authorization on the basis of a limitation in or exception to the protection under national law, do not qualify under the definition. On the other hand there are no specific demands as regards the means of manufacture of the copies. Accordingly photocopies or exceptionally even carbon copies may qualify, depending on the circumstances, and the distribution may take place in other ways than the selling of copies, such as handouts or offering for hire. What is required, however, is that ‘the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work’. This requirement was introduced during the Stockholm conference and implies that a merely symbolic dissemination of a few copies will not open a back door to the protection under the Convention. At the same time it is intended to secure that, in particular, audiovisual works are considered published by virtue of a limited number of copies that are rented from local distributors to cinemas and/or TV stations. Also rental of sheet music for orchestral performances is intended to be considered publication.⁵

At the same time, the provision clarifies that ‘[t]he performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication’.

In the same vein it must be assumed that the making available of a work over the internet does not qualify as ‘publication’ in the sense of

⁵ *Records Stockholm* 845ff.

Article 3(3) of the Berne Convention. One might argue that this is not obvious when the making available takes place in such a way that the author (or other owner of rights, derived from the author) allows members of the public to produce copies of the work, once downloaded. On the other hand Article 3(2) explicitly rules out that mere communication may qualify as publication. At the 1996 diplomatic conference, which adopted the WCT and the WPPT, the ‘basic proposal’ (the text which formed the initial basis for the negotiations at the conference) stated that making available on the internet should be considered publication.⁶ Several delegations opposed this and pointed out that this would only be compatible with the Berne Convention if the proposed provision required the dissemination of tangible copies.⁷

Furthermore, considering a work published when made available on the internet would raise a number of difficult questions and problems. In most cases, a work made available on the internet is globally accessible, and it should therefore be considered simultaneously published in all Union and non-Union countries. In this case, according to Article 5(4)(a) of the Convention, the ‘country of origin’ would be considered the Union country with the shortest term of protection. That would in practice probably be all the countries with the minimum 50 years term of protection, normally calculated from the end of the year in which the author died. Most importantly, in all those countries, works first made available on the internet would fall under the provisions exempting national works from Convention protection in Article 5(3) and they would thereby lose most of their protection under the Convention, a result that would seriously disrupt the functioning of the Convention in an internet age.⁸

Article 4 of the Berne Convention contains two *special points of attachment* regarding cinematographic (audiovisual) works, works of architecture and certain artistic works. For cinematographic works, Article 4(a) provides that even if the points of attachment under Article 3 are not fulfilled, authors of such works are protected if the maker has his, her or its headquarters or habitual residence in a Union country. In accordance with the terminology in the French text of the Convention, the term ‘the maker’ (*le producteur*) must be understood as the producer, that is, the person or entity who or which has taken the initiative to and is financially responsible for the making of the film. This

⁶ *Records Geneva 1996* 176ff.

⁷ *Records Geneva 1996* 680ff.

⁸ See also the report of Country of Origin Study Group of the International Literary and Artistic Association (ALAI) in 232 RIDA (2012) 2–43.

provision must be seen in the context of the differences which exist in national law as regards who is considered the author of a cinematographic work. This issue is further discussed in connection with Article 14*bis* of the Convention in Chapter 11 (1). In those countries where the producer is considered the author, its nationality may be difficult to ascertain if it is a legal, rather than a natural, person. Furthermore, in the same way as a book publisher, the producer will normally have invested in the work and such investments also provide a reason why the work is linked to the producer's country, even if an actual publication has not taken place. In the case of international co-productions it is considered sufficient for obtaining protection under the Convention that just one of the producers fulfils the point of attachment.⁹

Works of architecture are considered protected under the Convention if they are erected in a Union country, and 'other artistic works', in practice probably mainly works of art, are also considered protected if they are incorporated in a building or other structure located in a country of the Union (Article 4(b)).

A frequently overlooked provision which is also relevant in the context of the points of attachment is the provision in Article 15(4). Where the presence of at least one of the above-mentioned points of attachment (the author's nationality, the country of first publication, and so on) normally will have to be proven when the rights are enforced, at least if disputed by the defendant, Article 15(4) implies that in certain cases the courts must be satisfied if they find that there is 'every ground to presume that [the author] is a national of a country of the Union'. The provision deals with anonymous unpublished works and is normally associated with the protection of traditional cultural expressions (or folklore as they were earlier more commonly referred to). In a number of cases it seems doubtful whether it has been correctly implemented in national law in countries where international instruments require transformation into national statutory instruments.¹⁰ The provision is discussed further in Chapter 11 (1).

In addition to the points of attachment, which are used to determine whether a work is protected under the Berne Convention, further criteria are used to determine *the country of origin of the work* in cases where the work is attached to a plurality of Union Countries. This is of importance when applying the rule on comparison of terms in Article 7(8), which is further discussed in Chapter 19, and which permits the country where

⁹ *Records Stockholm* 1179ff.

¹⁰ *Blomqvist* 2009 59ff.

protection is claimed to reduce its term of protection for foreign works in accordance with the term granted in the country of origin. There are also other cases where the protection in the country of origin exceptionally plays a role and exceptions from the main rule on national treatment in Article 5(2) accordingly apply, including the protection of works of applied arts in accordance with Article 2(7). The country of origin is also decisive as to in which country, according to Article 5(1) and (3), the author is not entitled to claim the minimum rights granted under the protection (even if nationals of a Union country may always claim national treatment in other Union countries (Article 5(3)).

The rules on the country of origin are included in Article 5(4)(a), according to which the main rule is that the country of origin is the country in which the work was first published. This also applies in cases where an author who is a national of one Union country first publishes in another such country. Where the work is published simultaneously in several Union countries, the country which grants the shortest term of protection is considered the country of origin, if such a difference in terms exists. The Convention is not explicit as regards the situation where simultaneous publication takes place in several Union countries with the same term of protection, but in the absence of such indication it must be assumed that all the countries where the first publication simultaneously takes place (that is, publication within 30 days of the first publication, as provided in Article 3(4)) are considered countries of origin. If on the other hand the work is simultaneously published in a non-Union country and a Union country, the latter is considered the country of origin (Article 5(4)(b)). In such case the rule of the country with the shortest term of protection in subparagraph (a) must apply as well, if the simultaneous publication in addition to the non-Union country also encompasses two or more Union countries with different terms.

One may well argue that the growing number of accessions to the Paris Act of the Berne Convention has made these rules less important because in practice protection under the Convention will be granted in most cases, but they still command interest because lack of attention to them may lead to diminished levels of protection, not least in countries where national works are granted a lower level of protection than works protected under the Convention, as permitted in Article 5(3). As an example, if a work by a European author is first published in the USA, infringements can only be brought before courts in that country when the work is registered in accordance with the local rules for national works.¹¹

¹¹ 17 USC § 411 and the definition of 'United States Work' in § 101.

On the other hand, authors from countries with shorter terms of protection, such as the 50 years pma (*post mortem auctoris*, after the death of the author) which is the minimum term of the Berne Convention, may obtain the longer term of 70 years granted in the EU and the USA by choosing to publish in (one of) those countries first and then waiting for 30 days or more before a possible later publication in their own countries or other countries with shorter terms of protection. Such ‘first publication shopping’ will typically not even diminish the protection in the author’s home country because the national rules on the international scope of application of the national statute in most countries ensure full protection of all persons who are either nationals or habitually resident in the country.

If the work is unpublished, or first published outside the Union and not simultaneously published within, protection will either depend on the nationality of the author, in which case the country of nationality is considered the country of origin (Article 5(4)(c)). Probably this rule applies *mutatis mutandis* in relation to the country in which the author is habitually resident if he or she is not a national of a Union country. Protection may also be granted pursuant to the special points of attachment for cinematographic works and works of architecture as well as incorporated artistic works under Article 4. In such cases the country where the maker is headquartered or is habitually resident, the country where the work of architecture is erected, or the other artistic work is incorporated in a building or other structure, respectively, is considered the country of origin (Article 5(4)(c)).

The relatively generous protection of works by authors from countries outside the Berne Union, in a way, opens a back door to the Union because such authors, or in practice their publishers, can systematically ensure a simultaneous protection within the Union and thereby obtain protection in all Union countries. The expression ‘the back door to Berne’ originates from the USA where simultaneous publication of national works in Canada, the UK and/or other Union countries was a widespread practice aimed at obtaining additional international protection, until the USA joined the Berne Convention in 1989. The *rule of retaliation* was originally adopted in the 1914 Berne Additional Protocol and later included in Article 6 when the Convention was revised in Rome in 1928. It makes it possible for countries of the Union to lower the protection for third countries that fail to protect the works of Union countries in an adequate manner. When this faculty is used, other Union countries are not obliged to grant any stronger protection either. Presently this provision is not applied in practice and its significance is diminishing

as the adherence to the international protection system is growing. For this reason it is not discussed further in this book.

3. THE ROME CONVENTION

The points of attachment under the Rome Convention are at the same time similar to and decisively different from those under the Berne Convention. Unlike the situation for copyright in literary and artistic works, the protection of related rights, even under national law, was not widespread at the time of the adoption of the Convention in 1961. Accordingly there was a more pressing need to ensure that rights owners from non-Convention countries would not unduly benefit from the protection, compared to what had been the case under Berne. In addition the points of attachment are further complicated by the fact that certain minimum rights under the Rome Convention are subject to possible reservations by the countries party to the Convention. It was therefore at least to some extent ensured that rights owners from countries that have chosen not to grant a certain minimum protection to foreigners shall not enjoy such protection in other Convention countries either. The provisions regarding the points of attachment are included in Articles 4 to 6 and in addition there are provisions on reservations, and so on, in Articles 16(1)(a)(iii) and 17.

One of the most important differences in the points of attachment between the Berne Convention and the Rome Convention concerns *performing artists*. Where the nationality of the author is probably the practically most important point under the Berne Convention, the nationality of the performer is irrelevant under the Rome Convention. Instead Article 4(a) attaches the importance in the first rank to the country where the performance took place.

The reason for this difference is that where authors normally work individually or in combinations of few persons who create joint or composite works, performers most often work in collectives ranging from duos, soloists with backing of more or less permanent bands or individually engaged session musicians to very large orchestras and choirs. The drafters of the Convention feared that the handling of the very large number of different nationalities, which would follow from applying a nationality criterion, would cause insurmountable practical problems.¹² This is not affected by the reference to the nationality of the performing

¹² *Masouyé 1981 27.*

artist in the definition of national treatment in Article 2(1)(a). The latter provision is merely recognition of the fact that the scope of application of national statutes may be based on other points of attachment than those of the international Convention. The national determination of the persons whom the law considers nationals, is of course also relevant for determining in the Convention the treatment that foreigners should also benefit from.

The limitation to performances taking place in a Convention country should also be understood in the context that the Rome Convention, like other international instruments on copyright and related rights, only deals with international situations. Thus, if a musician from Convention country A performs a work in Convention country B he or she will not enjoy protection under the Convention in country B, neither national treatment nor minimum rights, but only in other Convention countries, including his or her own country, A. In practice, though, it is quite common that Convention countries do grant protection to their own nationals, which is then in excess of the minimum requirements of the Convention.

In addition to the place where the performance takes place, Article 4(b) and (c) apply two points of attachment, namely whether the performance is incorporated in a phonogram which is protected under Article 5 of the Convention ((b)); or whether the performance, without being fixed on a phonogram, is carried by a broadcast which is protected under Article 6 of the Convention ((c)). Together with the place of the performance, these points of attachment are alternative: that is, if only one of them is fulfilled, protection must be granted. The points of attachment for phonograms and broadcasts to which the two latter points refer are discussed below. What needs to be underscored here is that these supplementary points of attachments for performers in practice mean that a phonogram and its incorporated performances are normally always either all protected or all unprotected under the Convention. To some extent this also applies to 'live' broadcasts, although the playing of performances fixed on phonograms in an otherwise 'live' transmission must be determined separately and does not follow the protection status of the broadcast as such. It is only performances fixed on phonograms that fall outside the specific point of attachment regarding performances in broadcasts in Article 4(c). 'Phonograms' are defined in Article 3(b) as 'any exclusively aural fixation [...]', so if performing artists participate in a TV programme which is recorded on video for later broadcasting, they may qualify for protection by virtue of the points of attachment for the subsequent broadcast as such, as provided in Article 4(c), in those cases where the audiovisual exclusion in Article 19 does not apply. As to

performing artists who, in a similar situation, contribute to a time-shifted broadcast on sound radio, it would appear that the points of attachment for phonograms and not for broadcasts apply.

For *producers of phonograms* Article 5(1)(a)–(c) establish three alternative points of attachment: the nationality of the producer ((a)); the country where the first fixation of the sounds took place ((b)); or the country in which the phonogram was first published ((c)). National treatment must be granted if any of those points attaches the phonogram to another Convention country. It contains no provision which equates nationality with habitual residence, as does the Berne Convention, and it does not seem quite clear how nationality is determined for phonogram producers. Most commonly, they are incorporated or otherwise constitute legal, rather than natural, persons. The question seems to be left for national law (and courts) to decide. Probably it would often be justified to attach some weight to the law under which the company is established and registered, when applicable. As regards the publication point of attachment, a publication within 30 days in a Convention country of a phonogram which was first published in a non-Convention country is considered simultaneous and thereby equal to a first publication in a Convention country (Article 5(2)). It is required that a publication fulfils the conditions laid down in the definition in Article 3(d), namely that there is an ‘offering of copies of [the] phonogram to the public in reasonable quantity’.

The points of attachment for phonograms were quite controversial when the Rome Convention was negotiated because several countries already granted protection of phonograms, be it through related rights, copyright proper, or in other ways, and opinions differed as to how close an attachment should be required in order to grant rights under the Convention. Accordingly the points of attachment discussed above are only the main rule. Article 5(3) further allowed contracting parties to declare by means of a notification to the Secretary-General of the UN that they would not apply either the criterion of publication or, alternatively, the criterion of fixation. Thus they would be able to apply a combination of either nationality and fixation, or nationality and publication. Even this level of freedom to choose was not enough for some countries that had shortly before passed national legislation more or less basing the protection of phonogram producers solely on the fixation criterion. A grandfather clause was therefore inserted in Article 17, according to which countries, who at the final day of the Rome diplomatic conference solely based the protection of phonogram producers on the criterion of fixation, may notify the Secretary-General of the UN that they will only apply that criterion, also in relation to the

reservations under Article 16 concerning reciprocity regarding the communication rights granted under Article 12. This issue is discussed further in Chapter 16 (2).

This touches on one of the reasons why the points of attachment for phonogram producers were so controversial. The protection covers not only the right to authorize or prohibit reproduction under Article 10, but also the optional rights to equitable remuneration for broadcasting and other communication to the public under Article 12. Some generosity may very well be appropriate when the issue is preventing pirated copies of foreign recordings, because they are also likely to cause disruption of the market for national recordings. The matter is different regarding rights which cause an ongoing flow of payments, such as broadcasting royalties. Here there are strong arguments as to why producers from non-Convention countries should be prevented from using generous points of attachment as a back door to protection under the Convention. Rules pursuing this objective were introduced in Article 16(1)(a)(iii) which makes it possible for contracting states to declare by notification to the Secretary-General of the UN that they will not apply the provision of Article 12 as regards phonograms to a producer who is not a national of another contracting state. Such a reservation implies that a country, having taken the required reservations, may exclude the fixation and publication criteria completely in relation to those rights. The reservation is linked to the rights granted under Article 12 as such, and it may therefore apply to not just the remuneration rights of the phonogram producers but those of the performing artists as well.¹³ The other provisions relating to reservations under Article 16 are discussed in Chapter 16 (2).

For *broadcasting organizations* Article 6(1) (a) and (b) of the Rome Convention operate with two alternative points of attachment. Protection is granted if: the headquarters of the broadcasting organization is situated in another contracting state ((a)); or the broadcast was transmitted from a transmitter situated in another contracting state ((b)). During the Rome conference it was clarified that the state where 'the headquarters of the broadcasting organization is situated' should be understood to mean the state under the laws of which the broadcasting entity was organized. It was further pointed out that various different national types of corporations were also to be considered as included.¹⁴ It is probably correct to assume that the form of incorporation of the broadcasting organization is

¹³ *Masouyé 1981* 43.

¹⁴ *Records Rome 1961* 43.

a matter left to national law to decide. Indeed, it here seems to be a matter of admitting subjects of protection that are legal persons, rather than excluding natural persons from protection in those, probably rare, cases where, for example, a private local radio station is run by a natural person rather than a company.

According to Article 6(2), contracting states may declare by notification that they wish to use the above-mentioned alternative points of attachment in a cumulative way and thus only protect when both are satisfied. Thereby a high level of flexibility is obtained, because such a notification will enable a contracting state to apply either the two criteria cumulatively, or only the location of either the headquarters or the transmitter, respectively. Each of the two latter criteria will in itself give a broader protection than the cumulative use of both, and they can therefore be applied within the limits laid out by the permitted notification.

4. THE PHONOGRAMS CONVENTION, THE SATELLITES CONVENTION, THE TRIPS AGREEMENT, THE WCT, THE WPPT AND THE MARRAKESH VIP TREATY

In the 1971 **Phonograms Convention**, which only protects producers of phonograms, a simpler solution than that of the Rome Convention was chosen, and protection was granted exclusively on the basis of a criterion of nationality (Article 2). A grandfather clause was added, however, in Article 7(2) allowing a contracting state, who at the date of the end of the diplomatic conference (29 October 1971), afforded protection solely on the basis of the place of first fixation, to declare that it will apply that criterion instead of the nationality of the producer by a notification deposited with the Director General of WIPO.

The 1974 **Satellites Convention** in its Article 2(1) limits the protection to situations where the originating organization is a national of another contracting state, but in Article 8(2) it allows contracting states, who on the day of adoption of the Convention (21 May 1974) protected on the basis of the country from where the signal is emitted to the satellite, to maintain that point of attachment if they notify the Secretary-General of the UN accordingly.

The **TRIPS Agreement**, the **WCT** and the **WPPT** do not provide for points of attachment of their own, but apply *mutatis mutandis* the relevant provisions in the Berne and Rome Convention, respectively, for

the different categories of rights, and the **ACTA Agreement** refers as far as it is concerned to the provision of the TRIPS Agreement.

While the **TRIPS Agreement**, in its general rule in Article 1(3) states that member states shall accord the protection under the Agreement to nationals of other member states, it adds that ‘nationals’ shall be understood as those natural or legal persons that would meet the criteria for eligibility under the Berne and Rome Conventions, respectively, where such states were all members of the WTO party to those Conventions. Countries that have made notifications in accordance with Article 5(3) or 6(2) under the Rome Convention shall make a similar notification to the Council for TRIPS.

Article 3 of the **WCT** makes the provisions in Article 2 to 6 of the Berne Convention which, *inter alia*, include the rules on the points of attachment, applicable *mutatis mutandis* in respect of the protection granted under the WCT. The application *mutatis mutandis* is explained in an agreed statement linked to Article 3. It clarifies that when the Berne Convention refers to itself and to the countries of the Union, in relation to the WCT it should be understood as references to that treaty and to its contracting parties. Where the Berne Convention contains references to countries, they should in relation to the WCT be understood as also including the intergovernmental organizations (such as the EU) which under certain conditions may become party to that Treaty, as provided for in WCT Article 17 (discussed in Chapter 24).

The **WPPT** uses the same method of reference as the TRIPS Agreement, in such a way that the term ‘nationals’ is defined as those who would be eligible under the points of attachment of the Rome Convention, if they were applicable. It is worth noting that even if the TRIPS Agreement and the WPPT both explicitly use the term ‘nationals’, nationality is not necessarily the relevant point of attachment at all. The nationality of performing artists is not a relevant point of attachment for TRIPS and WPPT; it is a term which in certain contexts has had its original meaning completely removed by means of a definition.¹⁵

As regards the rights under Article 15 of the WPPT regarding equitable remuneration for broadcasting and other communication to the public of phonograms published for commercial purposes, a question emerges regarding the applicable points of attachment because the WPPT does not include any explicit reference to the provisions in Article 16(1)(a)(iii) of the Rome Convention on reservations. According to this provision, a

¹⁵ Sterling 2008 385; von Lewinski 2008 278 and 442ff; Ficsor 2004 237ff; a different view is expressed by Ricketson and Ginsburg 2006 1246ff.

contracting state may refuse protection under Article 12 of the Rome Convention, that is, granting equitable remuneration for broadcasting and other communication to the public of commercial phonograms for foreign producers who are not nationals of other convention countries. The agreed statement linked to Article 3 of the WPPT, however, shows that it was understood that the subsequent provision in Article 16(1)(a)(iv) is applicable. That would in its turn be pursuant to the very broad wording of the notification provision in Article 15(3) of the WPPT, and it can therefore probably be safely assumed that this provision also permits the use of notifications under Article 16(1)(a)(iii) of the Rome Convention.¹⁶

The WPPT additionally includes an agreed statement linked to Article 3(2) which clarifies that '[f]or the application of Article 3(2), it is understood that fixation means the finalization of the master tape ("*bande mere*")'. This attempts to solve a practical question which has had increasing importance due to modern recording techniques, namely when and where a recording takes place. A commercial production of a musical recording may very well have been recorded in several different countries as various instruments or vocals, effects, mixing, post production, and so on, may be added along the way and in different studios. According to the agreed statement it is the finalization of the final product which is decisive for the application of the points of attachment. This is not very much in the interest of the performing artists, because it may well mean that a performing artist who has participated in a recording in a Convention country subsequently, and without his or her knowledge or agreement, may be deprived of international protection.

Another agreed statement to Article 3 clarifies that the references to nationals of a contracting party under the Rome Convention will, when applied to the WPPT, also mean nationals of the member states of an intergovernmental organization which in accordance with Article 26 is a contracting party to the WPPT.

The **Marrakesh VIP Treaty** does not grant any protection of its own, but provides for limitations and exceptions to protection granted under other treaties, notably the Berne Convention, the TRIPS Agreement and the WTO, and therefore it does not contain any provisions on points of attachment for the protection. In that respect it must be considered to rely on, implicitly, the points of attachment provided for under the said international instruments. As regards points of attachments delimiting the

¹⁶ *Ficsor* 2002 638.

beneficiaries, the Treaty seems rather open. Its provisions are built around the concept of an ‘authorized entity’ which in Article 2(c) is defined as:

an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

It is added to the definition that such entities follow their own practice determining who the beneficiaries under the Treaty are. This clearly seems to address the issue of the detailed assessment of the various impairments giving entitlement to access and using copies in alternative formats. Less clearly, but possibly, it also addresses the question of the nationality, domicile or other attachment to the authorized entity and the country in which it operates which most likely may be demanded by such institution. Article 3 generally indicates who the beneficiary persons with reading impairments are, but only in relation to the disabilities covered, not in respect of nationality or habitual residence. It does not seem to be the intention of the Treaty to oblige authorized entities in a given country to serve persons with visual impairments or other reading impairments coming from any other country.

5. THE BTAP

Where the points of attachment under the Rome Convention are applied also under the TRIPS Agreement and the WPPT, the BTAP has gone its separate way. According to Article 3(1) of the Treaty, protection shall be accorded to performers who are nationals of other contracting parties. Paragraph (2) expands this by stating that performers, who are not nationals of a contracting party, but have their habitual residence in a contracting party, shall be assimilated to nationals of a contracting party.

Unlike the TRIPS Agreement and the WCT there are no definitions or other provisions which modify those rules by reference to the Rome Convention; they must be applied as they are written. This means that the place of the performance, the place of publication of a fixation of the performance and the protection status of the audiovisual work, into which it may be included, are without any relevance for its protection. It also means that there will be no uniform protection status for the numerous performances that are typically included in an audiovisual work or other audiovisual fixation. Each performer will be protected, or not, depending

on his or her nationality or habitual residence. In addition, each individual performer may enjoy a level of protection different from that of other performers, depending on the level of protection granted in his or her country of nationality or habitual residence, due to the provisions of Articles 4 and 11 allowing for material reciprocity whenever contracting parties declare reservations regarding the scope of protection for the rights of broadcasting and communication to the public. Similar differences may also be caused by reservations under Article 19(2) regarding application of the Treaty to audiovisual fixations of performances made before the entry into force of the Treaty in a state.

Such disparities in the level of protection obviously call for great care when the provisions are implemented in national law and in the administrative practices of producers of audiovisual works and collective management organizations. Furthermore in those contexts particular attention must be given to the rudimentary protection of performances in relation to use in audiovisual media which is granted under the Rome Convention, for which the points of attachment of that Convention still apply. This is relevant for the right of fixation, live broadcasting and, indeed, the other rights granted under Article 7 of the Convention to the extent they have not been cut off by Article 19, notably as regards the use of audiovisual fixations to which the performer has not consented. These rules are discussed in further detail in Chapters 12 (2) and 16 (2).

In conclusion, one may indeed note that computerization has allowed for simpler points of attachment than those that were imposed by the practical realities pertaining when the Rome Convention was adopted. That, however, does not necessarily mean that things get simpler in real life.

SUGGESTIONS FOR FURTHER STUDY

The points of attachment are discussed by *Goldstein and Hugenholtz 2013* 160–72. The points of attachment of the Berne Convention are discussed in-depth by *Ricketson and Ginsburg 2006* 237–92, and for discussions of those of the Rome Convention see *Nordemann, Vinck, Hertin and Meyer 1990* 374–82 and *Ulmer (1962–1963)* 10 Bull Copyright Soc’y USA 165, 171–6. Regarding the criteria of the Rome Convention and the WPPT, see *Ficsor 2002* 601–5 and *Reinbothe and von Lewinski 2002* 269–78. On the background for the points of attachment in the BTAP, see *von Lewinski* in (2001) 189 RIDA 3, 23ff.

6. Conflicts of laws and choice of law

1. INTRODUCTION: THE LAW OF THE COUNTRY OF PROTECTION

One of the most fundamental issues concerning international protection is to determine which national law applies to which acts regarding the protected work or object of related rights. The basic main rule in this respect is the principle of territoriality: that is, the law of a country applies in the national territory and only there. This rule is also expressed in Article 5(2) of the **Berne Convention** where the second sentence states that ‘the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed’. By virtue of the incorporation by reference in Article 9(1) of the **TRIPS Agreement**, Article 1(4) of the **WCT** and Article 1 of the **ACTA Agreement**, this also applies to the protection of copyright in literary and artistic works under those instruments.

The wording of Article 5(2), however, raises a basic question: exactly which law is it aiming at? The provision gives only limited guidance as to the exact country to which reference is made in the more complex situations. Is it the place where the causal act took place? Is it the place where the exploitation took place, if that is somewhere else? Is it the place where the work or object of related rights reaches its audience? Is it the place where the loss is suffered, typically the home country of the rights owner? Or is it the place where the matter is brought before a court of law? In particular in relation to infringements across borders, an issue that is discussed in further detail under (2), below, the issue of applicable law is disputed, and different commentators have reached a variety of conclusions.

The starting point of the analysis of this question, of course, must be the wording of Article 5(2). This wording may cause misunderstandings because it is not necessarily a reference to the law of the country where the matter is brought before the courts of law, as a strict reading might indicate, but rather to the legislation of the country where the utilization

has taken place. This is most commonly referred to as the law of the country of protection.

This assumption makes common sense. National sovereignty implies that national law regulates which acts can lawfully be done in the national territory, and the lawful or unlawful character of such acts once committed should not change depending on where the matter is adjudicated. '[T]he country where protection is claimed' must therefore be understood as 'the country *for which* protection is claimed' (emphasis added) just as it has been written out, for example, in Article 8(1) of the Rome II Regulation of the European Union.¹

The basic structure of the Berne Convention builds on national legislation which restricts certain acts relating to the protected works. Accordingly what counts must be the place where those acts, such as the reproduction or the communication to the public, take place. This is reflected in the wording of Article 5(2) which determines the applicable law as far as 'the extent of protection, as well as the means of redress afforded to the author to protect his rights' is concerned. The starting point must therefore be the rights, or, reversely formulated, those limitations to the general liberty of action, that are stipulated under national law implementing the minimum protection and national treatment under the Convention. So far it is obvious that the rights, as granted in each country, are applicable only in the territory for which they are enacted. This is emphasized by other provisions of the Convention as well, in the context of the limitations and exceptions permitted in Articles 11*bis*(2) and 13(1) and (3).

This understanding is also confirmed by Article 5(1) of the Berne Convention on national treatment, which is discussed in Chapter 7 (1), and which is based on the application of national law to the nationals of other Union countries. Similarly the provision of Article 19 enables authors to enjoy a level of protection in the country of protection in excess of the minimum rights granted under the Convention. Finally the provision in Article 16 regarding seizure of infringing copies supports this understanding.²

The reference to the law of the country of protection explicitly limits its scope to questions regarding the extent of the protection, that is, the existence and scope of rights, and the means of redress, whereas other issues are left without mention, including not least the question of who is

¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

² *Fawcett and Torremans 2011* 676ff.

the owner of rights and the choice of law in contract. These issues are discussed under (3) and (4), below. Issues of jurisdiction are not referred to either, and are therefore left for national law to decide, including the national norms on private international law (conflict of laws).

The scope of the reference to the law of the country of protection, however, must be read with some caution. In particular it would seem obvious that to the extent the reference to means of redress in Article 5(2) also concerns the law on procedures to be followed by and before the courts of law, it must necessarily be seen as a reference to the law of the forum country where the demand for protection is brought before the courts.³

As regards *related rights* the applicable law under the **Rome Convention** may be deduced from the provisions on national treatment, including the definition in Article 2(1) according to which national treatment shall mean the treatment accorded by domestic law of the contracting state in which protection is claimed to the various groups of beneficiaries as listed and specified in the provision. From the context it clearly emerges that in this respect certainly the extent of protection and means of redress were aimed at, but like the Berne Convention it leaves other issues without mention. There is no basis either for assuming that any other solutions apply as regards the other instruments in the field of related rights, namely the **Phonogram Convention** (Article 3), the **Satellites Convention** (Article 2(1)), the **TRIPS Agreement** (Article 3(1)) as regards its provisions on related rights, the **WPPT** (Article 4) and the **BTAP** (Article 4). After all, the rules indicated above are all straightforward consequences of the generally recognized principle of territoriality.

The question then remains how the rules on applicable law as expressed in Article 5(2) of the Berne Convention otherwise relate to the *general rules of private international law*. In the view of several prominent commentators⁴ the said rules point exclusively to the substantive law on protection and enforcement in the country of protection, not its law in general and in particular not to the norms on applicable law in its domestic private international law. Accordingly there is no room for applying the 'individualizing method' according to which the applicable law is determined based on an assessment of the links a case under the circumstances has to a given country. Ruled out as well is *renvoi* which

³ *Fawcett and Torremans 2011 676ff; Ricketson and Ginsburg 2006 319; Masouyé 1978 33ff.*

⁴ *Fawcett and Torremans 2011 679; Ricketson and Ginsburg 2006 1298.*

means that the private international law of one country refers to the substantive law of another country.

2. THE LAW APPLICABLE TO CROSS-BORDER COMMUNICATIONS

Utilization of a work is rarely confined to one specific act, and thereby the restricted acts under copyright may entail multiple elements, such as the reproduction and subsequent distribution of the copies made, or further dissemination or reproduction of works that are broadcast or communicated to the public. When applying the rule in Article 5(2) of the Berne Convention, the permissibility of such acts will depend on the nature and scope of the rights granted in the national legislation of the country where such acts occur, and this is independent of the possible protection against those acts in other countries, including the country where the reproduction, broadcasting or communication that led to the subsequent distribution or other dissemination took place.

The case where reproduction takes place in one country and distribution in another is conceptually simple to deal with, because the rights are separate. Thus the right of reproduction applies in the one country and the right of distribution (if any, and depending on whether the reproduction was lawful or not, even if it took place in another country) applies in the other.

However things get more complicated if only one right is at play. Nothing in the international instruments rules out, for example, that an act of communication may be perceived as covering both the act of transmission and the inextricably linked dissemination, whether it happens in the same territory as the act of communication or in other territories, neighbouring or not. One may even argue that such perception makes sense, because the dissemination and perception of the works, whether in one or the other country, is normally the very economic rationale for any act of communication. If, however, the dissemination is covered under the right of communication in one country, the main field of application of that element of the protection is the dissemination of domestic and foreign communications within that country, not so much the dissemination abroad of domestic communications, because they will be subject to the rules of the foreign countries where the dissemination takes place.

The phenomenon of communication of works across national borders is not a new one in the field of copyright; it emerged as early as when sound radio was introduced in the early twentieth century. Broadcasting

satellites made it particularly important around the 1980s and with the advent of the internet it has assumed global and inescapable importance and attracted considerable divergence of views.

The problems in this respect are already complicated in connection with *regional satellite broadcasting*. Typically the whole process begins with an initiating act, done in a particular country. That may be a technician, acting under the responsibility and orders of a broadcasting organization, who undertakes the technical preparations and causes the showing of, say, a film. He or she literally 'presses the button'. From there the signal will be sent to a transmitting station, possibly situated in another country, from which the signal is sent to the satellite, which broadcasts it with the effect that it may be received by the public in a plurality of countries, depending on the footprint (area of coverage) of the satellite.

The issue of applicable law was the object of comprehensive discussions at WIPO in the 1980s. The disagreement was between proponents of the so-called 'emission theory' according to which only the legislation in the country of emission should be applicable and of the so-called 'communication theory' (also named the 'Bogsch theory' after the then Director General of WIPO, Dr Arpad Bogsch) according to which the legislation in the footprint countries should apply as well.⁵ The disagreement had a political flavour to it because the footprint of most European satellite broadcasting covers East European countries, and during the Cold War it was an unattractive proposition to the Western European countries and their broadcasters to concede influence on the clearing of rights for their broadcasting to rights owners on the other side of the 'iron curtain'.

The question did not reach a generally agreed solution, and wherever copyright protection is respected by satellite broadcasters the practical reality probably is that it has little consequence whether one or the other national legislation applies. What counts is first and foremost who owns the right to authorize the broadcast, and on what terms, notably as regards possible other rights owners in the footprint countries. Those questions obviously have found the required solutions in the contractual practice of the rights owners and distributors, independently of the various theories.

⁵ *Ficsor 2004 75ff.*

In this respect it is worth noting that an explicit solution was adopted in the European Cable and Satellite Directive.⁶ It is based on the law of the emitting country, but a 'long arm' provision gives the possibility of applying other legislation as well, if the country of emission does not grant a sufficient level of protection. This solution should probably not be considered the default solution elsewhere. The Directive harmonizes in substance the rights to be granted in respect of satellite broadcasting, and thereby it establishes a framework for the application of the long arm provision which at least for the time being does not exist in other regions of the world. The solution may, though, be introduced in regional legislation, or even in individual countries.

The scope of protection as regards broadcasting in national law is not discussed here, but it is worthwhile considering the scope of the minimum rights granted in the international instruments. Suffice it to state here, that there is no generally agreed international clarification on this issue. The topic is discussed further in Chapter 16 (2).

Also as regards the dissemination of works and objects of related rights on the *internet*, quite some discussion has taken place,⁷ also under the auspices of WIPO, but no general agreement seems to have emerged as to which law is to be considered applicable. Technically there are similarities between broadcasting and internet dissemination in the sense that an act of communication in one country, possibly conducted through one or more other countries, may initiate reception of the content in a multitude of countries.

An important difference, however, is that the internet is interactive. The initiative for the individual transmission is with the recipient whereas it is the broadcaster who initiates the dissemination of contents through satellite broadcasting. In addition the party initiating the making available of protected subject matter on the internet will normally copy it to a server, which may be situated in the same or in another country. The act of reproduction is an essential part of the communication. That is not the case regarding broadcasting. Broadcasts are normally recorded by the broadcaster, but that is for completely different purposes, and therefore they cannot be assimilated with the uploading in computer networks.

Furthermore, dissemination on the internet as a rule is global, rather than regional, and not least it causes acts of reproduction in the receiving country, caused by downloading, even when this is done solely with the

⁶ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁷ For an overview see *Ricketson and Ginsburg 2006* 1301–14.

purpose of watching or listening to the work or other object on the downloading person's computer.

Also in this case, however, a fundamental question is whether it is the law of the country where the act of uploading took place, or that of the country of reception, where the economically relevant effect of the uploading materialized, which applies, or possibly both. Again the starting point must be the minimum rights which are granted in the international instruments in the field. In this case we have, in particular, the right of communication to the public which according to Article 8 of the WCT include that the work, performance or phonogram is '[made] available to the public [...], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'. Separate rights of the same nature are granted by Articles 10 and 14 of the WPPT and Article 10 of the BTAP.

It would therefore seem clear that in the case of a cross-border infringement where a work is uploaded in country A and downloaded in country B, the potential downloading in country B is decisive for the uploading to be considered covered by the right of making available in country A. That is not the same as saying that an isolated downloading in country B in itself constitutes an act covered by the protection against making available. On the contrary, the restricted act consists in making the work available in such a way that access to it is enabled.⁸ This act primarily takes place in the country from which the work is uploaded.

As in the case of satellite broadcasting, however, there are arguments why the right must be understood as reaching further and also implying dissemination in other countries than where the making available took place, at least if such dissemination was intended or the country in question was specifically targeted. In that respect, however, opinions are divided and there is no clear international consensus, as further discussed in Chapter 16 (3) in relation to the scope of the right of making available.

3. DETERMINATION OF THE SUBJECT OF PROTECTION

The Berne Convention is the only international instrument in the field of copyright and related rights which include explicit provisions (Article 5(2)) regarding the applicable law, but it limits its rules in this respect to the extent of protection as well as the means of redress offered to the

⁸ *Records Geneva 1996 204.*

author to protect his or her rights. As regards the question as to who as a general rule is considered the first owner of the rights, that is, the person who benefits from the rights in the absence of any transfers, and so on, the wording of Article 5(2) gives no guidance. The Convention contains a specific provision in Article 14*bis*(2)(a) regarding audiovisual works according to which the question is a matter for legislation in the country where protection is claimed. The rule is linked to a rule of presumption which is discussed in Chapter 11 (1). At the same time Article 15(4)(a) of the Convention points in the opposite direction towards the country of nationality of the author, leaving it to the legislation in the country where there is every ground to presume that the author is a national to designate a competent authority to protect and enforce his or her rights in the countries of the Union.

As regards other cases there are no provisions in the international instruments regulating which law applies, and the question is disputed. There are proponents for the law of the country of protection⁹ or the source country (such as the country of origin, but possibly also the country of the author's nationality or habitual residence) or the country with the closest relation to the case.¹⁰ It is probably fair to state that both solutions can be backed by good arguments. If the law of the source country is applied it will result in a uniform and accordingly easily manageable legal status in all countries of protection, but at the same time it will imply the extraterritorial application of the law of the source country, including possible presumptions regarding authorship or transfer of rights in employment relationships, and so on. For some countries such a consequence is squarely unacceptable. In view of the wording of the Convention, which seems deliberately to evade the issue, it is probably most correct to conclude that the issue is not regulated by the Convention.

If this is correct, it means that the question is left to be determined by the national law of the country where the matter is brought before a court of law. In this respect nothing rules out *renvoi*, that is, a reference in national law to the law of another country. Not just the substantial law of the forum country is at play, but also the body of private international law of that country which freely may refer to either the legislation in the source country or the country where protection is claimed, which may or may not be the same as the forum country. Such reference does not seem obligatory under the Berne Convention, but depending on the circumstances may be based on the general maxim in private international law

⁹ Ricketson and Ginsberg 2006 376ff; Ficsor 2004 42.

¹⁰ Goldstein and Hugenholtz 2013 136ff.

that a case should be decided under the legal system to which it has its closest connection. In this respect there is no basis for determining that the one or the other solution would be incompatible with the Convention.

Jurisprudence in the United States of America has referred to the law of the country of origin, while recognizing that in some cases it might not be the country of origin as defined in the Berne Convention, with regard to the transfer of rights from employee to the employer. In doing so, the court applied the national law on conflict of laws and concluded that there was nothing in the Berne Convention to alter that conclusion, which was to consider the law of the source country applicable.¹¹ Similarly in French jurisprudence the *Cour de cassation* has found that Article 5(2) of the Berne Convention, by not regulating the ownership of copyright, its acquisition or its transfer, leaves the matter for the rules on conflict of law in the country of protection, which in this case pointed to the country of protection.¹²

Interestingly in another case the same French court applied the law of the country of protection (in the case, French law) as regards ownership of the moral rights of a film, with the argument that those rules under French law are fundamental and mandatory parts of the *ordre public*. Already on this ground the court declined to consider the law of any other country including the law of the source country of the film and the provisions of the Berne Convention.¹³ This has been read to express that the decision also intends to indicate the legal situation as regards other categories of works.¹⁴

Like the Berne Convention, the **Rome Convention** contains no provisions regarding choice of law to determine the initial owner of rights. This in particular caused lively discussions in connection with the negotiations of what ultimately became Article 12 of the BTAP.¹⁵ In the light of those discussions and the wording of that Article it is safe to say that the applicable law is not generally agreed on. However, given that there are no provisions to the contrary in the Convention, it must be up to the law of the forum country, including its rules on conflicts of law, to

¹¹ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* 153 F 3d 82 (2d Cir 1998).

¹² *Cour de cassation, chambre civile I*, case no 11-12508 of 3 June 2013.

¹³ *Cour de cassation, 1ère chambre civile*, 28 May 1991 (*Asphalt Jungle*); comment by *Edelman* 1992 IIC 629–42.

¹⁴ *Ginsburg and Sirinelli*, 15 Colum-VLA J L & Arts 1991 143ff.

¹⁵ *Ginsburg and Lucas* 2003; *Ginsburg and Lucas* 2004.

determine the applicable law, if need be through *renvoi* to the substantive law of another country.

There does not seem to be any basis for assuming otherwise as regards any of the other international instruments on copyright and related rights, which are discussed in this book.

4. CHOICE OF LAW

The general default rule within contract law is that freedom of contract prevails, which means that the parties to an agreement may freely determine among themselves how to organize their legal relationship. This freedom normally applies whenever the law does not establish any general or specific limitations in that respect. Accordingly it is generally permitted, and frequently happens in practice when transfers of rights are made across borders, that the parties determine which law shall apply to the agreement.

The protection of the object of the agreement, the work, performance, phonogram or broadcast, follows from national law and the principle of the law of the country of protection (which is discussed under (1), above) and is therefore beyond the scope of agreements that can be made by private parties. In some cases, though, it might be useful to agree that the relationship *inter partes* should be organized ‘as if’ a certain law of protection were applicable. This might be practical in cases where a contractual relationship covers a large number of heterogeneous objects of protection and/or territories. Parties may also find it convenient to agree on an applicable law when sorting out their differences after an infringement has occurred. Theoretically such agreements should be possible, even if it will have no effect on the level of protection applicable in relation to third parties, not privity to the agreement. Where they effectively result in less protection, they could be viewed as license agreements and where they result in a higher level of protection they could be viewed as purely contractual protection, such as regularly occurs, for example, in connection with ‘rights’ in sports transmissions or other uses of unprotected contents. However where such agreements diminish protection which is considered part of the *ordre public* they might not survive scrutiny in national courts abiding by such principles. In addition, as far as Europe is concerned, the Rome II Regulation¹⁶

¹⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

provides in its Article 8(3) that the choice of law according to Article 8(1) may not be derogated from by agreement. This applies to intellectual property rights across the board, and a supplementary rule in paragraph (2), pointing to the law of the country where the act of infringement was committed, applies to unitary Community intellectual property rights only, to which category copyright and related rights do not belong.

As regards the choice of the law governing the agreement itself, some national conflict of laws rules only permit the application of foreign law if the contract has a reasonable link to the country the law of which is chosen, but whenever that requirement is fulfilled there are rarely any general restrictions. Certain specific restrictions, in particular regarding inalienable rights, are discussed below.

In the absence of an agreement on the choice of law in a contract dealing with exploitation in another country than that of the assignor or licensor several different model solutions have been proposed, including the law of the country of protection and the law of the country of domicile of the author, but most importantly it has been maintained that, for example, a publishing contract should be submitted to the law of the country where the publisher is headquartered or domiciled.¹⁷ In most cases this will correspond to the most common conflict of laws rules, that absent agreement to the contrary an agreement should be subjected to the law in the country to which the agreements has its closest links. That is normally presumed to be the country of habitual residence of the party required to deliver the characteristic performance of the contract.¹⁸ Clearly one may argue that the manuscript of a book is a very characteristic contribution, but the decisive element of the agreement is that the manuscript is turned into a book, printed and sold, and the outcome of this activity normally determines the author's honorarium.

At the same time it is also clear that other agreements on protected works or objects of related rights may have a less clear link to the domicile of the assignee or licensee. In music publishing, for example, where the printing of sheet music is of minor importance compared to the licensing activities regarding other uses of the music, music publishers often operate in regions, such as the Nordic and Baltic countries, or Germany, Austria and Switzerland. If, say, an Austrian composer makes a publishing agreement with a German publisher in order to have his music promoted in the USA, the latter country would probably have a closer

¹⁷ *Goldstein and Hugenholtz 2013* 148 with further references.

¹⁸ See, for example, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

link to the contract than Germany; whereas if the aim of the contract were global promotion of the work one might even consider the law of the home country of the composer, in this example Austria, applicable, because the agreement would have no stronger linkage to the German music market than to any other territory in the world.

Certain specific rights forming part of the cluster of rights granted under copyright or related rights are, sometimes even at the international level, subjected to more or less strong limitations as to their transferability. This applies to the moral rights which, according to Article 6*bis* of the Berne Convention are retained by the author independently of the economic rights and even after the transfer of those rights. Strictly speaking, this does not necessarily imply an interdiction of a transfer of rights, and it is normally accepted that the provision does not prevent authors from waiving the exercise of the rights. In national law, however, the rights are frequently established as personal rights which cannot be transferred, and this is well in line with their fundamental character of a protection of personal integrity, as mirrored in the work or performance. Many laws, though, permit that the rights be waived to some extent, but even that is not always permitted. The resale right under Article 14*ter* of the Berne Convention is explicitly granted as an inalienable right. Also in regional and national law there are examples of inalienable rights including certain user rights regarding computer programs (Article 5(2) of the European Computer Software Directive¹⁹), regarding databases, (Article 15 of the Database Directive²⁰) and regarding rights of remuneration concerning rental (Article 4 of the Lending and Rental Directive²¹).

Having such variations in national law as regards inalienability or the possibility to waive the exercise of rights obviously may cause difficulties in the international exercise of rights. The countries that have introduced such limitations in their national law typically did so in order to protect their authors and performers against being caught in a heavy-handed contractual practice of their contracting partners. Such protection would be futile if it could be sidelined through an agreement on choice of law which refers to the legislation of a country where such protection is not granted. This applies so much more because a person

¹⁹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (consolidated in Directive 2009/24/EC of 23 April 2009).

²⁰ Directive of the European Parliament of the Council 96/9/EC of 11 March 1996 on the legal protection of databases.

²¹ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (consolidated in Directive 2006/115/EC of 12 December 2006).

without advanced knowledge in the field will rarely be able to understand the consequences of such a choice of law.

In European law, Article 3(3) of the Rome I Regulation²² and Article 3(3) of the European Convention on the law applicable to contractual obligations²³ at least to some extent accommodate this particular need for protection, by providing that where all other elements relevant to the situation at the time of the choice are connected with one country only, a choice of a foreign law by the parties shall not prejudice the application of rules of the law of that country, which cannot be derogated from by contract. One may, however, raise the question whether an even wider ranging protection may be granted by the law of the country of protection if it considers the inalienability within its own borders an element of the protection as such. In that case one may disregard even a choice of law agreement which is linked with relevant elements to another country, where the national legislation does not recognize the inalienability in the same way as the country of protection. Another way of looking at the matter, which would lead to the same substantive result, would be to question whether a transfer of the moral rights enabled through an agreement on choice of law could be disregarded as being contrary to the *ordre public* of the country of protection or the forum country. This question may be raised in cases where foreign courts deal with infringements in their own country of moral rights in a work created by an employee under the ‘works made for hire’ provision of 17 USC § 101, according to which the employer is considered the author and thereby also the first owner of the moral rights. The problem may also emerge in cases where copyright as such, including the economic rights, is considered inalienable (but the exercise of which may be transferred) as is the case under, for example, German law.

The Rome I Regulation and the European Convention on the law applicable to contractual obligations clarify in their Articles 9(2) and 7(2), respectively, that they do not restrict the application of the rules of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract. Furthermore in their Articles 21 and 16, respectively, they permit that rules of the law of any country may be refused, but only if such application ‘is manifestly incompatible with the public policy (“ordre public”) of the forum’.

²² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

²³ Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.

Accordingly those general, but regional, rules do not exclude right away the application of the specific rules on inalienability in the domain of copyright and related rights. As regards the latter rules, the general opinion seems to be that they apply regardless of agreements on choice of law that would otherwise neutralize them.

The validity of transfers and other transactions must be judged under the law of the country of protection. However, according to some commentators the effect of such contractual disposal may possibly have to be judged under the law of the contract,²⁴ or that law may have to be consulted preliminarily in order to ensure that it does not allow for only a more limited alienability than the law of the country of protection of forum, because in that case the strictest legislation must be applied.²⁵

As regards the conclusion and validity of contracts transferring copyright or related rights none of the international instruments in the field contain any general provisions concerning formal requirements for such contracts, but the Berne Convention contains a special rule in Article 14*bis*(2)(c). Strictly speaking it does not directly deal with transfers of rights but with the obligation to bring contributions to the making of an audiovisual work, an undertaking which triggers the presumption of legitimation under subparagraph (b), which is discussed in Chapter 11 (1). The provision is rather complex. As a starting point it provides that the question whether the undertaking should be made in a written agreement or a written act to the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. To this it adds, however, that it is a matter for the legislation of the country of protection to provide that the undertaking shall be in a written agreement or a written act to the same effect. Countries that have such provisions included in their national law are required to notify WIPO.

One is probably not much mistaken in assuming that such a provision reflects differing views on what the rule was supposed to be in the absence of an explicit provision. As far as the European Union is concerned, the issue is regulated in Articles 11 and 9(1) and (2), respectively, in the Rome I Regulation and the European Convention on the law applicable to contractual obligations. As regards formal requirements it is required that the contract satisfies the requirements of the law which according to the other rules of the Regulation/Convention governs the agreement, or of the law of the country where it is concluded. If the

²⁴ *Adeney 2006 646ff.*

²⁵ *Ricketson and Ginsburg 2006 1323ff.*

parties concluding the contract are in different countries, the contract is valid if it satisfies the formal requirements of the law, which governs it under the Regulation/Convention, or of the law of one of those countries. These rules are regional by nature, but the issue that they deal with is of very practical importance, not least in view of the requirements found in countries following the common law tradition that assignments and exclusive licenses of copyright must be written and, in some cases, signed by the rights owner or his or her duly authorized representative.

As regards the validity of the agreement as such, including questions such as whether a binding offer and acceptance have been made and whether under common law rules sufficient consideration has been exchanged for a promise to be binding, Article 8 of the European Convention on the law applicable to contractual obligations and Article 10 of the Rome I Regulation point to the national law which would govern it under those instruments if the contract or term were valid.

SUGGESTIONS FOR FURTHER STUDY

In recent years there has been a growing interest in the interface between private international law and intellectual property, witnessed by the publication of important works, such as *Fawcett and Torremans 2011*. *European Max Planck Group on Conflict of Laws in Intellectual Property 2013* is in principle a commentary to a set of principles established *de lege ferenda* (a suggestion of how the law should be) by a group of distinguished academics, but it also contains valuable assessments of the law in force. The issues specifically related to copyright and related rights are discussed, for example, by *Ricketson and Ginsburg 2006* 1291–327, and *Goldstein and Hugenholtz 2013* 131–53. See also *Austin* (1999) 23 *Colum-VLA J L & Arts* 1–48 and *Xalabarder* (2002) 8 *Ann Surv Int'l & Comp L* 79–96. Regarding the discussions on the applicable law for cross-border satellite transmissions, see *Fabiani* 1988 *Copyright* 17–26. Regarding the international aspects of provision under national law protecting authors and performers against unfair contracts or granting them rights of equitable remuneration, see *Peukert* (2004) 35(8) *IIC* 900–22.

PART II

The protection granted under the international instruments

7. National treatment

1. LITERARY AND ARTISTIC WORKS

Historically the national treatment requirement was at the core of the protection of literary and artistic works under the **Berne Convention**, because it contained only a very limited catalogue of minimum rights in the version that was adopted in 1886. The provision on national treatment, however, was and remains very broadly worded. It entails that a Union member country must grant to authors of other Union countries ‘the rights which [the] respective laws [of the Union member] do now or may hereafter grant to [its] nationals [...]’. The provision is now in Article 5(1) of the Paris Act of the Convention. Later treaties dealing with related rights, however, have adopted more narrow formulations or in reality more or less abandoned the rules. This is discussed under (2), below.

It follows logically from the concept of granting national treatment that the protection at least as a main rule must be granted independently of the existence and level of protection in the country of origin. This is explicitly stated in Article 5(2) and Article 19, and it is often referred to as the principle of ‘independence of protection’.

Even if national treatment is the main rule under the Berne Convention, it also contains a number of exceptions, where Union members may reduce the protection in accordance with the level of protection granted in the country of origin of the work. This is the case regarding the protection of works of applied arts (Article 2(7)); the protection of authors from non-union countries that fail to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union (Article 6); the term of protection (Article 7(8)); the artists’ resale royalty right (Article 14*ter*); and reservations regarding the right of translation (Article 30(2)(b)).

These exceptions clearly concern areas where there are frequently differences in the level of protection under national law, and where such differences have a significant economic importance. In various contexts it has therefore been questioned whether various newly emerged rights can be considered included under the term of copyright, as used by the Berne

Convention, and thereby submitted to the demand for national treatment. Among the new kinds of rights discussed in this context are the royalties on unused recording media, which in some countries are collected for the benefit of those rights owners whose works, and so on are presumed to be copied by the consumers. Another such right is the so-called public lending right, a right for authors of books to receive compensation from public libraries (typically such libraries that are funded by public authorities) for the lending of their books to the public.

In this respect it seems clear that the provision of the Berne Convention only applies to those categories of works and to those rights, which in accordance with the provisions of the Convention can be said to be under its regime of protection. Phonograms or broadcasts, for example, are not covered by the Berne Convention and its demand for national treatment, regardless of the fact that in some national legislation they do enjoy protection under the rules on copyright, rather than related rights. Furthermore the concept of 'rights' must be understood as legal claims granted to the author, or to others who derive their rights from the author, which can be made against other individuals or legal persons based on specific acts these individuals or legal persons have done in relation to the work.

Rules on *domaine public payant* (fees payable for use of works, the term of protection of which has expired, for the purpose of funding public endowments, and other means of support for culture), payments under social and health care schemes, tax exemptions and the like, endowments for the arts or similar subsidies are not 'rights' in the sense of Article 5(1). The decisive point must be the nature of the rights in question, not whether they formally have been included in the national legislation on copyright or in other legislation.

The underlying question about, in particular, newly emerged remuneration rights and their possible inclusion under the national treatment of the Berne Convention is politically sensitive. The wording of Article 5(1) dates from an era where individual exclusive rights were the predominant main rule. Even where some collective elements were present, such as the management of rights to publicly perform works of music with or without words, it was based on exclusive rights granted by law. With the passing of time, additional rights with a less individual structure have been added, including remuneration schemes for private copying based on levies charged on blank recording media and, in some countries, recording equipment. One cannot say that such arrangements are outside the realm of copyright protection, because their purpose is to substitute enforcement of rights which would not be feasible in practice. Nobody could in actual fact control the copying of music, and so on, on cassette

tapes, CDs or USB sticks, even if they tried; nor would anybody probably want a society where such control would be possible. So these arrangements replace exclusive rights which are clearly covered by national treatment, and they follow by and large the rules applicable for copyrights as well, in terms of, for example, the protected subject matter, the owners of rights or the term of the protection.

On the other hand it may also be a politically unsustainable position to require strict national treatment, if the differences in level of protection between the various countries become too important, not least in cases where the arrangements generate significant ongoing monetary payments. Both differences in national fee levels and the fact that some countries choose not to institute such arrangements may cause tensions which cannot be ignored. It may also be observed that in most cases where significant differences in levels of protection have been recognized and negotiated, the result has been an international regulation based on material reciprocity. By this is meant that the rights owners are entitled to enjoy in other Convention countries only those rights that their own countries grant to the rights owners of the foreign countries, or to enjoy those rights only to the extent a similar protection is granted. Such cases can be seen in the provisions of the Berne Convention on works of applied arts (Article 2(7)); on retaliation (Article 6); on the term of protection (Article 7); and on the resale royalty right (Article 14*ter*). Likewise there are examples in the field of related rights in Article 12 of the Rome Convention and Article 15 of the WPPT regarding equitable remuneration for broadcasting and other communication to the public of commercially published phonograms and in Article 11 of the BTAP on the rights of broadcasting and communication to the public. The whole system of national treatment under the international instruments dealing with related rights has undergone a development in which it has been reduced, as it is discussed under (2), below. The political controversies in the area remain difficult, both in the fields of copyright and related rights.

A quite delicate issue is the understanding of the term 'rights' in Article 5(1), beyond its application to certain new 'rights' such as blank recording tape remuneration. Does the term cover only the restricted acts defined as 'rights' under the Convention, such as reproduction or communication to the public, or does it extend further to cover also the remedies and sanctions at the disposal of the rights owner in case of an infringement? Certainly it seems artificial to separate the rights from their enforcement, because without appropriate enforcement provisions and remedies available, precious few 'rights' would be left in the real world, so such a separation would seem unfounded and lead to absurd results. On the other hand, in the subsequent paragraph (2) of Article 5

the prohibition of formalities for enjoyment and exercise of rights builds on a reference to ‘these rights’ (that is, the rights referred to in paragraph (1)) and it may be read as clarifying the concept by dealing with ‘the enjoyment and the exercise’ of the rights. In the next sentence, this reading is further confirmed in that the determination of the applicable law is presented as a consequence and laid out to cover both the existence of protection and ‘the means of redress’. This understanding is also supported by the fact that some, albeit rudimentary, enforcement provisions are included in the Berne Convention, notably in Article 13(3) and Article 16 on seizure, and therefore naturally are seen as expressing minimum ‘rights’, protected under the Convention.

Here, however, there is reason to take note of the interpretation, made by the USA, that particular remedies in excess of a certain basic level (notably attorneys’ costs and statutory damages), may be reserved for such works which have been duly registered under the national rules in this respect, also as regards foreign works.¹ If this interpretation could also be applied to the understanding of Article 5(1), it would mean, for example, that sanctions under the TRIPS Agreement may be applied to such enforcement measures and remedies which are granted under that Agreement which are in excess of what may be considered granted under the Berne Convention, as discussed in Chapter 4.

Whether this is correct must be considered quite doubtful. Clearly it would seem strange if the drafters of the Convention would reserve a certain minimum of enforcement measures and remedies for national treatment and give whatever might be in excess thereof free without pointing that out in the language of the Convention or in the records of the diplomatic conferences. Such an understanding would, indeed, considerably weaken the scope of application of the requirement for national treatment. Furthermore given that national treatment is a basic principle of the Convention, it would seem obvious that it would cover the nature and extent as well as the enforcement of the rights, because otherwise the purpose of the Convention, as stated in its Preamble, would not be met: ‘to protect *in as effective [...] manner as possible*, the rights of authors in their literary and artistic works’ (emphasis added). On the other hand, the deviating interpretations and the possible conflict between sanctions under the TRIPS Agreement and national treatment under the Berne Convention have developed later and may reflect a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ in the sense of Article 31(3)(b) of the

¹ 17 USC §412.

Vienna Convention. That provision, however, poses some rather strict conditions, not least in respect of a broad agreement among the rather large and diversified membership of the Berne Union, and it is not evident that they have been fulfilled.

The **WCT** for its part simply refers to the national treatment requirement of the Berne Convention. This is done separately in two different relations. By virtue of the general reference in WCT Article 1(4) it applies to the general protection level of the Berne Convention, which is incorporated by reference to also apply under the WCT. In this respect the reference includes both the main rule on national treatment and the exceptions from this rule which have been mentioned above. A separate reference in WCT Article 3 makes the main rule on national treatment in Article 5(1) of the Berne Convention applicable to the additional rules on protection granted in the WCT as well.

The **TRIPS Agreement** includes a separate provision about national treatment in Article 3 which requires that nationals of other member states are accorded a treatment no less favourable than that which the countries accord to their own nationals, but subject to the exceptions already provided in, *inter alia*, the Berne and Rome Conventions. The Agreement's demand for a treatment which is 'no less favourable' than the treatment of own nationals, differs slightly from that of the Berne and Rome Conventions, which refer to the rights that are granted to the nationals. This does not, however, entail any real difference, because neither the Berne nor the Rome Convention prevents foreigners from enjoying a stronger protection than nationals, as clarified in Article 19 of the Berne Convention and Article 21 of the Rome Convention. During the negotiations, the USA delegation tried to get wording included which would rule out demands for material reciprocity regarding remuneration schemes for private copying, but without success. This does not, however, prevent the question of the compatibility of such arrangements with the TRIPS Agreement, and the provisions from the Berne Conventions incorporated therein, from being taken up for separate consideration or adjudication.² The national treatment under the TRIPS Agreement is not confined to the 'rights' granted, but addresses the 'treatment [...] with regard to the protection of intellectual property'. A footnote omitted in this quote states that for the purpose of this provision "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters

² Gervais 2012 198ff.

affecting the use of intellectual property rights specifically addressed in this Agreement’.

By virtue of the reference in Article 2(3) of the **ACTA Agreement** the provisions on national treatment in the TRIPS Agreement apply *mutatis mutandis* to the protection granted under ACTA.

2. RELATED RIGHTS

As was already briefly mentioned in the discussion of national treatment of copyright, above, the general tendency has been that national treatment for related rights is weaker than that, granted for copyright in literary and artistic works. The **Rome Convention** defines in Article 2(1) the concept of ‘national treatment’ as ‘the treatment accorded by the domestic law of the Contracting State in which protection is claimed’ to performers, producers of phonograms and broadcasting organizations who or which are linked to the country of protection through certain points of attachment to the contracting state, which are listed in the Article.

In this way separate and to some extent independent points of attachment are used in the definition of national treatment. This is due to the particular complexities of those points in the Rome Convention and the fact that the Convention does not define any specific country of origin to which the definition of national treatment could refer. The points of attachment used in the definition have the function to circumscribe those performances, recordings and broadcasts which any state would be inclined to consider as ‘its own’, and they are not in all aspects identical to those which are used to determine which objects should qualify for protection under the Convention.

An important difference is that the nationality of performers is given relevance regarding the definition. That should probably be seen in the context that some countries extend the scope of their national law to cover performances by their own nationals, and it is therefore relevant for pinpointing those beneficiaries that national law would normally grant the highest possible level of protection.

Thus for performing artists ‘national treatment’ is defined as the treatment accorded by the domestic law of the contracting state in which protection is claimed to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory. For producers of phonograms it is the treatment granted by the country to producers of phonograms who are its nationals, as regards phonograms

first fixed or first published on its territory. Finally, as regards broadcasting organizations it is the protection granted to broadcasting organizations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

Article 2(2) adds to the definition that '[n]ational treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention'. This clearly implies that the protection 'specially guaranteed', that is, the minimum rights granted under the Convention, must be accorded to foreigners of other Convention countries, even if such protection is not given to the country's own rights owners, as defined in Article 2(1).

It is less clear whether the provision also means that national treatment is not required for rights which are granted to the rights owners of the country of protection, but which exceed the minimum rights. On the one hand, the 1961 preparatory works of the Convention leave little doubt that at the time a generous national treatment was envisaged, going beyond the minimum rights, just as they were, and are, in the case of the Berne Convention. This is explicitly stated in relation to Article 2(2) of the Convention in the General Report of the diplomatic conference, where a proposal aiming at permitting material reciprocity regarding rights granted in excess of the minimum protection was rejected.³ In the same document the same was expressed also in a specific context, that is, protection of performers as regards fixations of their performances in film or other audiovisual media, granted by national law in excess of the cut-off provision of Article 19.⁴

Certain commentators, though, have pointed out that the subsequent practice of the contracting parties seems to indicate a different understanding, reflected in the more narrow provisions on national treatment in the **TRIPS Agreement** Article 3(1) and the **WPPT** Article 4(1) according to which the obligation to grant national treatment for performing artists, producers of phonograms and, as far as the TRIPS Agreement is concerned, broadcasting organizations only applies in respect of the rights granted under those agreements. Article 4(1) of the **BTAP** provides an additional example of such limited national treatment. Those provisions appear to have been negotiated under an understanding, at least among some of the participating parties, that also under the **Rome Convention** national treatment only needs to be granted as far as the minimum rights under the Convention are concerned, because otherwise

³ *Records Rome 1961* 39.

⁴ *Records Rome 1961* 55; *Ficsor 2002* 609ff; *Ficsor 2004* 137ff.

such national treatment provisions could not apply between those parties to the instruments that are also parties to the Rome Convention, due to the rule on special agreements in Article 22 of the Convention.⁵

This point of view may raise some concern. The rather clear statements in the General Report of the Rome diplomatic conference were unanimously adopted by the plenary of the conference.⁶ Thus, they carry the weight of an 'instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty' in the sense of Article 31(2)(b) of the Vienna Convention on the Law of Treaties. It would seem out of order if such an agreement subsequently were considered changed without at least the explicit consent of all relevant parties (probably also including those countries that did not participate in the diplomatic conference, but later joined the Convention) aiming at changing the stated understanding of the Convention and in line with the provisions of Article 31(3)(a) and (b) of the Vienna Convention, which deal with subsequent agreements and practice of the parties.

Under international law mutually accepted documents, such as a general report of a diplomatic conference, and subsequent agreements and practice offer elements for the interpretation of equal strength. This follows from the customary law on interpretation of treaties, principles which are codified in Article 31 of the Vienna Convention. Subsequent agreements or practice, however, have been concluded between or followed by the 'parties'. This is not the case here, because there are countries which were represented at the diplomatic conference in Rome, or later adhered to the Convention, which did not participate in the negotiation of the TRIPS Agreement. Furthermore when TRIPS was negotiated it was a given that the Agreement would be joined by the USA, a country that had (and has) not joined the Rome Convention. As earlier mentioned, the negotiators of that country tried during the TRIPS negotiations to obtain national treatment for the proceeds from the blank recording media remuneration schemes, but without success.⁷ The rules on national treatment for the owners of related rights under TRIPS therefore clearly were negotiated as a specific rule of that Agreement and also for this reason cannot be seen as an interpretation of the Rome Convention.

⁵ *von Lewinski 2008* 201ff and 241ff.

⁶ *Records Rome 1961* 132.

⁷ *Gervais 2012* 198ff.

Despite TRIPS the higher level of protection in the Rome Convention continues to apply among the parties to the Rome Convention, and the lower level of TRIPS applies only among those countries party to TRIPS that are not at the same time party to the Rome Convention and in all TRIPS relations between Rome and non-Rome countries. This follows clearly from the provisions in Article 22 of the Rome Convention, dealing with special agreements between parties to that Convention, and the safeguard clause in TRIPS Article 2(2). In terms of *'realpolitik'*, however, there is every reason to take note of the viewpoint expressed by European delegates according to which a narrow interpretation of the Rome Convention is appropriate.⁸ In view of the economic consequences it is very much in the interest of the countries of Europe, where there is a long tradition for a strong protection of related rights, to obtain a general understanding of such a narrow interpretation.

As it has already been mentioned above, in the **TRIPS Agreement** national treatment in respect of related rights is explicitly limited to apply only in respect of the rights provided under the Agreement. In other words this means the minimum rights of the Agreement. One may therefore well argue that not much national treatment is left at all, but solely minimum rights. The same applies under **ACTA**, in which Article 2(3) in this respect refers to the TRIPS Agreement.

The same model was used in the **WPPT** where Article 4(1) states as its main rule that national treatment shall be granted with regard to the exclusive rights specifically granted under the Treaty and to the right to equitable remuneration provided for in Article 15 of the Treaty. Paragraph (2), however, adds a further limitation that the obligation under paragraph (1) 'does not apply to the extent that another Contracting Party makes use of the reservations [regarding the right to equitable remuneration for broadcasting and other communication to the public] permitted by Article 15(3) of [the] Treaty'.

A similar model is found in the **BTAP** where the provisions of Article 4(1) closely resemble Article 4(1) of the WPPT. Article 4(3) of the BTAP also resembles Article 4(2) of the WPPT, but with the following words added: 'nor does it apply to a Contracting Party, to the extent that it has made such reservation'. This means that a country may choose to make a reservation in order to grant rights regarding broadcasting and other

⁸ See, for example, *Reinbothe* in GRUR Int 1992 707, 713 and, as regards the WPPT, in *Records Geneva 1996* 772 (para. 953); less categorical *Reinbothe and von Lewinski* 2002 285.

communication to its own nationals while denying it to performers from other countries, party to the Treaty.

Furthermore, in the BTAP a new paragraph (2) is added to Article 4, containing a more or less pleonastic provision allowing for material reciprocity regarding the rights of broadcasting and communication to the public in Article 11 of that Treaty. The difference between paragraphs (2) and (3) is that the former allows reciprocity as regards the rights granted in the other contracting party whereas the latter allows reciprocity as regards the rights for which that other party has made reservations. Frequently in practice those two areas will be identical, but clearly the negotiators of those countries granting such rights, or envisaging them for the future, did not want to take any chances.

On the other hand, while Article 4(3) of the BTAP refers to the material reciprocity permitted as a consequence of reservations regarding the rights granted in Article 11 on broadcasting and communication to the public, it misses out as regards the similar provisions applicable under Article 19(3) dealing with the application in time of the provisions, and notably granting a possibility to refuse protection of audiovisual fixations made before the Treaty entered into force for the country in question. This must probably be seen as a purely technical glitch, which does not prevent contracting parties from applying such material reciprocity.

The wordings of the TRIPS Agreement, the WPPT and the BTAP do not contain any references to the definition of 'national treatment' in Article 2(1) of the Rome Convention, and it must therefore be assumed that it does not apply in relation to those instruments. The definitions of 'nationals' in Article 1(3) of the TRIPS Agreement and Article 3(2) of the WPPT, respectively, explicitly deal with the persons, and so on, to whom the treatment shall be granted. They do not mention the points of attachment to be used when determining the rights owners the treatment of whom sets the standard for the national treatment. This is, however, more a point of drafting order than of real concern, because of the modest probability that a question of national treatment will ever occur under those instruments. The same can be said of the BTAP, even though that Treaty in Article 3 clearly defines the beneficiaries as the nationals of the contracting parties and non-nationals who have their habitual residence in a contracting party, and thereby indirectly also points at the treatment of nationals and residents as the level of protection to which national treatment, in principle, applies.

The practical absence of national treatment under the TRIPS Agreement, the WPPT and the BTAP in reality corresponds to the situation

under the **Phonogram Convention** and the **Satellites Convention** where only minimum rights and no national treatment are granted.

SUGGESTIONS FOR FURTHER STUDY

The development of national treatment over the various acts of the Berne Convention, its context in the Convention and its present understanding is discussed by *Ricketson and Ginsburg 2006* 295–321. A broad overview of the provisions in the different instruments is given by *Goldstein and Hugenholtz 2013* 101–14. See also *Vaver* in (1986) IIC 577–607 and 715–33. Regarding the provisions of the TRIPS Agreement see *Gervais 2012* 190–202 and *Correa 2007* 51–65. Regarding the Rome Convention see *von Lewinski 2008* 201–2 and 241–4. Regarding the WCT and the WPPT, see *Ficsor 2002* 434–7 and 606–16; and regarding the WPPT *Reinbothe and von Lewinski 2002* 279–89.

8. Most favoured nation clause

In line with the practice followed in international trade relations, the **TRIPS Agreement** contains in its Article 4(1) a provision according to which ‘any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members’. From this, however, the same paragraph exempts ‘any advantage, favour, privilege or immunity accorded by a Member [...] granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country’. In other words the most favoured nation clause does not limit the possibilities of parties to the Berne and Rome Conventions to apply material reciprocity in accordance with the rules of those Conventions that permit such deviation from national treatment. Other international instruments, too, concerning intellectual property rights, which had entered into force prior to the entry into force of the WTO Agreement (that is, before 1 January 1995), are exempted, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other WTO member states.

The wording of this provision is very broad and it covers all advantages, and so on, which have been granted bilaterally or in regional or similar agreements and which are not covered by the rules on national treatment, whether this is because the advantage in question falls beyond the scope of the rules on national treatment, or because the right in question has not been granted to the nationals of the country where protection is claimed.

A number of instruments have been notified under the provision, including in particular the EU Treaty; the EEA Treaty; the Cartagena Agreement between the members of the Andean Community—Bolivia, Colombia, Ecuador, Peru and Venezuela; the Asuncion Treaty and the Ouro Preto Protocol on the Mercosur Community between Argentina, Brazil, Paraguay and Uruguay; the European Agreement on Television

across Frontiers; the European Convention on the Protection of Television Broadcasts; the Universal Copyright Convention and the North American Free Trade Agreement (NAFTA).

None of the other international instruments on copyright and related rights that are discussed in this book contain similar provisions, except for **ACTA** which in Article 2(3) makes *inter alia* Article 4 of the TRIPS Agreement applicable *mutatis mutandis*.

SUGGESTIONS FOR FURTHER STUDY

See *Gervais 2012* 202–17; *Correa 2007* 65–72; *von Lewinski 2008* 281–5; and *United Nations Conference on Trade and Development: Most-Favoured-Nation Treatment*.

9. Formality requirements

Article 5(2) of the **Berne Convention** states that '[t]he enjoyment and the exercise of these rights [that is, the rights granted under national treatment and the minimum rights, as stated in the preceding paragraph] shall not be subject to any formality'. The concept of formality must be understood in a broad sense as covering any action required to ensure that the rights of the author come about or may be claimed.

Accordingly it is not permitted for national law of the Union countries to demand that a claim for copyright protection must be made, in writing or otherwise, in order for works originating in other Union countries to be protected. Such formalities were permitted in the early acts of the Convention and it still contains a less important rule about 'press clippings' in Article 10*bis*(1) where formalities play a role. That provision is discussed in Chapter 18 (2).

Formalities were explicitly permitted in the UCC. Here, however, they are harmonized, as Article III(1) of the UCC provides that they shall be considered fulfilled if 'from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright'. In the same way the Pan-American Copyright Convention contained a rule concerning the use of the words 'all rights reserved'. In practice many publishers still apply these rules even if they no longer have any international legal significance; it does no harm and sometimes may even have a deterrent effect on would-be infringers; or it may entail certain advantages under national law.

The prohibition of formality requirements also rules out that national law may require the registration of works originating in other Union countries as a condition for the protection to take effect. In some countries such rules have been linked to the obligatory deposit with the national library or similar institution of all publications in order to ensure comprehensive coverage of the collections in such institutions and the preservation of all published works for the future. Such legal deposit provisions are not in themselves incompatible with the prohibition, as

long as the lack of compliance is not sanctioned by a reduction in or absence of protection.

It is also considered permissible to establish recordation systems which are not linked to the obtaining of protection. (The word 'recordation' is sometimes used to distinguish such systems from the 'registration' systems which are understood to be those that are prohibited under the Berne Convention.) Even such arrangements can be found which entail a higher level of protection for works entered into the recordation system than that granted for other works. Such systems appear to be based on a reasoning that they are acceptable, provided that the advantages given are in excess of or of a different nature than the minimum rights of the Convention. Examples are the possibilities of obtaining statutory damages or attorneys' fees in case of infringements, or presumptions for the existence of the work or of authorship. Thus a presumption that recorded data is true is a feature of the 1989 WIPO Film Register Treaty (FRT). However, even though the Treaty entered into force after being ratified by five countries, it never obtained the necessary number of contracting parties for the International Film Registry to be viable, and the operations of both the Registry and the Treaty were subsequently discontinued.

In real life, of course, it is indispensable to register works, their authors and owners of rights in many different places in order to exercise the rights, not only in collective management organizations, but everywhere where rights are exercised. The interdiction is not directed against such registration, even if one may argue that it is a precondition for the rights to have any practical significance. On the other hand it covers such systems where lack of registration does not prevent the right as such from emerging, but prevents infringement claims from being brought before courts of law. In that context the interdiction must be understood as covering only formality requirements that specifically target copyrights. It does not prevent copyright claims from being subject to the same conditions and formal requirements as other claims in courts of law in respect of, for example, the form and contents of the writ, payment of fees, and the like.

It goes for the interdiction of formal requirements as for all other protection requirements of the Berne Convention that it only applies to the rules in the country of protection which apply to works from other Convention countries. It does not affect the treatment of works originating in the country of protection. A country like the USA has therefore chosen to maintain certain formal requirements regarding the protection of its national works,¹ whereas they were abolished as regards works

¹ 17 USC §411(a).

from other Berne Union countries when the USA joined the Union in 1988. Certain formalities, however, remain in force also as regards works from other Union countries, notably as a precondition to obtaining statutory damages and attorneys' fees. As discussed in Chapter 7 (1), this interpretation is doubtful, because the rights freed from registration requirements under Article 5(2), 'these rights', are the rights subject to national treatment according to paragraph (1) and the wording of this provision makes it a rather difficult legal exercise to distinguish certain remedies from others.

The **Rome Convention** and the **Phonograms Convention** contain in their Articles 11 and 5, respectively, provisions which in general are modelled over the formality provisions of the UCC, as mentioned above. They do not oblige countries to establish formality requirements for protection, but they determine when such requirements must be considered fulfilled as regards phonograms from other Convention countries. Thus, it shall be sufficient that the phonogram or its cover carries a claim consisting of the sign © (the letter 'P' in a circle) followed by the name of the owner of rights in accordance with the specific rules of the articles. These rules are increasingly of mere theoretical interest because Article 62(1) of the **TRIPS Agreement** rules out all formality requirements for the protection of copyright and related rights. Neither the **Satellites Convention** nor the **WCT** contain provisions specifically about formality requirements, but as regards the latter a prohibition applies by virtue of the general incorporation by reference of the substantive provisions of the Berne Convention (WCT Article 1(4)). The **WPPT** and the **BTAP** provide in their Articles 20 and 17, respectively, that '[t]he enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality'.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 95ff and 321–9; *Goldstein and Hugenholtz 2013* 223–32. Regarding the adherence of the USA to the Berne Convention, see *Final Report of the Ad Hoc Working Group on US Adherence to the Berne Convention*, (1985–1986) 10 Colum-VLA J L & Arts 513, 516ff and *Oman* (1988) 3 J L & Tech 71, 85ff.

10. The object of protection

1. LITERARY AND ARTISTIC WORKS

The object of protection under the **Berne Convention** is, as indicated in the title of the Convention, literary and artistic works. According to Article 2 this expression:

[...] shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, *such as* books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science [emphasis added].

Of decisive importance are the words italicized in the quote above, ‘*such as*’, which introduce the detailed enumeration of categories of works, because they clarify beyond doubt that the list is not exhaustive but only provides examples. Since the wording of the provision was last revised in Stockholm in 1967 it has, for example, become generally accepted (and confirmed explicitly in the TRIPS Agreement and the WCT) that computer programs are considered literary works under the Convention, as will be discussed below. Also databases that are original by virtue of the selection or arrangement of the data are considered covered by the more general term ‘literary and artistic works’, as will be discussed below in the context of TRIPS and WCT.

The enumeration given in Article 2(1) only serves to clarify the concept of ‘literary and artistic works’, the operative provision obliging countries to protect such works is included in Article 2(6), according to which ‘[t]he works mentioned in this Article shall enjoy protection in all countries of the Union’.

The Convention does not go into further details regarding what is required for a ‘production’, as paragraph (1) calls it, to be a ‘work’, and

thereby it gives a certain leeway to national law to determine the object of protection in details. It is clear, however, that it points at something brought about by human beings, and it is also narrower than just anything fulfilling that criterion. In accordance with already well-established national law at the time when the Berne Convention was first adopted, it is presupposed that certain demands for originality or individuality may be made, as also reflected in the more elaborate provision on collections of works in Article 2(5). Simplifying a complex picture almost to the limit, one may say that countries following the tradition of ‘common law’ have chosen a relatively low threshold for protection where little, or sometimes even no, personal creative effort on the part of the author is required. Countries following the ‘civil law’ tradition, on the other hand, often tend to require the protected work to reflect a certain creative effort from the author or to reflect the personality of the author. In cases where a very generous protection is granted, it is typically counterweighed by increasing requirements for similarity before infringement can be established.

The use of the word ‘production’ carries a meaning in itself as well, and it indicates, when also read together with the words ‘whatever may be the mode or form of its expression’, that the protection covers expressions and not ideas, procedures, methods or mathematical concepts as such. This has been explicitly confirmed later in Article 9(2) of the TRIPS Agreement and Article 2 of the WCT.

The various categories of works mentioned in Article 2(1) refer to well-known phenomena, but the detailed definition or delimitation is left for national law to make. In certain respects the Convention itself contains provisions for specific categories of works, such as works of applied arts in Article 2(7) or cinematographic works in Article 14*bis*, but the general and mostly used concept, covering all categories, is ‘literary and/or artistic work’.

‘Scientific works’ is sometimes used as a separate category in national law, but that is not the case in Article 2(1) of the Berne Convention which refers to ‘productions in the [...] scientific [...] domain’. Thereby it signals that what is covered is not only the fields of fine arts, fiction and poetry, but also more technical or scientific productions, such as handbooks, instruction manuals or technical drawings (‘blueprints’).

The exemplification of the categories of works has developed through the various revisions of the Convention for more than a century and even though the non-exhaustive character of the list in principle made the addition of still new categories superfluous, again and again there have been wishes to ensure clarity by adding new categories, as they have emerged in practice. In most cases the wish has just been to add another

illustration, and it therefore would make little sense to try to deduce definitions or specific delimitations from the text of the Convention. The matter might seem slightly different in those cases where the Convention itself refers to specific categories of works in operative provisions, but most commonly it can probably be assumed that it just refers to the overall concepts which had already emerged in national law at the time of the inclusion of each category.

There may, however, be reason to dwell a little on certain specific elements of the enumeration, including not least the 'other writings' which humbly appear after the pamphlets. These words are interpreted as covering computer software (that is, computer programs, preparatory material for their making, accompanying manuals and documentation and the like). This is well in line with the wording 'whatever may be the mode or form of its expression' because the form in which the program appears, such as in codes or in other forms of expression different from natural human language, is irrelevant. So it is, also, whether human perception of the work presupposes the intervention of a technical device. Regardless of the indisputable functional aspects of computer software, it cannot be considered included under works of applied art, and consequently the various specific rules concerning the level and term of protection for that category of works, including the possibilities of applying material reciprocity rather than national treatment, cannot be applied to computer software. This interpretation is now confirmed explicitly in Article 10(1) of the TRIPS Agreement and Article 4 of the WCT.

There is also reason here to mention the various categories of *derivative works*, in particular translations, adaptations, musical arrangements and other transformations of literary or artistic works. Such derivative works are protected as original works in accordance with Article 2(3) of the Berne Convention. Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall, according to Article 2(5), be protected as such creations. For both categories, the Convention clarifies that protection must be granted without prejudice to the copyright in the underlying works. The requirement that the derivative work in itself must add sufficient originality or individuality in order for its independent protection to emerge is explicitly formulated only in relation to the protection of collections under Article 2(5), but it applies without doubt also in relation to translations, adaptations, and so on. Thus when Article 2(3) states that the protection of translations must be granted 'without prejudice to the copyright in the *original work*' (emphasis added), in the specific context this should not

be read as works that are original in the sense that they are new or reflect the author's creativity. It is rather a loose translation from French and indicates the work that served as the source for the derivative work.

As regards the culturally, economically and practically very important derivative works which consist in producing an *audiovisual* (or *cinematographic*) work, a film, based on a literary, musical, dramatic or musico-dramatic work, it should be noted that the Berne Convention contains explicit rules in Article 14*bis* which are discussed separately in Chapter 11 (1). The Convention assimilates to cinematographic works 'works expressed by a process analogous to cinematography'. This covers first and foremost the practically very important area of TV productions but in general all categories of production of moving images, with or without sound. In international parlance the term 'audiovisual work' is frequently used, covering both film and TV productions, instead of 'cinematographic work', and it is used in a similar way in this book.

The wording of the protection of collections such as anthologies and encyclopedias in Article 2(5) points only at collections of works, whereas it leaves without mention collections of other data (databases). It is, however, generally accepted that such collections also enjoy copyright protection under the Convention. This follows from the general wording of the coverage of protection under Article 2(1), and it has also been confirmed explicitly in Article 10(2) of the TRIPS Agreement and Article 5 of the WCT that such collections, when original, enjoy copyright protection. It may also be deduced as a conclusion by analogy from Article 2(5) and whether to prefer the one or the other method, or both, is a matter of taste because they do not entail any nuances as regards the level of protection granted.

The Convention allows national law to make it a condition for protection that the work has been *fixed in some material form*, Article 2(2). A fixation may take place by writing the work down in text, musical or other notation, or by recording it, such as video recording a ballet or pantomime. Not all countries include such a requirement in their national legislation, and when absent there is a possibility, at least theoretically, for courts to find infringements based on admission by the perpetrator or declarations by witnesses, even without having access to a copy of the actual work. It is not required that the copy, where mandatory, should be made by the author or rights owner him- or herself, and also other copies, including unlawful recordings made by infringers, should therefore suffice to fulfil the condition of fixation.

It is not a condition for the protection that the work is *lawful*. As regards translations this is supported by remarks in the preparatory works

of the 1908 Berlin Act.¹ This has been discussed by a WTO dispute resolution panel in a case raised by the USA against China concerning the incorporation in national law of Article 9(1) of the TRIPS Agreement, the provision which incorporates by reference the substantive economic rights under the Berne Convention. The panel concluded that China had an obligation under those provisions to protect works that had failed content review under national law and, to the extent they constitute copyright works, the deleted portions of works edited to satisfy content review. In so concluding, the panel formally referred to the general requirement to grant minimum rights and national treatment under Article 5(1), but this also encompassed the description of the works to be protected in Article 2.²

The Berne Convention also provides for some exceptions from the protection which are of interest from the viewpoint of both principle and practice. In accordance with Article 2(4) it is a matter for legislation in the countries of the Union to determine the protection to be granted to *official texts* of a legislative, administrative and legal nature, and to official translations of such texts. In this field different solutions have been preferred in national law. Countries following the common law tradition typically maintain copyright protection of statutes, and so on (sometimes referred to as 'crown copyright'), not least in order to ensure the authenticity of the renderings of such texts. Many other countries abstain from granting such protection based on a view that the dissemination of such texts should in no way be met with obstacles. The main purpose of such considerations, however, is primarily the dissemination of the official texts in their country of origin, and that is not covered by the Convention. What Article 2(4) makes possible is that a general provision exempting official texts from copyright protection may also apply to such texts from other Convention countries. Accordingly a UK crown copyright, for example, cannot be claimed under the Berne Convention in another Union country in which the national law without distinction between national and foreign origin exempts such texts from copyright protection. A country granting crown copyright for its nationals, however, is also obliged to grant such protection for official texts from other union countries, because the rights dealt with in Article 2(4) in the absence of a provision permitting material reciprocity are subject to national treatment under Article 5(1).

¹ *Records Berlin 232; 1886 – Berne Convention Centenary – 1986* 146.

² *China – Measures Affecting the Protection and Enforcement of Intellectual Property Right, Report of the Panel, WT/DS362/R* 29ff.

Article 2(7) of the Berne Convention contains some complex, but practically very important, provisions regarding the protection of *works of applied arts* and *industrial designs and models*. Subject to the special provisions regarding the term of protection in Article 7(4), Article 2(7) leaves it to national law to determine the level of protection of such works, designs and models as well as the conditions under which they shall be protected. Consequently Union countries are not obliged to protect such works under copyright, even if they fulfil the originality, or individuality, requirement, or they may establish other conditions for the protection. This should be seen in the context of the protection of industrial models and designs which is obligatory under Article 5*quinquies* of the Paris Convention for the Protection of Industrial Property. Such protection is normally conditional on the fulfilment of formality requirements, and it is quite different from copyright protection, including as regards the determination of the protected subject matter and a much shorter term.

The Berne Convention leaves flexibility to the national legislator to choose between:

- full cumulative protection under both copyright and design law, that is, enabling the rights owners to claim protection under one or the other system, or both at the same time, if applicable;
- partly cumulative protection under which only some works of applied arts, industrial designs and models enjoy copyright protection, for example, if a higher-than-normal level of originality or individuality is demonstrated; or
- no cumulative protection in which case works of applied arts enjoy no copyright protection at all or forfeit such protection if design protection is applied for, or if the work is made subject to industrial exploitation, for example, if the owner of rights permit more than a certain number of copies to be made, as determined in detail in national law.

Article 2(7) further permits those countries that opt for granting copyright protection to deny protection under copyright, that is, both national treatment and minimum rights, for works of applied arts originating in other Union countries that solely protect them as designs and models. Such material reciprocity, however, is only permitted to the extent that a special protection for designs and models is available in the country where protection is claimed. If that is not the case, material reciprocity is not permitted, and the works, designs or models must be granted protection as artistic works.

News of the day and miscellaneous facts having the character of mere items of press information are also exempted from copyright protection under Article 2(8) of the Berne Convention. By exempting explicitly such subject matter, the drafters of the Convention again underscored that the required level of originality or individuality for protection is not particularly high. Otherwise the exception would not have been required, because it would deal with phenomena that would clearly be below the threshold. Actually the drafters clearly envisaged that they would typically not fulfil the requirements to be considered works.³ The provision still makes sense, though, because the limit between pure information and a work with little or no originality or individuality can be difficult to draw. Therefore the provision alleviates concerns that copyright might unduly prevent the free flow of news and information. It has even been proposed that the provision is binding in the sense that its wording '[t]he protection of this Convention shall not apply to [...]' should oblige countries to abstain from such protection.⁴ This assumption, however, is not supported by the discussions during the preparation of the Stockholm revision conference, where there was discussion as to whether to maintain the provision, nor by the text of the provision itself. It clearly aims at delimiting the scope of the Convention and that is not the same as imposing an obligation on national law to abstain from protecting, whether under copyright or, possibly, unfair competition law.⁵ It is another matter that there are very good reasons not to protect such information in general, but systematic extraction by aggregators of news materials from newspapers and other news organizations may, depending on the circumstances, rightly be treated as parasitical competition.

Concerns regarding the safeguarding of an unhindered public debate are in a similar way behind the provision in Article 2*bis*(1) of the Berne Convention concerning *political speeches* and *speeches delivered in the course of legal proceedings* which national law may also, wholly or in part, keep outside copyright protection. Nevertheless the author retains the exclusive right to make, and certainly also publish, collections of such works (paragraph (2)).

As already mentioned, Article 10(1) of the **TRIPS Agreement** added a new category of works to the list of examples, *computer programs*. This

³ *Records Stockholm* 1155.

⁴ *Ricketson and Ginsburg* 331ff; *Ruse-Khan and Kur in Kur with Levin (eds)* (2011), *Intellectual Property Rights in a Fair World Trade System, Proposals for Reform of TRIPS*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 359, 378ff.

⁵ *Blomqvist 2011* 7ff.

was confirmed through a somewhat different wording of Article 4 of the **WCT**. Already at the time of negotiation of the TRIPS Agreement there was a clear international tendency towards protecting computer software under copyright. It had manifested itself and developed during various international meetings of government experts, convened by WIPO and UNESCO during the 'period of guided development'.⁶ There were, however, good reasons for codifying this result in the TRIPS Agreement, not least because computer programs due to their functional character might be considered protectable as works of applied art. This implied a possibility to shorten the term of protection to 25 years (which in the view of many would probably not have been too bad) and, in particular and much more serious, to abstain from granting copyright protection (with the risk of being met with material reciprocity in other Union countries) as provided for in Article 2(7) of the Berne Convention. For this reason the TRIPS Agreement not only requires that computer programs shall enjoy copyright protection, but also adds that they 'shall be protected as literary works under the Berne Convention (1971)'. This does not necessarily imply that the national statute or national law in general must define or categorize computer programs as literary works, but that the protection must be at least at the level that applies to such works under the Berne Convention.

The protection under the TRIPS Agreement applies regardless of whether the programs are 'in source or object code'. This wording intended to avoid a situation that had occurred in some national jurisprudence where only the source code enjoyed protection. Source code is programs at a level of abstraction where the code can be perceived (and thereby written or amended) by human beings who are trained to understand the programming language in question. The countries where this had occurred had thereby refused protection for computer programs in object or machine code with the argument that in its binary form it was beyond human perception. Since computer programs are normally distributed in object code, such practice would in reality make copyright protection illusory.

When the WCT was negotiated, the parties were aware that this wording of the TRIPS Agreement was not as technology neutral as would be desirable, and instead they opted for the expression 'computer programs, whatever may be the mode or form of their expression', a phrasing taken from Article 2(1) of the Berne Convention. In order to accommodate those negotiating governments that did not wish to commit

⁶ See Chapter 2.

themselves further through the WCT than they had already done in the TRIPS Agreement, an agreed statement was added. According to this '[t]he scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement'.

As discussed above, the TRIPS Agreement and the WCT also supplemented the provisions of the Berne Convention by specifically granting protection to original collections of data, not just collections of protected works.

Article 2 of the **Marrakesh VIP Treaty** also contains a definition of the term 'works', which refers to the meaning of the term in Article 2(1) of the Berne Convention. However it further narrows down the term by specifying that it applies to works 'in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media'. This definition applies '[f]or the purposes of this Treaty' and therefore does not in any way limit the scope of the term in the context of other treaties. It implies that the limitations and exceptions for the benefit of persons with visual and other reading impairments, established by the Treaty, do not apply to all the categories of works, covered by the protection under the Berne Convention, the TRIPS Agreement and the WCT, but only to the specifically indicated works. Accordingly works such as audiovisual works or works of art not linked to texts or other notations are not within the scope of the Treaty. An agreed statement linked to the definition further explains that for the purposes of the Treaty it is understood that the definition includes the works referred to in audio form, such as audiobooks.

2. PERFORMANCES, PHONOGRAMS, BROADCASTS AND SATELLITE SIGNALS

The **Rome Convention** does not contain any definition of a '*performance*', but defines in its Article 3(a) 'performing artists' as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works'. This definition gives a number of examples, which serve to clarify the concept. The performance thus seems to be the activity that is exercised by the artists covered by the definition, that is, the acting, singing, delivering, and so on. When referring to literary and artistic works, the concept of works under the Berne Convention was on the mind of the

drafters of the Rome Convention.⁷ There were, however, calls for a more extensive protection that were not fulfilled. They came from circus and variety artists, who feared they would not fulfil the requirement of the definition that they perform a 'work'. Instead, a provision was included in Article 9 of the Rome Convention permitting national law to grant protection for such artists. When the performance of works was maintained at the core of the protection it was not least in order to delimit the area of protection in relation to sportsmen and others who might have legitimate demands for some protection, but the inclusion of whom might expand the concept of 'artist' in a way that was seen as problematic.⁸

The **TRIPS Agreement** contains no definitions of 'performance' or 'performing artist' and it must therefore be assumed that it follows the definition and concepts which, in this respect, have been established by the Rome Convention.

The **WPPT** repeats in its turn in Article 2(a) the definition of the Rome Convention, adding to 'declaim' and 'play in' the verb 'interpret'. In this lies a clarification, not least that the work of conductors is also covered by the protection, just as was understood to be the case under the Rome Convention.⁹ In addition, performances of 'folklore' were added in line with performances of 'works'. By 'expressions of folklore' is normally understood '[c]haracteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of a community, including folk tales, folk poetry, folk songs, instrumental folk music, folk dances and plays, artistic forms of rituals, and other productions of folk art'.¹⁰ Thus, the difference between works in general and expressions of folklore is not that the latter are not seen as fulfilling the requirements for being protected as works. It is rather that due to the collective element in their creation and adaptation over time, they evade the typical model on which copyright is based, namely that there is normally one or more reasonably identifiable authors. Accordingly it does not pose any problems to consider performances of expressions of folklore protected under the Rome Convention, but occasionally the inclusion of performances of folklore in the WPPT is presented as an extension of the protected subject matter.¹¹

⁷ *Records Rome 1961* 39ff.

⁸ *Ulmer* in 10 *Bull Copyright Soc'y USA* (1962–1963) 165, 176ff.

⁹ *Records Rome 1961* 40.

¹⁰ *Ficsor 2004* 289.

¹¹ *Ficsor 2004* 234.

A special rule regarding circus and variety artists, on the other hand, is missing from the WPPT. This does not imply any real difference from the Rome Convention. After all, the rule does not add anything in substance, because national legislation is at any time free to grant a more excessive protection than what is required by the international instruments, and that applies to the WPPT as well.

The **BTAP** repeats the definition of ‘performers’ of the WPPT, but adds in an agreed statement that ‘[i]t is understood that the definition of “performers” includes those who perform a literary or artistic work that is created or first fixed in the course of a performance’. This addition is not ideal, because it might invite the erroneous conclusion that the rule is different under those international instruments dealing with the protection of performers where such wording is missing. That is not the case; improvising jazz-musicians have always been granted the full panoply of protection under the Rome Convention, the TRIPS Agreement and the WPPT. In addition there is no obvious reason why protection should suddenly be denied to those who act in those theater forms and films where they are extemporizing or, for example, making their own dialogue as the pre-existing action is played.

On the other hand the statement invites a clarification that protection is still not granted for sportsmen and the like, who do not perform works. Perhaps under some national law the pre-existing routine or choreography of an ice-skater or floor gymnast may qualify as a work and make the skater or gymnast a performing artist, but a soccer player is not. He or she is not performing a work. The fact that his or her play may later be described in a work is another matter that does not qualify the playing as a performance of such work.

A better decision of the diplomatic conferences adopting the BTAP was not to give in to requests that the definition be supplemented with a clause keeping so-called ‘extras’ outside the protection. Extras are those persons who assist in the making of films, and occasionally in theater plays, not by playing a role but only by adding their presence, for example, as members of crowds or the like. It is well-established practice in national legislation granting protection as regards audiovisual fixations of performances, that such participation is not considered performance of a work and is therefore not covered by the protection, either. That is clearly also a correct interpretation of the definition in Article 2(a) of the BTAP.

The **Rome Convention** defines in Article 3(b) a *phonogram* as ‘any exclusively aural fixation of sounds of a performance or other sounds’. That the recording must be exclusively aural means that the soundtrack of an audiovisual recording (film or video) is not included under the

definition. The soundtrack of a film is a part of the audiovisual work and is therefore protected under Article 14*bis* of the Berne Convention as part of that original work and enjoys no protection under the Rome Convention. In practice, however, phonograms with film music seem to be treated in the same way as other fixations of sound, including as regards equitable remuneration for broadcasting and other public performances. This is probably because such film sound tracks are normally separate recordings of a more distinct version excluding pure background music and with another mixing of the sound than the version used in the film. Also from a practical viewpoint it makes sense to treat such recordings in the same way as other phonograms, if they have been published commercially and, for example, are played on the radio.

The **Phonograms Convention** defines in Article 1(a) a 'phonogram' in the same way as the Rome Convention. The **TRIPS Agreement** does not contain definitions of its own here, either, and it must also be assumed to use the same concepts as the Rome Convention.

Contrary to this, Article 2(b) of the **WPPT** to some extent elaborates on the definitions. As regards the sounds recorded, the WPPT definition refers to the sounds of a performance or other sounds, in the same way as the Rome Convention, but then it adds 'or representations of sounds'. In plain English it might also have stated 'or descriptions of sounds', because it aims at cases where a performance is recorded without any fixation of the sounds it generated.¹² The so-called MIDI system (Musical Instrument Digital Interface) is a digital technology in widespread use. To put it simply, it works somewhat like the holes in an old-fashioned player piano roll. If a MIDI recording is, say, a performance on a keyboard instrument, it will digitally record each keystroke, its relative pitch, attack, force and duration, but not its sound. The sound is added digitally during the replay, at which time the operator may freely choose whether it should be a concert piano, a ragtime style out of tune piano, a church organ, synthesizer or whatever else. Even though the recording as such in such a case is completely without sound, it is a phonogram in the sense of the WPPT.

Like the Rome Convention, the WPPT exempts the sound track of an audiovisual recording. To this an agreed statement adds that 'the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work'. Accordingly the legal

¹² *Records Geneva 1996 246.*

status of a preexisting phonogram does not change if the phonogram is used in a film.

Article 2(b) of the **BTAP** defines the object of protection of that treaty, the '*audiovisual fixation*', as 'the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device'. Notably the definition reflects the core feature of films, and the like, in that they embody images which are capable of imparting a sensation of movement, regardless whether they are silent or accompanied by either the sounds audible when the recording was made, other sounds added later, or no sounds at all. Furthermore the definition requires a certain stability, which is implied by the use of the word 'fixation', as it is also required in connection with the concept of 'reproduction' which is discussed further in Chapter 12 (1). The fixation must be sufficiently stable to be either perceived by human senses or form the basis for a reproduction or communication through a device. Such reproduction or communication may be done in a matter of a fraction of a second, using computer technology, but some sort of embedding into physical subject matter, as opposed to, for example, a reflection of a mirror or a mere transmission, is required.

An agreed statement adds to the definition that it 'is without prejudice to Article 2(c) of the WPPT', that is, to the definition of 'fixation'. This way the two definitions are clearly distinguished. The latter definition is limited to fixations of sounds only and excludes sound fixations with accompanying moving images, whereas the former covers all fixations of images, including the accompanying sounds, if any.

The **Rome Convention** defines in Article 3(f) the concept of '*broadcasting*' as 'the transmission by wireless means for public reception of sounds or of images and sounds'. The concept therefore only encompasses transmissions 'over the air' (and in a vacuum) and in the absence of further limitation in that respect it covers both terrestrial transmissions from transmitters based on Earth and satellite transmissions. Cable transmissions are not included under the Convention in the way they are, at least to some extent, under, for example, European law.¹³ Webcasting, where content by the originator is disseminated over the internet, is not covered either. The wording 'for public reception' is not the best possible, because it seems to point at reception that occurs in a place

¹³ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (consolidated in Directive 2006/115/EC of 12 December 2006) Article 7(2).

open to the public. It seems to be generally accepted that it should be read as if it said ‘for reception by the public’.¹⁴

The meaning of the term ‘broadcasting’ is important for understanding the protection. What is protected is the transmission as such, that is, the emission of certain electromagnetic radiation, and neither the works, performances, phonograms nor unprotected material embedded therein, nor the consolidation thereof in a programme or a channel. Depending on the circumstances, the content will normally enjoy separate protection under copyright or related rights, and such rights may belong to the authors, the participating artists, producers or other owners of rights in the contents, or even the broadcasters themselves as regards their own productions or rights otherwise acquired, for example, through contract, but the so-called ‘signal’ rights of the broadcasters are independent thereof.

Again in this case, the **TRIPS Agreement** contains no definitions of its own and must therefore be considered as building on the same definitions of the concepts that are used in the Rome Convention. The **WPPT** does not deal with the protection of broadcasts. It is, however, of some interest to note the definition of ‘broadcasting’ in Article 2(f), which here is aimed at the broadcast as a way of using protected material. It clarifies, as it is also derived by interpretation from the Rome Convention, see above, that satellite transmissions are covered by the concept. To this the WPPT adds that ‘transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent’. This wording leaves it unclear whether the categorization of a transmission as a broadcast is global or territorially limited, in case the decoding facilities are only made available to the public in certain territories. A territorial limitation may be deduced from the English text, which refers to *where* the means for decrypting are provided to the public, rather than to *if* or *when* they are provided. The equally authentic French and Spanish texts (Article 32(1)), however, use the pronouns *lorsque* and *cuando*, respectively, which may be read as indicating that the signal is considered a broadcast in all contracting parties, even if only a geographically limited distribution of decrypting means has taken place in one or some of those Parties. Similar wording is found in all three language versions of BTAP Article 2(c).

The **Satellites Convention** contains in Article 1 a number of definitions which reflect the somewhat more complicated field of application

¹⁴ *Ficsor* 2004 142.

of that Convention. In accordance with item i) a 'signal' is 'an electronically-generated carrier capable of transmitting programmes'. A 'programme' is according to item ii) 'a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution'. A 'satellite' is defined in item iii) as 'any device in extraterrestrial space capable of transmitting signals'. An 'emitted signal' is according to item iv) 'any programme-carrying signal that goes to or passes through a satellite'. On this basis Article 2(1) establishes the object of protection as a 'programme-carrying signal [...] emitted to or passing through [a] satellite'. To this Article 3 adds the very important limitation that the Convention does not apply where the signals emitted by or on behalf of the originating organization (defined in Article 1 (vi) as the person or legal entity that decides what programme the emitted signals will carry) are intended for direct reception from the satellite by the general public.

The object of protection is, in other words, broadcasts distributed to local distributors via the so-called 'communication' or 'fixed service' satellites that are reserved for closed transmissions. Transmissions via so-called 'direct broadcasting satellites', which are intended to be received directly by the public, are kept outside the protection. They are covered by the Rome Convention, which means that the transmitting broadcasters are able to control retransmissions by broadcasting satellite or terrestrial broadcasting, but not cable redistribution.¹⁵ (In a number of countries national and regional law goes further and protects also against cable redistribution, like Articles 4(1) and 8(1) of the European Cable and Satellites Directive.)¹⁶ The Satellites Convention covers such satellite transmissions that are not covered by the Rome Convention because they are not intended to be received by the public. They are intended for other broadcasters or cable distributors who in their turn, simultaneously or delayed, possibly will transmit them to the public, whether unchanged or edited. An example of transmissions protected by the Satellites Convention is the Eurovision exchange of programmes between broadcasters, such as major events, song contests, sports, and so on from other parts of the region or the world for use in national broadcasts.

¹⁵ See further the discussion in Chapter 16 (3).

¹⁶ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 399–525 and *von Lewinski 2008* 120–7 regarding works protected under the Berne Convention and *Goldstein and Hugenholtz 2013* 187–244 regarding both works and objects of related rights.

11. Beneficiaries of the protection

1. AUTHORS OF LITERARY AND ARTISTIC WORKS

According to Article 2(6) of the **Berne Convention**, the protection, which the protected works shall enjoy in all countries of the Union, shall operate for the benefit of *the author* and his (or her) successors in title. The Convention does not define the concept of the ‘author’, which to some extent must be determined on the basis of other provisions of the Convention. The starting point must be that the protected work is a creation by a human being and accordingly the author is the person who has added the original or individual elements which qualify it as a work. This, however, is not explicitly stated in the Convention, and there is reason to believe that there is a certain leeway for national law.

This clearly appears when looking at Article 14*bis*(2)(a) according to which the ownership of copyright in a cinematographic (or audiovisual) work shall be a matter for legislation in the country where protection is claimed. Item (b) adds a special rule for ‘those countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work’. Those provisions are included because some countries of the Union do not count such authors of contributions as authors of the film, but instead consider the producer, who often is a legal entity, to be the author. In the same vein, some countries consider the initiator of a so-called ‘*collective work*’ its author, thereby excluding the contributors. Also as regards works created by *employees* as part of their duties, it is generally accepted that the employer may be considered author, and not just assignee or licensee.

Adding on the freedom for national law to decide who is author of *an audiovisual work*, Article 14*bis*(2) contains a complex presumption rule regarding who is legitimized to exercise the rights. It applies to those countries that have decided to let the contributing authors be co-authors of the audiovisual work, which then, as far as they are concerned, is seen as a work of joint authorship. It does not concern the so-called pre-existing works, such as the text of fiction or drama that is screened, or the already existing music with or without words that is included in the

audiovisual work. It has to do with the ‘contributions’: works that are created in the course of the making of the audiovisual work and which (at least traditionally) do not have any separate existence other than as a part of that work, such as dialogue, scenography, costumes, background music, filming, and so on. Depending on the circumstances, such contributions may very well be sufficiently original or individual to constitute works in their own right. Boundaries are moving, though, because some costumes, fantasy figures or props are now living their own commercial lives beside the films for which they were created, a situation hardly envisaged by the drafters of the Berne Convention and for which it is uncertain whether the presumption of the Convention applies.

The provision in Article 14bis(2) aims at facilitating the exploitation of the audiovisual works by creating certainty as to who is entitled to enter into agreements regarding their use. Accordingly in those union countries where the producer is not *per se* considered the author of the film, the provision prevents authors of contributions from ‘object[ing] to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work’. This is, however, dependent on two conditions: that those authors have ‘undertaken to bring such contributions’; and that there is not ‘any contrary or special stipulation’.

The provision does not explicitly say who is entitled to exercise those rights, but it was clearly presupposed when it was adopted at the 1967 Stockholm revision conference that it should be the producer or ‘maker’.¹ It was also referred to as a ‘presumption of legitimation’ to exercise the rights and not a presumption of ownership or transfer of ownership. One might say that this character of presumption is reflected by the fact that it is rebuttable, but that does not necessarily make it easier to understand. On the contrary, it links the legitimation towards third parties with the *inter partes* authorization in such a way that it can hardly be of much use in practice. The idea of a presumption of legitimation would seem to be that the *bona fide* licensee would not have to check the underlying production contracts of the licensing producer in order to check that the necessary authority to license is at hand. That would, indeed, be a desirable objective. However, as those underlying contracts might actually nullify the producer’s legitimation, the provision does not free the licensee from having to check them anyway. This is further emphasized by item (d) according to which ‘[b]y “contrary or special stipulation” is

¹ *Records Stockholm* 1182ff.

meant any restrictive condition which is relevant to the aforesaid undertaking'. This includes, for example, relevant provisions in collective labour agreements of the employed contributing authors or general framework agreements.²

In addition, Article 14*bis*(3) exempts from the presumption the most important authors of contributions, absent provisions in national law to the contrary. This applies to 'authors of scenarios, dialogues and musical works created for the making of the audiovisual work [and] to the principal director thereof'. Those countries that exempt the principal director must, however, notify WIPO, but only one such notification seems presently to be in force, despite the fact that such exemptions are not uncommon in national legislation. As regards the musical works, the exception has to do with the fact that such rights traditionally in most countries are managed collectively by authors' societies, independent of the film producers. An important exception here is the right to perform the film music when performing films in cinemas in the USA, which in accordance with the national competition law is managed by the producer. This should be kept in mind when licensing film music, also regarding non-US films that possibly may be performed in US cinema theaters, where composers and lyric writers, in the absence of collective licensing of rights to the cinema theaters, can only in practice claim royalties via the producer and distributor.

Article 14*bis*(2)(c) finally clarifies issues regarding the undertaking to make contributions to the audiovisual work and the formal requirements that national law may establish as regards the proof that it has been assumed by the author. Basically the Berne Convention leaves it to national law to regulate contractual relationships, and some national legislation requires written form for assignments and exclusive licenses. Regarding this, item (c) provides that:

[t]he question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence.

This reference to the law of the home country of the producer, however, is supplemented by a reference to the law of the country of protection:

² *Records Stockholm* 1187.

However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

Such declaration has so far only been made by Portugal, but since it may often not be possible to exclude in advance that a film might later be exploited in that market, or that other countries may make such declarations, the practical consequence is probably that such agreements as a matter of routine should be concluded in writing in all the Union countries that consider authors of contributions co-authors of the audiovisual work.

The, as such, laudable purpose of Article 14*bis*(2) and (3) was to bridge the different systems of authorship of audiovisual works and the importance attributed to the rules can be seen in the discussions that took place in the preparation of Article 12 of the BTAP.³ It should also be noted that the provision makes it mandatory for those countries of the Union that do not consider the producer to be the author *per se* to include a presumption. One might, on the other hand, ponder whether the political difficulties involved in negotiating it did not in the end make it more symbolic than real. It certainly does not justify any lack of attention to details when negotiating and drafting contracts regarding film rights.

The Berne Convention also contains some general rules of *presumption regarding the identity of the author and producer* of practical importance in Article 15. Paragraph (1) states that:

[i]n order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner.

This also applies if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity. The presumption prevents pirates and other infringers from delaying enforcement through groundless claims regarding authorship, while permitting such claims where they can be substantiated. In the same vein paragraph (2) states

³ See *von Lewinski* 189 RIDA (2001) 3, 44ff.

that '[t]he person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work'.

Concerning anonymous and pseudonymous works paragraph (3) states that:

[t]he publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

Finally Article 15(4) contains what could be named the *folklore* rule. It concerns unpublished works where the identity of the author is unknown, but where there is every ground to presume that he or she is a national of a country of the Union. The provision enables national legislation to 'designate [a] competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union'. There are no provisions concerning the relations between such authors and the authority, and that accordingly seems to be left for national law to determine. The designation of the authority must be notified to WIPO which will communicate the information to the other countries of the Union. So far only India has made such notification. Provisions explicitly implementing this rule in national law are rare, even though it is of course automatically implemented in those countries that do not require international treaties to be implemented in national legislation or where such legislation otherwise contain an *en bloc* reference to the Convention.⁴

By virtue of the incorporation by reference in Article 9(1) of the **TRIPS Agreement** and Article 1(4) of the **WCT**, the provisions of the Berne Convention referred to above apply also under those instruments.

2. PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS

In the **Rome Convention** *performing artists* are defined in Article 3(a) as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works'. In the light of the particular structure of that Convention with three

⁴ *Blomqvist 2009* 54, 59ff.

different groups of beneficiaries there is no basis for assuming that the rights of performers may be 'absorbed' by the phonogram producers or broadcasters in the same way as the rights of contributing authors may be taken over by the producers of audiovisual works. Nothing, on the other hand, seems to prevent the rights of employed performing artists from being considered transferred to the possible employers of the performers, such as producers, broadcasters, theatres or others.

The Rome Convention contains no provisions comparable to the presumptions for audiovisual works in the Berne Convention because under Article 19 the rights of the performing artists concerning exploitation of audiovisual recordings of their performances no longer apply, once the performer has consented to such fixation.

Article 8 of the Convention states concerning bands and other groups of performers that national law may specify the manner in which performers may be represented in connection with the exercise of their rights if several of them participate in the same performance. Thus national law may grant the band or orchestra leader authority to represent the band legally, but nowadays it seems that at least in some musical genres it is far from certain that bands have a formal leader at all.

Where the **TRIPS Agreement** seems to follow the concepts of the Rome Convention as regards the subject of protection, the **WPPT** clarifies the protection concerning performing artists who perform expressions of folklore. In this respect reference is made to the discussions in Chapter 10 (2).

The possible inclusion of *presumptions concerning ownership or transfer of rights* took a predominant position in the negotiation of the **BTAP**. As mentioned in Chapter 2, that issue caused the first diplomatic conference on the adoption of the Treaty to fail in 2000, even though all other substantive issues had been agreed on. In view of that history, the final outcome in Article 12 of the BTAP represents a well-matured compromise.

Contrary to Article 14*bis* of the Berne Convention, it only contains optional provisions allowing contracting parties to establish presumptions of ownership or entitlement to exercise, subject to contracts to the contrary, the exclusive rights of authorization under Articles 7 and 11 of the Treaty (paragraph (1)). It further permits national law to require that the performer's consent to the fixation of his or her performance, or contract, be in writing and signed by both parties to the contract or by their duly authorized representatives (paragraph (2)). Finally it clarifies that independently of such transfer, national law or individual, collective or other agreements may provide the performer with the right to receive

royalties or equitable remuneration for any use of the performance, as provided for under the Treaty, including its Articles 10 and 11.

Even if one might be tempted to diminish the importance of the provisions in view of their optional character, they cannot be disregarded. The interpretation may differ, however, depending on whether national law of the country where protection is claimed takes on itself to determine ownership of rights of audiovisual fixations having their closest connection to other countries, or whether it refers such determination to the foreign country to which the fixation has its closest connection. Contrary to one of the options in the basic proposal (the basis for negotiations) at the 2000 diplomatic conference, the BTAP does not seem to contain any regulation of the question of applicable law, as discussed in Chapter 6 (3). In any case, the provisions clarify beyond doubt that national law may establish such provisions as regards 'audiovisual fixations produced under its national law', as stated in paragraph (2). If national law determines ownership of rights in foreign fixations, this leads to the understanding that paragraph (1) allows the presumptions regarding ownership or right to exercise to apply not solely to audiovisual fixations produced under its national law, but also to such fixations produced under the national law of other contracting parties. Otherwise it would make no sense to include the Article in an international treaty, because a country may in any case provide as it pleases regarding its domestic productions. If, on the other hand, national law refers that issue to the law of the foreign country under the law of which the fixation is produced, the provision obliges the country of protection to recognize such foreign presumptions that fall within the limits and conditions stipulated in paragraph (1).

According to paragraph (3), '[i]ndependent of the transfer of exclusive rights described above [in paragraphs (2) and (3)], national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11 [the rights of making available to the public and of broadcasting and communication to the public]'. This may be understood in the same 'dual' way as proposed regarding the presumption rules, above. Thus, rules to the said effect may be implemented with effect for foreign fixations, or national rules from the foreign country of fixation must be accepted by countries referring to the law of that foreign country. Regardless of this, however, the provisions leave to the practitioners some quite difficult issues regarding how to ensure a seamlessly functioning international system in which some countries offer remuneration

under the law, in others royalties are granted through collective agreements and in still others no such rights are offered at all, while at the same time there does not seem to be any harmonization of the underlying question of applicable law.

The **Rome Convention** defines in Article 3(c) a *producer of phonograms* as 'the person who, or the legal entity which, first fixes the sounds of a performance or other sounds'. Since the producer thus may be a natural or a legal person whilst the making of the recording at some point necessarily must be initiated by a human being, the consequence must be that where an enterprise has its employees make the recordings, the enterprise, and not the employees, is considered producer.

Article 1(b) of the **Phonograms Convention** defines *producer of phonograms* exactly like the Rome Convention and the **TRIPS Agreement** contains no definitions of its own here either, and must therefore be assumed to use the terms with the same meaning as the Rome Convention.

The **WPPT**, in its turn, makes some clarifications compared to the Rome Convention. Instead of emphasizing who 'first fixes' the sounds, the producer is defined in Article 2(d) as 'the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds [...]'. In this way the Treaty emphasizes more distinctly than the Rome Convention the commercial character of the protection. As the main rule the protection will belong to a company or other legal person, based on a recording made for that entity by an employee in its service or even by a person hired as an independent contractor. In the numerous private recordings, though, which are made as well, the rights belong to the natural persons who make them. Decisive is not necessarily who 'presses the button' which starts the recording process, but rather who carries the responsibility in terms of organization and finance.

The **Rome Convention** does not define *broadcasting organizations*, but there is hardly any doubt that the subject of the protection in that respect is the enterprises that broadcast, as this concept is defined in Article 3(f). In this respect the Convention builds on the understanding, already appearing in its title, that this activity is exercised by 'organizations', normally companies, authorities or other legal persons and that still seems to be the case in general. It should, however, not be deduced that the Convention would not apply to those relatively rare cases where, for example, a local radio station might be run by an individual in his or her own name.

The exact determination of the subject of protection may cause difficulties because broadcasting is a complicated process, which sometimes involves numerous activities. It is noteworthy that the **Satellites**

Convention in Article 1(vi) defines the ‘originating organization’ as ‘the person or legal entity that decides what programme the emitted signals will carry’. Against this the European Satellite and Cable Directive⁵ defines in Article 1(2)(a) ‘communication to the public by satellite’ as ‘the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth’. Even if these definitions cannot be used directly as sources of interpretation of the Rome Convention, one may perhaps cautiously deduce certain generally accepted concepts from them. The act of terrestrial or satellite broadcasting is a technical process. If it is outsourced to, for example, the PTT, the latter does not turn into a ‘broadcaster’. The production of a ‘programme’, such as an entertainment show, does not qualify either, even if the producer has much leeway to decide which content is used in the show. The decisive point must be who is responsible for the programming schedule and thereby determines the overall contents of the signal, which is the object of the protection.

SUGGESTIONS FOR FURTHER STUDY

Regarding the provisions of the Berne Convention, including the special rules for audiovisual works, see *Ricketson and Ginsburg 2006* 357–98 and regarding both copyright and related rights see *Goldstein and Hugenholtz 2013* 245–75. See also the critical comment on authorship and management of royalties from collective management of film rights by *Porcin* in (2012) 35 *Hastings Comm & Ent L J* 1–34. For an analysis of Article 12 of the BTAP, apparently based on the assumption that the applicable law is that of the country under the law of which the fixation is made, see *Ficsor 2012* 4ff. As regards the definition of ‘performers’ in the BTAP, see *Ficsor 2012* 13ff. Regarding the beneficiaries of the Rome Convention, see *Ulmer* in (1962–1963) 10 *Bull Copyright Soc’y USA* 165, 165, 176ff and *Masouyé 1981* 21ff.

⁵ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

12. The right of reproduction

1. LITERARY AND ARTISTIC WORKS

As the word ‘copyright’ already indicates, the protection against reproduction or making of copies is historically a core right for *literary and artistic works*. It is therefore noteworthy that explicit general rules in this respect were only included in the Berne Convention in its latest acts adopted in Stockholm and Paris in 1967 and 1971, respectively. In earlier acts, however, the right clearly was understood to apply, and it was reflected in some of the exceptions in the Convention, but the very description of minimum rights was not approached in a systematic way in the early acts. Since all countries having national copyright legislation protected against reproduction, national treatment was sufficient at the international level. It was supplemented with specific rules concerning reproduction in amended forms, including in particular adaptation, translation, making into an audiovisual work, and so on, but as technology developed an increasing number of minimum rights were added to the Convention. Thus it became an oddity that, in particular, the exclusive right of reproduction was missing.

At the 1967 Stockholm conference the right was included in Article 9(1) of the Convention according to which ‘[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works in any manner or form’. It was deliberately given a broad and technology neutral wording, further clarified in paragraph (3) which states that ‘[a]ny sound or visual recording shall be considered as a reproduction for the purposes of this Convention’. This addition might not have been strictly necessary in view of the broad wording of the main rule, but in consequence of the existing provisions on recording and ‘mechanical’ reproduction (that is, the making and reproduction of recordings) it was included as a reminder, not in order to invite *a contrario* deductions. Indirectly it also clarifies that there is no distinction between reproduction and fixation, as it occurs in the international instruments on related rights. The Berne Convention protects against fixation by treating fixations as reproductions.

The exclusive right of reproduction ‘in any manner or form’ covers not only reproduction of the work in its entirety, but reproduction of parts as well. As is normally also the case in national law there is of course a lower limit to the protection. If the work is shortened to a degree where it can no longer be recognized, protection no longer applies, but the precise determination in this respect is left to national law.

Also a recording (fixation) of a performance of a work is considered a reproduction of the work, but the concept of reproduction or copying requires the making of a copy, that is, the embedding of the work in a physical substance. A performance or transmission is not a reproduction and it is normally required that the embedding of the work in the physical matter is so stable and durable that the work from such embedding can be further reproduced, performed or transmitted. Storage in a computer memory may enable such reproduction or communication, even if it lasts only a tiny fraction of a second, so the time required is short, but it has to be there.

The discussion, which has occurred in some countries, whether the work should be directly perceivable from the copies through the senses of human beings has been cut off by the provisions of Article 9(1) and (3). They clearly cover also phonograms, player piano rolls, or computer programs in machine or object code where they are expressed in binary numbers that are unintelligible to humans. It also covers storage, printing and reproduction of other works in digital formats, not only on CDs, DVDs, Blu-rays and similar digital media, but also in RAMs, ROMs, SD cards, USB keys and any other storage units regardless of whether the storage is permanent or only lasts as long as the computer is turned on.¹ The issue is discussed further in relation to WCT Article 1(4), below.

Where Article 9(1) of the **TRIPS Agreement** solely by reference incorporates Article 9 of the Berne Convention without adding anything in substance, the reference in Article 1(4) of the **WCT** is supplemented by the following agreed statement:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

The first sentence expresses an interpretation of the Berne Convention concerning which there has been general agreement at least since a

¹ *Ficsor 2004* 194ff.

meeting of government experts convened by UNESCO and WIPO in 1982² and which is a straightforward and logical consequence of the words ‘in any manner or form’ in Article 9(1) of the Berne Convention. The second sentence is remarkable in the way that it was adopted at the diplomatic conference by a majority only, not unanimously. This raises questions regarding the understanding of Article 31(2)(a) of the Vienna Convention on the Law of Treaties according to which a certain predominance in interpretation is given to ‘any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty’. It is not obvious whether such an agreement needs to be positively joined by all participants in the negotiations, or whether it suffices that it is adopted in accordance with the applicable rules in the presence of all parties. According to the Rules of Procedure of the diplomatic conference the Treaty itself could be adopted with a two-thirds majority³ so it would seem illogical that a clarifying statement should require unanimity. If a majority were to be required, it should in this case rather be among all members of the Berne Union, as this is required for amending that Convention (Article 27(3)).

The statement was controversial even if its contents may hardly be contested from a legal point of view, that is, as a correct interpretation of the Berne Convention. After all it is not obvious that there should be important exclusions when the Convention uses the words ‘in any manner or form’. The disagreement had to do with factors that reached further, not least concerning transmissions of protected content over the internet. When a work is transmitted, it passes along a string of different computers (nodes and hubs) which might very well be situated in different countries. Technically the work, or most commonly parts thereof, is recorded in the memory of a computer and then immediately retransmitted and erased from the memory.

Depending on how this factual situation is handled, both in practical and legislative terms, one may imagine a number of consequences if a work passes through numerous computers in different countries on its way from the server, where it was uploaded, to the receiving member of the public. There are possible consequences regarding the law applicable to the transmission; regarding needs to obtain additional permission from the rights owners in transit countries if they are not identical with those who authorized the initial upload; or a possible co-responsibility for the owner or operator of an intervening computer if the initial upload was an

² *WIPO Copyright 1982* 245ff.

³ *Records Geneva 1996* 390.

infringement. For this reason a number of delegations would have preferred a solution where temporary storage would not qualify as reproduction because of the possible legal consequences thereof.

In the end the solution of the WCT is based on the broad wording of Article 9(1) of the Berne Convention together with the flexible permission of exceptions in paragraph (2), the three-step test, which is discussed further in Chapter 18 (4). The temporary storage of a work in a computer as a part of its transmission is, indeed, considered a reproduction, but if it is merely a technical requisite, without independent potential for exploitation and economic significance it may be subject to an exception from the protection under national law, such as Article 5(1) of the European Infosoc Directive.⁴ However as the Berne Convention does not impose on the Union members any particular method for its implementation in national law, nothing prevents legislation from defining such temporary reproduction as not being a reproduction, as long as the legal effect of such a provision does not exceed what otherwise in accordance with Article 9(2) could be implemented by means of an exception from the exclusive right of reproduction.

2. PERFORMANCES, PHONOGRAMS AND BROADCASTS

As regards related rights, the right of reproduction was explicitly included in the **Rome Convention**, but with certain conditions regarding the protection of performing artists and broadcasts.

For the *performances of performing artists* Article 7(1)(b) and (c) of the Convention requires that the protection shall include the possibility of preventing:

- (b) the fixation, without their consent, of their unfixed performance;
- (c) the reproduction, without their consent, of a fixation of their performance:
 - (i) if the original fixation itself was made without their consent;
 - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

⁴ Directive of the European Parliament and of the Council 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

- (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

The character of the required minimum protection ('the possibility of preventing') is reduced compared to the normal level for copyright, which was well established in national law and a few years after the adoption of the Rome Convention was formulated in Article 9(1) of the Berne Convention as 'the exclusive right of authorizing'. This was deliberate because national law in some of the negotiating countries did not secure a protection under private law, but solely under criminal law. The chosen wording permits a type of protection where the consent of the performer is required for a lawful exploitation to take place, but a possible infringement can only be pursued by the public prosecutor under criminal law.

The protection against unauthorized fixation is granted with the sole qualification that it only covers unfixed performances. It does not cover recordings of the playing, or of a broadcast of, existing recordings. Such 'fixation of fixations' is considered reproduction, and falls as such under the scope of item (c). The protection covers recordings, made simultaneously with the performance, whether made within viewing and/or hearing distance of the performance, or made at the receiving end of a simultaneous transmission of the performance, such as a direct broadcast or cable transmission. This protection against unauthorized fixation applies to both audio and video recordings because the limitations under Article 19 regarding audiovisual recordings only apply when the performing artist has consented to the incorporation of the performance in such a fixation.

The right of reproduction under the Rome Convention is narrower than what was implicitly understood to be the case under the Berne Convention and later confirmed in its Paris Act. The reason for this was that the drafters of the Rome Convention did not consider it necessary to grant rights to performers regarding reproduction made by third parties. Instead such rights were vested in the phonogram producers by means of their separate protection under Article 10. The protection of performers in this respect could therefore be left to be dealt with in the contractual relationship between performers and producers. Rights are granted to performers only as regards reproduction of: unauthorized recordings, such as clandestine ('bootleg') recordings made at concerts; recordings made under an exception in the law but reproduced for other purposes than envisaged by that exception; or reproductions that are made for purposes different than those for which the performers gave their consent.

The latter provision presupposes that the performer has consented to the fixation for one or more distinct purposes, such as the publication of a commercial phonogram, use as soundtrack in a film, or for later broadcasting. In such a case the performer's rights also include reproduction for purposes which were not foreseen when the original consent was given, such as the use of a commercial phonogram as soundtrack in a film or the publication of a recorded broadcast as a commercial phonogram. One may wonder, however, how efficient this protection really is, and in particular in the media businesses of today which are much more integrated than was the case when the Rome Convention was adopted in 1961. Possibly for this reason, national legislation frequently grants the right without such qualifications and leaves it to the parties to negotiate a transfer from the performers to the producers and broadcasters. Also the WPPT grants a wider protection, as discussed below.

The minimum protection of the performing artists regarding reproduction has no further application when they have consented to the incorporation of the performance in a visual or audiovisual fixation (Article 19). In such a case they are left to look after their interests – including their initial pay, subsequent royalties or the like and their moral interests – already when contracting the permission to make the recording. If the recording is clandestine or otherwise made without the performer's consent, protection must be granted under national law. Also here national law often grants a stronger protection than the minimum required by the Rome Convention, as does the BTAP which is discussed below.

The **TRIPS Agreement** ensures (in Article 14(1)) performers the 'possibility of preventing' both fixation of their unfixed performances and reproduction of such fixations when made without their authorization. This protection, however, is only granted '[i]n respect of a fixation of their performance on a phonogram'. Accordingly the TRIPS Agreement grants no protection at all regarding fixation on, or reproduction of recordings on, audiovisual media such as film or video.

The absence of an explicit enumeration of the qualifications of the Rome Convention relating to whether the recording was made without consent or for a particular purpose, and so on, does not mean that such qualifications cannot be maintained under the TRIPS Agreement. Article 14(1) must be read in the context of the general provision in paragraph (6) according to which *inter alia* 'conditions, limitations, exceptions and reservations' permitted under the Rome Convention shall also apply, *mutatis mutandis*, to the rights of performers. This provision seems to make it possible to replace even such a specifically worded provision as

Article 14(1) with a rule corresponding to the minimum protection under Article 7(1)(c) of the Rome Convention.⁵

The **WPPT** grants the minimum protection of performers in Articles 6 and 7. Article 6 covers the rights in unfixed performances and grants performers ‘the exclusive right of authorizing as regards their performances [...] the fixation of their unfixed performances’. To fully understand this provision it has to be read in the context of the definition in Article 2(c) of ‘fixation’ as ‘the embodiment of *sounds*, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device’ (emphasis added). Consequently the protection only covers sound recordings, not recordings on video or film. In this respect the protection under the WPPT is narrower than under the Rome Convention where audiovisual fixations made without the consent of the performer are covered by the protection, as discussed above. On the other hand the protection under the WPPT is reinforced to be an ‘exclusive right of authorizing’, that is an individual right which can be enforced by the performer him- or herself, and not just a possibility of preventing.

This reinforcement of the rights also applies to the right of reproduction in Article 7. That right is limited to sound recordings, but grants ‘the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form’. The various qualifications of the right under Article 7(1)(c) of the Rome Convention have been omitted. A phonogram is defined as a fixation of ‘sounds [...] other than in the form of a fixation incorporated in a cinematographic or other audiovisual work’ in Article 2(b) of the WPPT, and the soundtracks of audiovisual recordings are therefore not covered.

The words ‘direct or indirect’ reproduction aim at covering both when the reproduction is made directly from another copy, such as from a recorded to a blank CD, or indirectly, such as the recording of a broadcast in which a CD is played. The addition ‘in any manner or form’ may not add much in itself, but nevertheless establishes a useful parallel to Article 9(1) of the Berne Convention. An agreed statement is linked to the provision, dealing with the application of the right of reproduction in the digital environment. It corresponds to the one linked to Article 1(4) of the WCT and is discussed in that context, above.

Articles 6 and 7 of the **BTAP** closely resemble the similarly numbered provisions of the WPPT, obviously with the important difference that the rights of fixation and reproduction of the BTAP cover audiovisual

⁵ *Gervais 2012* 308ff.

fixations, and the reference to reproduction of performances fixed in phonograms in WPPT Article 7 is therefore replaced by a reference to reproduction of performances fixed in audiovisual fixations in the similar provision of the BTAP. Otherwise the provisions are identical.

Contrary to the development over time which has taken place regarding the protection of the performers' right of reproduction, the protection of *producers of phonograms* has been very stable. It was first determined in Article 10 of the **Rome Convention**: '[p]roducers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms'. As earlier mentioned the reference to 'indirect' reproduction indicates that an intervening transmission will not affect the protection. This provision is repeated without change in Article 14(2) of the **TRIPS Agreement**, whereas Article 11 of the **WPPT** clarifies the protection by requiring an 'exclusive right', rather than a 'right' to authorize and prohibit, and by adding the words 'in any manner or form'. This does not signify any substantive change from the earlier instruments. The agreed statement to Article 1(4) of the WCT regarding the application of the right of reproduction in the digital environment is also repeated in relation to Article 11 of the WPPT.

A certain deviation from this pattern can be observed in the provisions of the **Phonograms Convention**. This instrument was conceived as a narrow agreement which would specifically assist the fight against piracy and therefore ensure the necessary protection in such a flexible way that as many countries as possible could join it. Thus Article 2 only requires that '[e]ach Contracting State shall protect producers of phonograms [...] against the making of duplicates without the consent of the producer [...]'. Article 3 further points out that:

[t]he means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

The Convention thereby provides plenty of leeway for its implementation in national law, but following the broad support of the TRIPS Agreement a decreasing number of countries are making use of this lower level of protection.

Broadcasting organizations enjoy, according to Article 13(b) of the **Rome Convention**, 'the right to authorize or prohibit [...] the fixation of their broadcasts'. They must also be granted

the right to authorize or prohibit

[...]

- c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of Article 15 [limitations and exceptions], of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions [...].

The diplomatic conference confirmed that the right of fixation covered not just programs in their entirety but also excerpts. It abstained from pronouncing itself on whether the protection also covered individual picture frames from television broadcasts when used as still photos.⁶ The limitations of the exclusive right of reproduction resemble the corresponding provisions in Article 7(1)(c) of the Convention regarding performers' rights, but apart from indicating that this similarity was intended⁷ the General Report of the conference sheds little light on why this limitation was included. The corresponding reason regarding the performers was the relation to the rights of the producers of the phonograms, but that is of less relevance regarding the broadcasters. It must be assumed, though, that an overall balance between the stakeholders was intended, and by cutting off the rights in all cases where agreements may be made in connection with the consenting to the fixation, the drafters of the Convention avoided as much as possible the disruption of existing contractual relations.

The protection under Article 14(3) of the **TRIPS Agreement** covers the right to prohibit the fixation and the reproduction of fixations when undertaken without the broadcaster's authorization. Here, too, the provision of paragraph (6) implies that the protection against reproduction may be narrowed down in accordance with Article 13(c) of the Rome Convention. Furthermore TRIPS Article 14(3) adds:

Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

⁶ *Records Rome 1961* 49ff.

⁷ *Records Rome 1961* 50.

Accordingly the protection of rights of broadcasting organizations in their broadcasts (signals) is as such voluntary under the TRIPS Agreement, provided that the contracting states grant the minimum protection of owners of copyright (not related rights) as regards the content of the broadcasts, which in any case would have to be granted by virtue of the reference in TRIPS Article 9(1) to the Berne Convention.

The **Satellites Convention** contains no rights of fixation or reproduction.

SUGGESTIONS FOR FURTHER STUDY

See about the right of reproduction under the Berne Convention *Ricketson and Ginsburg 2006* 622–45 and as regards the rights under the Rome Convention *Ulmer* in (1962–1963) 10 Bull Copyright Soc’y USA 219, 219ff and 234ff. As regards the WCT and the WPPT see *Ficsor 2002* 85–143 and 622ff and *Reinbothe and von Lewinski 2002* 37–44 and 308–16.

13. Translation and adaptation rights

The protection of *literary and artistic works* under Article 9(1) of the **Berne Convention** covers, as earlier mentioned, reproduction ‘in any manner or form’ and this wording could perhaps be understood as granting protection against the use of the work not solely in its original form but also in a changed form. This, however, does not seem to be the general opinion today. That can be deduced from the use of the same wording in treaties on the protection of related rights where adaptation rights were clearly not intended. Furthermore the Berne Convention contains a clear *lex specialis* in Article 12 according to which ‘[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works’. In addition Article 8 provides that ‘[a]uthors of literary and artistic works [...] shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works’. Finally Article 14(1) provides that ‘[a]uthors of literary or artistic works shall have the exclusive right of authorizing [...] the cinematographic adaptation and reproduction of these works [...]’. Paragraph (2) adds to this that ‘[t]he adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works’.

This multitude of partly overlapping provisions reflects the development of the Convention. Historically the *right of translation* was among the most important rights for a multilateral convention in the nineteenth century, and it was subject to much dispute between countries mainly importing or exporting literature. In the early acts of the Convention, the right was subject to certain time limits, and when those limitations were removed it was a natural thing to clarify that the protection lasts throughout the term of protection. The controversy continues, however, in some more out-of-the-way provisions, and the clear and unambiguous rule in Article 8 is supplemented by some, in principle, quite wide-ranging possibilities of reservations allowed by Article 30(2)(a) and (b).

The said provisions allow countries joining the Union to make a reservation according to which, temporarily at least, Article 8 is replaced by the provisions in Article 5 of the original 1886 Berne Act, as completed in Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. According to Article V(1)(a)(ii) of the Appendix to the Berne Convention, developing countries already members of the Union may also make such reservation. Article 30(2)(a) further permits countries of the Union that have made the reservations permitted under earlier acts to retain the benefit of those reservations when they ratify or adhere to the 1971 Paris Act. The reservation concerning the right of translation is among those reservations. In practice this means that countries that join the Union, and countries that have made the corresponding earlier reservations, are obliged to grant translation rights for only ten years after the publication of the work, and after the expiry of that term they are obliged to grant such right only if the author during the ten year period him- or herself has exploited the right by publishing the work or causing it to be published in a country of the Union in a translation into a language in general use in the country for which protection is claimed. Such reservations have been made by Cyprus (Article 30(2)(b) and the Appendix Article V(1)(a)(ii)) and three continuing states after the former Yugoslavia, namely Bosnia and Herzegovina, Serbia and Slovenia (Article 30(2)(a)).

The right of *adaptation* under Article 12 was subject to some uncertainty in the early acts of the Berne Convention, and in its first incarnation it was not a separate right. It was rather a derivation from the right of reproduction which the Convention did not explicitly grant, but clearly presupposed the existence of. In the same way the right to *cinematographic adaptation* in Article 12 was included in the Berne Convention in 1908. The General Report of the conference considered the right of such adaptation covered by the right of adaptation, which already existed under the Convention. It was, though, still considered to be useful to insert a separate provision to this effect, as this – as it was expressed in the General Report – ‘will be more convenient for the parties concerned who have not necessarily penetrated the depths of our subject’.¹ The 1948 Brussels Act granted both the general right of adaptation and the right of cinematographic adaptation as independent rights, detached from the right of reproduction.

¹ *Records Berlin 265; 1886 – Berne Convention Centenary – 1986 157.*

The **TRIPS Agreement** and the **WCT** include no specific provisions regarding adaptations and translations and accordingly they both apply the provisions of the Berne Convention by virtue of the incorporation by reference in their Articles 9(1) and 1(4), respectively. Since those references only imply Articles 1 to 21 of the Berne Convention (for TRIPS except Article *6bis*) and its Appendix, it may possibly be deduced that, as far as developed countries are concerned, they do not permit the reservations under Article 30 under the Berne Convention, including not least that permitted regarding the right of translation, as discussed above. The question seems, however, only relevant as regards Cyprus and Slovenia, which are the only member states of WTO that have made a reservation and the national laws of those countries do not appear to make use of those reservations. As far as developing countries are concerned, the reference to Article 30 in Article V(1)(a)(ii) of the Appendix, which is included by reference under the protection required by the TRIPS Agreement, would seem to imply that such reservations remain a flexibility at their disposal.

Contrary to the rules regarding literary and artistic works, all the international instruments concerning *related rights*, the **Rome Convention**, **Phonograms Convention**, **Satellites Convention**, **TRIPS Agreement**, **WPPT** and **BTAP** are limited to protect against unchanged use of performances, phonograms and broadcasts. The performance is protected against, for example, live broadcast and it is the performance as such that is protected. The rights do not prevent another performer from performing the same work, even if he or she is imitating the first performance to such an extent that one cannot hear the difference. The protection includes the use of parts of the performances, phonograms or broadcasts, but it must be those objects of protection that are used. The protection is not, however, compromised by purely technical adjustments, such as electronic filtering or use of various effects.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 642–4 and 645–56 and *Goldstein and Hugenholtz 2013* 321–4.

14. The rights of distribution, importation, rental and lending

In modern international terminology the right of distribution is most commonly understood as covering the dissemination of protected subject matter which is caused by the change of ownership of a copy, whether an original or the result of an act of reproduction, which takes place in connection with a sale or other transfer of ownership.¹ Contrary to the national terminology in some countries, it does not cover rental and lending. It might, however, be useful to discuss those rights together as they all relate to the dissemination of protected subject matter by dealings with the copies in which they are embedded.

In a sense the minimum protection of *literary and artistic works* under the **Berne Convention** has included certain rights linked to the dissemination of copies since the 1886 Berne Act. Granting national protection makes no sense unless it covers unauthorized importation of copies that have been produced abroad without authorization. A provision to this effect was included in Article 12 of the Berne Act, according to which '[i]nfringing copies of a work shall be liable to seizure on importation into any country of the Union where the work enjoys legal protection'. This provision remains in Article 16 of the Convention, absent the words 'on importation', together with a similar provision in Article 13(3) regarding imported copies of phonograms produced abroad under a non-voluntary license. Apart from this, the Convention contained no rights of distribution, rental or lending, until it was introduced in Article 14(1) of the 1948 Brussels Act as regards the protection of works that have been adapted into an audiovisual work and Article 14(2) as regards the protection of the audiovisual works themselves. Those provisions were carried on in Articles 14(1)(1) and 14*bis*(1) of the 1971 Paris Act.

In order to understand the scope of that distribution right one should note that the French wording (which in case of doubt is decisive, as provided by Article 37(1)(c)) uses a term which is narrower than the English 'distribution', namely '*mise en circulation*', which indicates that

¹ *Ficsor* 2004 283.

it only concerns the first distribution, not subsequent distribution of copies already distributed once. Since the concept of distribution and its scope were not termed in well-established and precise terminology at the time, it is also relevant to observe that it only makes sense to discuss a 'first' distribution in relation to transfer of ownership, because rental and lending under the basic rules of property law would normally not enable a subsequent further dissemination of the objects beyond the control of the owner. It therefore seems most likely that rental or lending is not covered by the protection, even though rental of copies for performance in cinemas was the predominant exploitation of films when these provisions were included in the Brussels Act in 1948 and revised in Stockholm in 1967.

The **TRIPS Agreement** carries on these rudimentary distribution rules through its incorporation by reference of the economic rights under the Berne Convention in Article 9(1) without itself adding any general right of distribution.

Article 6, however, explicitly states that '[f]or the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 [on national treatment and most favoured nations treatment] nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'. This provision is first and foremost of relevance to the political discussion for and against *parallel importation*.

Some countries apply so-called international exhaustion, where the right of subsequent distribution is extinguished for the entire world when a copy is sold somewhere with the consent of the rights owner. This means that those countries allow free distribution of such copies imported from abroad.

Other countries prefer so-called national exhaustion, which means that the right of subsequent distribution is extinguished only in the territory of the country where the copy with the permission of the rights owner was offered for sale. If in such a country copies are resold which were not originally put on the market in its territory with the consent of the rights owner, the permission of the (local) rights owner is required. In other words, such countries grant a right to control the distribution of not just pirated but also lawfully made and sold copies, imported from above. Strictly speaking, it is not necessarily a question of granting importation rights, unless importation with the intention to distribute is covered by the restricted acts, but in practice that is more or less what the intended effect will be.

An in-between form is regional exhaustion, where there is free circulation of copies among all national territories in the region, whereas

copies imported from outside the region may only be put on the market with the consent of the owner of the rights. In other words, the region as a whole functions like a single country with national exhaustion.

It can be argued that national and regional exhaustion facilitates the fight against piracy. For practical purposes, all dealings in copies across borders will require the authorization of the owners of rights in order to be lawful. In addition the national or regional exclusivity which can be claimed by the rights owners will promote the establishment of local service organizations, the development of localized versions and so on. Against this it may be argued that such national exclusivity obstructs free trade and favours the interest of rights owners in maximizing their profits at the cost of consumers' legitimate interests.

Regardless of Article 6, the choice of model may have consequences as regards the general rules of the Agreement regarding national treatment and most favoured nations treatment, as laid down in Articles 3 and 4. Accordingly a country is not permitted to apply different systems towards different countries at the same time.

Apart from this, Article 11 of the TRIPS Agreement introduces a new minimum protection against *commercial rental of computer programs and audiovisual works*. This protection, however, is limited in two aspects. First, '[a] Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to wide-spread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title'. Accordingly the obligation to introduce the protection only commences when such rental actually has led to the material impairment. The burden of proof to be lifted by a country that would wish to bring the absence of rental rights in another country before the WTO Dispute Settlement Body would seem rather heavy. The exception was mainly introduced at the wish of the USA, where Congress had opposed introducing such rental rights.² Despite the exception, such rights seem to have been introduced in by far the majority of the member states.

Second, the rental right for computer programs is limited as regards cases where the program itself is not the essential object of the rental. This aims in particular at rental of objects like cars where nowadays many computer programs are installed. It may be argued, however, that rental of computers with programs installed hardly falls under that exception, because a computer does not have any practical function other

² *Gervais 2012 270ff.*

than running the programs. One may doubt whether this assumption is actually observed in practice when computers are made available in internet cafés or business centres in hotels. Perhaps a better view would be that to the user the practical function of a computer is, amongst other things, to read and write e-mails, check out internet sites, write texts, edit photos or make calculations, and the programs are mere means to that end, which could not be reached by the programs alone, but only in conjunction with a computer. Likewise, the program controlling the injection system of a car in the eyes of the driver is a means to get moving, and it will go nowhere without the car.

Compared to the rudimentary right of distribution under the Berne Convention and the TRIPS Agreement, the WCT goes further by granting in Article 6(1) authors of literary and artistic works a *general right of distribution*, described as ‘the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership’. When the first sale or other transfer of ownership of the original or copy has taken place with the consent of the owner of rights, the right of distribution may extinguish, or be exhausted. In that respect Article 6(2) leaves it to national law to determine the conditions, if any. This provision was given such a broad wording that a specific provision corresponding to Article 6 of the TRIPS Agreement on national or international exhaustion was not required. Clearly such leeway is there for national law under WCT Article 6(2). Also the Marrakesh VIP Treaty clarifies in Article 5(5) that it does not address the issue of exhaustion of rights.

Additional clarification was added through an agreed statement linked to Article 6 (and Article 7, as discussed below) of the WCT according to which as used in those Articles, ‘the expressions “copies” and “original and copies”, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects’. The background for this statement was that the delegation of the USA had proposed that the right of interactive dissemination, which eventually was grouped under the right of communication to the public, should be included under the right of distribution, possibly in combination with other rights as well. The foremost purpose of the agreed statement is therefore to prevent the provision from allowing exhaustion of the interactive dissemination right for works that had already once been subject to an interactive transmission with the consent of the rights owner.

Furthermore the WCT grants in Article 7 a minimum right regarding *rental* which in many aspects resembles Article 11 of the TRIPS Agreement, but which also presents some important differences. In

particular the rental right also covers ‘works embodied in phonograms, as determined in the national law of Contracting Parties’ (paragraph (1)(iii)). This provision is supplemented by a transition rule in Article 7(3) for countries that already had in force ‘a system of equitable remuneration’, that is, a non-voluntary license, notably Japan. The decisive date referred to in this provision, 15 April 1994, is the date of the adoption of the TRIPS Agreement, which also contains a similar rule in its Article 14(4) concerning the minimum protection of producers of phonograms (which is further discussed below).

It is less clear what lies in the reference to national law in paragraph (1)(iii). It is elaborated on in an agreed statement which states that:

[i]t is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party’s law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

What is at hand here is a rather unique case of the international community first granting a certain level of protection for related rights and only later adding the corresponding protection of literary and artistic works. This provision in the WCT is discussed further in the context of the discussion of Article 14(4) of the TRIPS Agreement, below.

As regards the *related rights*, the **Rome Convention** and the **Satellites Convention** contain no minimum rights regarding distribution, rental and lending, and the **TRIPS Agreement** has no protection against distribution through sale and other transfer of ownership. The agreement does protect, however, ‘producers of phonograms and any other rights holders in phonograms as determined in a Member’s law’ against unauthorized rental. For such rights owners, the rental right for computer programs under Article 11 of the Agreement shall apply *mutatis mutandis*, although there is a transitory provision for countries that already had a system of equitable remuneration, provided that ‘the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders’. It is not quite clear which ‘rights holders in phonograms’ the protection covers. It certainly comprises the phonogram producers who are explicitly mentioned, and it would also seem obvious to include the performing artists. After all, Article 12 of the Rome Convention leaves to national law the choice whether they shall be included as regards the right to equitable remuneration for certain uses, as discussed further in Chapter 16 (2). Under national law they frequently enjoy reproduction rights in excess of what is required under Article 7 of

the Rome Convention, and also thereby they may well be considered rights holders in the phonograms containing recordings of their performances (Chapter 12 (2)).

The situation is less clear regarding the authors of the works which are recorded on the phonograms, typically the composers and lyric writers of musical works. Possibly they fall under the wording ‘other rights holders in phonograms as determined in a Member’s law’, and it is, indeed, common international practice that performing artists and phonogram producers are not given a stronger protection than that which is granted to the authors of the underlying works. Still it could be argued that they are not ‘rights holders in [the] phonograms’ but rather in the musical works with or without words recorded in the phonograms. One might also argue that only owners of related rights are aimed at because otherwise Article 14 only deals with such rights, as prominently indicated in its caption. The provision may also be understood as leaving it to national law to determine whether other rights owners than the producers of phonograms are to be granted rental rights.³

This uncertainty was recognized when the **WCT** was negotiated, and, as the negotiators were not happy about touching the understanding of the TRIPS Agreement, whatever it might have been, they inserted in Article 7(1)(iii) the words ‘works embodied in phonograms, as determined in the national law of Contracting Parties’. The scope of protection was further clarified in an agreed statement which on the one hand takes a stand by leaving it to national legislation whether to grant an exclusive right of commercial rental to authors who under the national law are not granted rights in respect of phonograms. On the other hand, it declares that ‘this obligation is consistent with Article 14(4) of the TRIPS Agreement’. Legally such a statement, adopted within the framework of another organization and not by exactly the same contracting parties, cannot have any formal binding effect as regards the TRIPS Agreement, but at the same time one cannot totally disregard an interpretation which in this way has enjoyed support from a very significant number of those contracting parties.

The **WPPT** grants a right of distribution for performers and producers of phonograms in its Articles 8 and 12, respectively, and both Articles provide in their paragraph (2), like the WCT, that national law is free to determine the exhaustion of that right. As regards rental rights for related rights, the WPPT grants ‘the exclusive right of authorizing the commercial rental to the public of the original or copies’ of performances fixed in

³ *Gervais 2012 307ff; Implications 1996 28; Ficsor 2002 491ff.*

phonograms (Article 9(1)) and phonograms (Article 13(1)). Similar rights are granted by Article 9(1) of the **BTAP** for performances fixed in audiovisual fixations. However Article 9(1) of both the WPPT and the BTAP adds the words: 'as determined in the national law of Contracting Parties'. This qualification should be understood in continuation of the agreed statement linked to the identical wording in Article 7(1)(iii) of the WCT, meaning that national law may choose not to consider the performers right owners in relation to the phonograms or audiovisual fixations and thereby also deny them rental rights. In other words, granting such rights for performers in both phonograms and audiovisual fixations is optional.

For all three groups of beneficiaries it is added in the respective provisions that the right (if granted at all) applies 'even after distribution of them by, or pursuant to, authorization by the performer [the producer in WPPT Article 13]'. Articles 9 and 13 of the WPPT further add a paragraph (2) containing a grandfathering clause identical to Article 7(3) of the WCT and a similar clause, modelled over the 'materially impairing' test in Article 11 of the TRIPS Agreement.

Finally it must be mentioned that Article 2 of the **Phonograms Convention** requires that the contracting states shall:

protect producers of phonograms [...] against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Thus the Convention grants not only a right of importation regarding unauthorized copies, but also a right of distribution which for all practical purposes is not that much different from the right of distribution which applies to unauthorized copies under the copyright protection granted for literary and artistic works. The right of distribution is an essential tool in the fight against piracy. It enables measures against retail distribution, even if it cannot be documented who made the infringing copies and it is therefore impossible to take direct measures against that person or entity.

The Convention defines in Article 1(d) 'distribution to the public' as meaning 'any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof'. A phonogram may be offered to the general public indirectly through 'the

supply of duplicates to a wholesaler for the purposes of sale to the public, directly or indirectly'.⁴

SUGGESTIONS FOR FURTHER STUDY

In general and regarding the Berne Convention and the WCT, see *Ricketson and Ginsburg 2006* 656–69 and 687–98, *Goldstein and Hugenholtz 2013* 309–19. Regarding the TRIPS Agreement, see *Gervais 2012* 220–7; 265–72 and 307ff and *Correa 2007* 78–90; 128–31 and 164–6. Regarding the WCT and the WPPT, see *Ficsor 2002* 485–93; 625–7 and 632ff and *Reinbothe and von Lewinski 2002* 80–99; 317–32 and 351–63.

⁴ *Records Geneva 1971* 38ff.

15. The resale right

A right which may be said to be slightly related to the right of distribution is the resale right, a right for authors of works of fine art, writers and composers to obtain a share of the proceeds of the resale of original copies of their works and original manuscripts. The right is granted as a minimum right in Article 14^{ter}(1) of the **Berne Convention**, but is limited significantly in paragraph (2) according to which '[t]he protection [...] may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed'. Accordingly the country of protection is allowed to determine whether the right be granted at all. This corresponds to the fact that when the right was introduced in the Convention, by far the majority of countries of the Union did not grant any such right, and it was therefore not made an obligatory minimum right.

Furthermore under paragraph (2) the right can be subjected to material reciprocity instead of national treatment, and decisive in this respect is the right granted in the 'country to which the author belongs'. This must be understood as the country of which the author is a national or in which he or she is domiciled, and that is not necessarily the country of origin as defined in Article 5(4), see further the discussion of that provision in Chapter 5 (2).

The wording of Article 14^{ter} links the material reciprocity to the protection granted in the author's home country ('if legislation in the country to which the author belongs so permits' (emphasis added)) and at the same time also links it to the level of protection under the law of the country of protection ('to the extent permitted by the country where this protection is claimed' (emphasis added)). Thereby it justifies the interpretation that the exercise of reciprocity may only be based on whether protection actually exists in the author's country. The Convention does not allow, for example, a limitation of the amounts that may be claimed in the country of protection by referring to lower levels of remuneration granted in the author's home country. Probably reciprocity may, however, be linked to whether various categories of works (notably original manuscripts) are included under the protection.

Actually the wording ‘to the extent permitted by the country where this protection is claimed’ could give the impression that the country of protection may choose to grant the right to its own nationals without allowing authors of other Union countries to benefit. This interpretation, however, seems unfounded because the consequence would be that the countries of the Union would have no obligations under the Convention regarding resale rights whatsoever, and then there would have been no rationale for including the provision in the Convention at all. The problem also exists the opposite way, because in some countries the resale right may be granted in the statute, but without any consequences in real life. Not least arrangements where the remuneration is calculated as a percentage of a possible increase in the price of the specimen since the last preceding sale have turned out to be very difficult, if not impossible, to implement in practice. Probably in such cases it is permitted for the country of protection to demand that the right, which is granted in the statute in the home country of the author, have at least some practical effect in order for it to entitle the author to claim reciprocal protection abroad. Otherwise the purpose pursued by allowing material reciprocity would not be met.

Paragraph (3) states that ‘[t]he procedure for collection and the amounts shall be matters for determination by national legislation’, thereby leaving much room for the implementation in national law. Given that the right may be entirely denied, national law must also be free to introduce it partially, at the discretion of the legislator of the country of protection. Thus it is optional whether original manuscripts are included, or whether, for example, remuneration should be denied for transactions between individuals or sales through art galleries, whereas public auctions would be covered. Detailed provisions may be enacted determining what is considered ‘original works of art’ or ‘original manuscripts’. Here the Convention does not aim at originality in the sense of the condition determining whether a product is a ‘work’ but rather at the distinction between handcrafted unique specimens and copies that are cast, printed or otherwise produced in larger numbers. National law is also free to determine minimum limits for the sales prices that will trigger payment of the remuneration.

The resale right is also granted under the **TRIPS Agreement** and the **WCT** by virtue of their references in Articles 9(1) and 1(4), respectively, to the (economic) rights granted under the Berne Convention, whereas there is no comparable protection in the field of related rights.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 669–81.

16. Public performance, broadcasting, communication to the public and interactive making available to the public

The rights covering public performance, broadcasting, other communication to the public – and included under that also interactive making available to the public – present notable terminological challenges as regards their definition, interpretation and understanding. To cut a long story short, terminology often varies in national legislation. Logically this results in differences between at least some national terminology and the terminology used in the international instruments. This is crowned by the fact that the terminology used in the different international instruments is not always consistent. The Berne and Rome Conventions, for example, feature different nuances in the understanding of the term ‘communication to the public’. This must be kept in mind, not least when shifting between studies of national law and the international instruments, but also when studying the following pages, where each concept is explained, as the discussion progresses.

1. PUBLIC PERFORMANCE

Historically the first of these rights to emerge is the right of public performance which in today’s international terminology normally is understood as a performance made by a performing artist (possibly supported by electronic sound amplification within the locality where the performance takes place) or, without the presence of a performer, by means of some device (such as a TV set in a bar showing broadcasts or DVDs, or DJ equipment in a discotheque playing phonograms) for a public who is present at the same locality. Excluded from the term are cases where by means of wire or wireless technology a transmission of sounds and/or moving images takes place to a public situated at another locality. National law, however, sometimes uses the term ‘performance’

in a wider sense, covering also such communication to the public and in certain cases even broadcasting as well.

As regards *literary and artistic works*, the **Berne Convention** distinguishes even further in its terminology between ‘public performance’ of dramatic, dramatico-musical and musical works in Article 11(1)(i); ‘public recitation’ of literary works in Article 11*ter*(1)(i); and ‘public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images’ broadcasts of works in Article 11*bis*(1)(iii). Finally Article 14(1)(ii) grants exclusive rights to *inter alia* ‘public performance’ of works adapted or reproduced as audiovisual works. Article 14*bis*(1) further extends this right to apply to the audiovisual work as such, too. Among those provisions, which in themselves are phrased as granting exclusive rights, there is reason to single out Article 11*bis*(1)(iii) because it is subject to the provision in paragraph (2) of the same Article, which permits countries of the Union to reduce the right from an exclusive right to a mere right of remuneration. That rule is discussed further under (2), below.

This way the rights of public performance or recitation, granted by the Convention, are limited to the categories of works explicitly mentioned. That was a reasonable solution as long as certain categories of works, such as works of art, were not performed but displayed, an act which is covered by copyright protection in some national legislation, albeit with significant limitations such as a kind of broad exhaustion, but that right is not granted under any international instrument. The formulation did, however, increasingly cause problems as technological development and the internet outpaced the Paris Act of the Berne Convention. By demanding that computer programs must be protected as literary works, the TRIPS Agreement and the WCT imply that such programs should also be protected against public recitation, which may not be the most obvious form of exploitation, whereas the level of protection for other novelties, such as computer games and other so-called multimedia works remains unclear, at least at the international level.

The rights of public performance are carried on unchanged and without further additions through the provisions on incorporation in Article 9(1) of the **TRIPS Agreement** and Article 1(4) of the **WCT**.

In its basic form, personal performance in front of an audience present at the same location, the right of performance does not apply to *performing artists*, because they are supposed to be in a position to control whether and for whom they are performing. Accordingly such right is mentioned neither in the **Rome Convention**, the **WPPT** nor the **BTAP**.

Those three instruments, however, grant in their Articles 12, 15 and 11, respectively, certain rights related to what may be termed public performance of fixed performances. The Rome Convention and the WPPT grant a right of equitable remuneration which *inter alia* covers performances in the form of playing performing artists' performances, recorded on commercial phonograms, in places accessible to the public. This facultative provision, which also applies to the *producers of phonograms*, presents a number of particularities and is discussed separately under (2), below, because its main economic significance is in the field of broadcasting.

Already here it should be noted, though, that while neither Article 12 of the Rome Convention nor the definitions in its Article 3 define what is understood by 'communication to the public', Article 13 of the Convention includes under that term that broadcasts are communicated 'in places accessible to the public [...]'. This would indicate that the remuneration right applies, albeit facultatively, also to the performance, that is, playing, of phonograms in public places, such as discothèques. This understanding corresponds to the use of that concept in Article 11*bis*(1)(iii) of the Berne Convention and has also been followed in the practical management of those rights in the years following the adoption of the Rome Convention. The understanding is further reflected in the definition of the term 'communication to the public' which is included in Article 2(g) of the WPPT, in which Treaty a similar right of remuneration is granted in Article 15. That definition states *inter alia* that '[f]or the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public'.

The BTAP very much resembles in this respect the WPPT, although the basic structure of its Article 11 is based on an exclusive right of authorizing *inter alia* the communication to the public of audiovisual fixations of performances. According to paragraph (2), this right may be reduced to a right of equitable remuneration, or it may be abolished completely under paragraph (3). The understanding of the concept of 'communication to the public', though, is similar to that of the WPPT, as clarified in the corresponding definition of that term in BTAP Article 2(d).

Other aspects of these provisions on rights regarding broadcasting and communication to the public will be discussed separately under (2) and (3), below. There is no similar provision in the **Phonograms Convention** or the **TRIPS Agreement**.

The protection of *broadcasting organizations* under Article 13(d) of the **Rome Convention** covers 'the communication to the public of their television broadcasts if such communication is made in places accessible

to the public against payment of an entrance fee'. It is added that 'it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised'. This means that contracting states may replace the right by a legal or compulsory license and according to Article 16(1)(b) they may further declare that they do not wish to implement that right at all. This optional character is not explicitly mentioned in the corresponding provision of Article 14(3) of the **TRIPS Agreement**, but it seems to apply anyway by virtue of the general provision on reservations in paragraph (6) of the same Article.

The minimum protection under the **Satellites Convention** does not include public performance of TV broadcasts. According to Article 2(1) of the Convention, the protection covers 'distribution' which in Article 1(viii) is defined as 'the operation by which a distributor transmits derived signals to the general public or any section thereof'. The concept of 'transmission' is defined in neither the Satellites nor the Rome Convention, but it would seem to mean one or another form of conveying program content from one place to another by means of communication technology. Accordingly it does not seem to cover a performance in front of an audience present at the same location.

2. BROADCASTING RIGHTS

Article 11*bis*(1)(i) of the **Berne Convention** grants certain minimum rights of broadcasting for *literary and artistic works*. The Convention contains no explicit definition of the concept of broadcasting, but important contributions to its understanding can be deduced from the second part of that provision, where the protection is expanded to cover also 'the communication [of the works] to the public by *any other means of wireless diffusion of signs, sounds or images*' (emphasis added). Typically, broadcasting is defined as 'communication of works or objects of related rights to the public by wireless transmission' (emphasis omitted).¹

The right of broadcasting was introduced in the Convention by the 1928 Rome Act when broadcasting was developing as a new phenomenon, and at the time certain stakeholders nourished fears that the budding broadcasters would face an unfair struggle with the rights owners. The latter were already well underway in getting organized, in

¹ *Ficsor 2004 270ff.*

particular the composers, lyric writers and music publishers in their collective rights management organizations dealing with performing rights and taking up the management of broadcasting rights as well. The drafters of the Rome Act did not want to leave the broadcasters to negotiate without a certain support, and therefore they scaled down the exclusive right by adding paragraph (2) according to which:

[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

This is generally understood to mean that a country of the Union is not given the option to abstain completely from granting protection in this field, but the provision enables it to reduce the level of protection from exclusive rights to a statutory license (sometimes also referred to as a 'legal license') or a compulsory license. (Together such licenses are referred to as 'non-voluntary licenses'.)

Under a statutory, or legal, license, the permission to use the work, or a corresponding defense, as it is termed under common law, is given directly to the user by the statute, but against remuneration to be fixed in a way determined by the statute. Under a compulsory license the rights owner is obliged to license on reasonable terms the use in question when this is requested by the user, and if necessary the license may be granted on behalf of the rights owner by a public authority or a judicial or quasi-judicial body, as provided for in the legislation. The latter system may seem more cumbersome but grants a higher level of practical protection, because the rights owners will be informed in advance about the intended use and therefore may need to use fewer resources monitoring possible uses of their works in order to claim their due remuneration.

The possibility of introducing such 'conditions' is restrained in certain ways. They must be limited to apply in those countries where they have been introduced. This is probably meant to underline that a statutory or compulsory license in the country from where the broadcasting takes place has no implication on which rights apply to a possible rebroadcasting or cable retransmission in other countries. There is, however, reason to consider whether the limitation to the national territory also excludes the use of non-voluntary licenses for satellite broadcasting which

specifically is intended to be received in other countries than the one in which the broadcast originates.

When the provision was introduced, sound radio on AM frequencies was the technological reality, and here the geographical coverage was significant, particularly at night, and if the provision at that time excluded broadcasts so powerful that they could be received in, for example, neighbouring countries in Europe, the rules would in practice have been without any effect. Against this stands, however, that the vast geographical coverage at the time was technically inevitable and only a rather limited number of stations deliberately and commercially aimed at a foreign audience. Here, today's reality as regards satellite TV is quite different, and at the same time the problem rarely emerges in practice, because few countries have such licenses in their legislation at all, and even fewer actually apply such rules in practice.

In the European Union, Article 1(2)(b) of the Cable and Satellites Directive² clarifies that:

[t]he act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

This does not necessarily reflect a different understanding of Article 11*bis*(2) of the Berne Convention, because Articles 2 and 3(1) of the same Directive require that satellite broadcasting rights must be exclusive rights and authorization to broadcast by satellite must be acquired only by agreement (albeit with a possibility under Article 3(2) and (3) to use extended collective licensing for certain categories of works, which in the Union seems to be considered a regulation of the exercise of the rights, rather than a limitation thereof, as indicated in preamble item 18 of the Information Society Directive³).

Decisive in this respect is, as regards the question of applicable law which is discussed in Chapter 6 (2), whether there are elements in the countries where broadcasts are received which fall under the act of broadcasting, as it is covered by the minimum rights according to Article

² Council Directive 93/83/EEC of 27 September 1993 concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

11bis(1)(i) of the Berne Convention, Articles 7(1)(a), 12 and 13(a) of the **Rome Convention**, Article 2(1) of the **Satellites Convention**, Articles 6(1) and 15(1) of the **WPPT** and Article 11 of the **BTAP**. If it is the case, the principle of the law of the country of protection will imply that the law of the receiving country applies.

Satellite broadcasting is a complicated process which by definition implies that the work, and so on can be received by members of the public, frequently also in other countries than the country of emission or broadcasting.⁴ This reception is often intended and is a fundamental part of the underlying business model.

On the circumstantial level one may also point to the definition of 'broadcasting' in Article 2(f) of the WPPT. According to the definition 'transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent'. This seems to underline that the possible reception is an integrated part of the concept of broadcasting. It may certainly be assumed that when the broadcasting organization itself, or its licensees or agents, make decryption equipment available in a territory it is an aspect of the act of broadcasting.

Even when an actual local distribution of decoding equipment is not taking place there may be reason to conclude that the minimum right of broadcasting covers more than the mere act of emission over the air, and that it covers the full act of transmission which further includes the intended reception in the destination country, in particular in those cases where it in a non-negligible way contributes to the financing of the broadcasting activity, whether directly or indirectly. Among the elements dragging the broadcast under the protection in the destination country one might mention the language or languages used in speech, subtitles and videotext, the distribution of program information to the press by the broadcasting organization, the national or local targeting of commercials and the profile of the program content in general. Indirect financing of broadcasting may occur where, for example, government sponsored television is aimed at neighbouring countries for political or cultural purposes.

Against this view, credit may be given to the point often made that the act of reception is not covered by the protection against broadcasting, first and foremost because by its nature it is exercised by another person than the broadcaster, a person who is normally not engaged in any communication of the work or object of related rights to others but rather

⁴ *Ficsor 2004 75.*

is just perceiving it in his or her private sphere. This may lead to the view that the restricted act of broadcasting consists solely of making the emission and nothing else. Such solution, it is also argued, has the major practical advantage that the broadcaster needs only to take into account the national law of the country from which the broadcasting takes place.

Returning to Article 11bis(2) of the **Berne Convention**, additionally it explicitly clarifies that non-voluntary licenses under no circumstances are prejudicial to the author's moral rights, as granted under Article 6bis of the Convention. As discussed further in Chapter 18 (3), below, translation of the works probably does not fall under the use permitted by the paragraph, either. Furthermore an equitable remuneration must be paid. In the absence of agreement in that respect the remuneration must be determined by a competent authority, but the Convention leaves it to national legislation to determine the details.

The **TRIPS Agreement** did not change anything concerning those provisions which were incorporated into the Agreement by means of the general reference in Article 9(1). During the negotiations of the **WCT**, however, a proposal to abolish the possibility of non-voluntary licenses was kept under discussion almost to the end of the process. It was argued that such provisions were rarely used in practice and that the need for them had disappeared as a consequence of the very strong positions broadcasters hold in many countries, as opposed to the situation when the provisions were introduced, and the strongly increased use of collective management of rights. This view was countered by a number of countries, not least developing countries. They did not yet find the time ripe to give up the possibility of non-voluntary licenses and the provisions were therefore in the end carried on through the general incorporation by reference of Articles 1 to 21 in Article 1(4) of the **WCT**.

As regards the *related rights* it is necessary to distinguish between *live broadcasting* of performing artists' performances or of broadcasts of such performances, which takes place simultaneously as the performances are made, and deferred broadcasting, based on a recording of the performance or broadcast, which is discussed below. It should be noted here that the term 'live' in the terminology used in international copyright is meant to indicate broadcasting with no intermediate fixation. In the broadcasting business, that phenomenon seems to be referred to as 'direct' broadcasting, whereas a 'live' programme is understood as a programme, such as a show, that takes place before an audience, even if it has been recorded in advance of the broadcast. In the following, the normal copyright terminology is used.

As a starting point, Article 7(1)(a) of the **Rome Convention** grants to the *performing artists* the possibility of preventing live broadcasting, but

with two exceptions of which one is broadcasting of performances ‘made from a fixation’. In this way everything but live transmissions is excluded, and apparently it is not even a requirement that the fixation has been made with the consent of the performer. Thus the only protection granted in this respect is the right of equitable remuneration for *inter alia* broadcasting of commercially published phonograms under Article 12, which is discussed below. Broadcasting of all other fixations, including not only unauthorized (‘bootleg’) fixations, but notably also other unpublished fixations such as ‘demos’ or authorized recordings for technical or other internal use of concerts, stage shows and the like, regrettably seem to fall into a black hole as far as the performers’ rights are concerned.

The other exception cuts off the minimum protection ‘where the performance used in the broadcasting [...] is itself already a broadcast performance’. Accordingly the minimum protection is limited to cover only direct and immediate broadcasts. Simultaneous rebroadcasts, for example, broadcasts made by another broadcaster with or without consent from the immediate broadcaster, are not covered by the protection, and the performing artists are left to take care of their interests in this respect when they negotiate the permission for the immediate broadcast, including by trying to oblige the immediate broadcaster to use its signal rights to pursue infringing rebroadcasts. In this context it may be noted that Article 3(f) of the Rome Convention explicitly defines ‘broadcasting’ as ‘the transmission by wireless means for public reception of sounds or of images and sounds’. (As regards the definition of broadcasting as the object of protection, see the discussions in Chapter 10 (2).) One may argue that the definition would be more precise if the words ‘reception by the public’ were substituted for ‘public reception’.

The protection granted under the Rome Convention as regards broadcasting of unfixed performances is not included under the provision in Article 19 which explicitly cuts off the protection under Article 7 as regards performances that have been fixed in an audiovisual recording (film or video) with the performer’s consent. Accordingly the protection covers not only live broadcasting in radio, but also live TV transmission.

In this respect it probably corresponds to Article 14(1) of the **TRIPS Agreement** which explicitly exempts fixation and reproduction rights concerning recordings in audiovisual media, but without a corresponding exception as regards live broadcasts in radio and TV. This last point, however, is disputed.⁵ The same applies for the corresponding right under Article 6(i) of the **WPPT**, where in addition the relatively narrow

⁵ Gervais 2012 305.

description of the structure of rights granted in the Rome Convention ('the possibility of preventing') has been replaced with an exclusive right. The limitation of the protection to apply to direct transmissions, not simultaneous retransmissions, which applies under the Rome Convention, was not explicitly repeated in Article 14(1) of the TRIPS Agreement, but still applies by means of the general reference to the limitations of the Rome Convention in Article 14(6) of the Agreement, and in Article 6(i) of the WPPT it has been carried on explicitly. Thus in this respect there is no real difference between the instruments.

Article 6 of the **BTAP** is identical to Article 6 of the WPPT, and the remarks concerning the WPPT, above, apply here as well. Given the context, however, there is no doubt here as to its coverage regarding live TV broadcasts of performances. Audiovisual media are the core field of application of the Treaty as a whole.

Since the protection of *producers of phonograms* is linked to their phonograms, which in themselves are fixations, no right of live broadcasting is granted in any of the international instruments in the field.

The protection of *broadcasting organizations* against simultaneous rebroadcasting of their signals, on the other hand, is a core part of their minimum rights which was first included in Article 13(1) of the **Rome Convention**. It is granted without any limitations and must therefore cover not only direct rebroadcasting of the initial broadcast, but also indirect rebroadcasting where the signal is not taken from the initial broadcast but from a simultaneous rebroadcast thereof, made by a third party with or without authorization. The right is worded as 'the right to authorize or prohibit' and thereby it is stronger than the similar minimum right for performing artists under the Rome Convention.

In Article 14(3) of the **TRIPS Agreement**, however, the right is worded solely as a right to 'prohibit [...] when undertaken without [...] authorization'. In that way it has been made possible to abstain from granting exclusive rights under private law and to replace them with a right to prohibit, possibly to be enforced by a public authority. Furthermore Article 14(3) contains a general limitation on the protection of broadcasting organizations. Member States of the WTO may choose not to grant them any related rights, but in that case they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the restricted acts, subject to the provisions of the Paris Act of the Berne Convention. Thus in reality the minimum protection for broadcasting organizations is significantly weaker under the TRIPS Agreement than under the Rome Convention. Broadcasting organizations do not necessarily get any protection whatsoever in relation to the broadcasting of non-copyright protected content, or content for

which they have only acquired a non-exclusive license to broadcast. In addition, the protection against broadcasting under Article 11*bis*(2) of the Berne Convention may be reduced from an exclusive right to a mere right of remuneration, as discussed above.

The **Satellites Convention** also protects against simultaneous rebroadcasting. According to Article 2(1) the protection must include ‘the distribution on or from [the] territory [of a contracting state] of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended’. The term ‘distribution’ is in Article 1(viii) broadly defined as ‘the operation by which a distributor transmits derived signals to the general public or any section thereof’.

When now turning attention to deferred broadcasting made from a recording, it is useful first to discuss the protection of *the performing artists* and *the phonogram producers* together, because those two groups jointly enjoy certain rights under Article 12 of the **Rome Convention**. Those rights are not exclusive, but a right to a single equitable remuneration if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public. In most countries this form of use is economically very important, and in view of the amount of music which is broadcast (and otherwise played in public) from phonograms everywhere around the world, it is rather misleading that it is still frequently referred to as ‘secondary use’. When introduced in the Rome Convention in 1961 it was highly controversial, and it was deliberately worded in a very narrow way.

As mentioned before, the Rome Convention grants no rights whatsoever as regards broadcasting or communication to the public of other recordings than commercial phonograms, such as demo recordings, ephemeral recordings or other recordings made by the broadcasting organization itself or by others. In those respects the performers and producers are left to take care of their interests – to the extent possible – when exercising their rights of fixation and reproduction and their possible physical control over the copies of unpublished recordings. Within its field of application, the provision grants no exclusive right either but solely a right to equitable remuneration for the use.

National legislation may choose whether this right is granted to both groups of beneficiaries or to one of them only. By using the words ‘a single equitable remuneration’ the text further makes clear that the performers or the phonogram producers cannot claim the remuneration separately, but only jointly, if the right is granted to both groups. In that case national legislation, absent agreement between the parties, can also

lay down the conditions as to the sharing of the remuneration. Typically countries using this option provide for a 50/50 split. The right of remuneration only covers use 'directly' for broadcasting. In this way retransmissions of broadcasts are exempted from the rights of remuneration, but the intention was not to curtail remuneration claims in cases where broadcasting organizations merely transfer a commercial phonogram to tape and then broadcast from the tape.⁶ In a similar way it seems to be general practice today that broadcasting takes place from copies stored on computer hard disks or other computer memories and not from the physical carriers, and this should not affect the payment of remuneration.

Article 12 of the Rome Convention must be seen in the context of Article 16(1)(a), which permits wide-ranging reservations that can be made by notification to the Secretary-General of the United Nations (not the Director General of the WIPO because the Convention is jointly administered by several UN organizations, that is, ILO, UNESCO and WIPO). Sub-item (i) permits a state party to the Convention to choose that it will not apply Article 12 at all, or it may exempt certain uses in accordance with sub-item (ii). This could, for example, be the case where a country grants remuneration rights as regards broadcasting, but not, for example, the playing of phonograms in discothèques. Furthermore according to sub-item (iii) a country may limit the field of application by excluding phonogram producers who are not nationals of another contracting state. This is mainly aimed at excluding the 'backdoor' to the protection, which would otherwise open by using first or simultaneous publication of the phonogram as points of attachment, as discussed in Chapter 5 (3). Finally sub-item (iv) allows national treatment in this field to be replaced by material reciprocity, as discussed in Chapter 7 (2).

The right of remuneration is carried on in Article 15(1) to (3) of the **WPPT** in a slightly updated wording which in reality repeats the substance of Articles 12 and 16(1)(a)(i) and (ii) of the Rome Convention. WPPT Article 15, however, adds an important further element, namely paragraph (4) according to which phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them (in short: phonograms disseminated over the internet) for the purposes of that Article shall be considered as if they have been published for commercial reasons. This should be seen in the context of the discussion of the concept of 'publication' in relation to literary and

⁶ *Records Rome 1961*, 49.

artistic works which are made available interactively on the internet, see Chapter 5 (2). The provision stays clear of this discussion by explicitly dealing only with phonograms and limiting the legal effect of their being made available to their entitlement to the equitable remuneration according to Article 15. The provision does not require that such making available must have a certain commercial character for it to apply, and such demand probably cannot be made. Most likely, it would raise some quite difficult questions of delimitation, but national law is, of course, free to try this out, provided that the corresponding reservations in accordance with paragraph (3) are duly made. The status of minimum protection is underlined by an agreed statement clarifying that 'Article 15 does not prevent the granting of the right conferred by [the] Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain'.

The minuscule substantive changes made in WPPT Article 15 compared to Article 12 of the Rome Convention show that the provision is still controversial, as it was when the Rome Convention was adopted in 1961. Several attempts were made during the negotiations to limit the possibilities for the contracting parties to make reservations and to strengthen the level of protection, possibly as exclusive rights, but no agreement to this effect could be reached. In particular, many delegates expressed their desire that the possibilities of reservation be limited in relation to digital broadcasting, because in that area both quality and ease of copying might have a much greater negative impact on the justified interests of the rights owners than in the case of analogue broadcasting. This discussion was reflected in an agreed statement of the following wording:

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

This declaration resembles the *vœux* or 'wishes' for future initiatives, which were adopted at several of the revision conferences regarding the Berne Convention of the previous century, and they only have a (possible) political importance. They do not carry any legal weight.

Turning now to the *performing artists* only, Article 11(1) of the **BTAP** grants to performers 'the exclusive right of authorizing the broadcasting [...] of their performances fixed in audiovisual fixations'. Paragraph (2),

however, allows contracting parties to declare by notification of the Director General of WIPO that they will replace such exclusive right with 'a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting [...]'. They may also declare that they will 'set conditions in their legislation for the exercise of the right to equitable remuneration'. Such conditions, for example, might consist of introducing obligatory collective management, or, possibly, provisions permitting such exercise to take place through the producer of the fixation. According to paragraph (3) a contracting party may go even further and declare that 'it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses', or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) or (2) at all. Countries making such reservations cannot claim national treatment in other contracting parties as far as the reserved rights are concerned, as stated in Article 4(3) and discussed in Chapter 7 (2).

Facing such wide-ranging possible reservations, one may ask what the point is of including a minimum right in the Treaty, if in reality it is optional and therefore not 'minimum' at all. The answer is that without writing the right into the Treaty, the right would not be subject to national treatment at all, not even between contracting parties that actually decide to grant the protection. Under Article 4, national treatment only applies with regard to 'the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty. Acknowledging that the different countries are at very different stages in terms of being able to shoulder such rights economically and as regards their management in practice, the adopted provision granting protection *à la carte* enables a smooth transition from little or no protection at the national level to increasingly widespread and internationalized protection, as it has been the case with the corresponding rights in the Rome Convention and the WPPT.

The protection of *broadcasting organizations* according to Article 13 of the **Rome Convention** includes a right to authorize or prohibit 'rebroadcasting of their broadcasts'. The term 'rebroadcasting' is defined in Article 3(g) of the Convention as 'the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation'. Accordingly this protection does not cover deferred rebroadcasting, based on a recording of the first broadcast.

The protection under Article 2(1) of the **Satellites Convention**, on the other hand, covers all signals, including so-called 'derived signals' which in Article 1(v) are defined as 'a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have

been one or more intervening fixations'. Accordingly this protection against distribution of program-carrying signals by any distributor for whom the signal passing through a non-broadcasting satellite is not intended also covers deferred broadcasting or other transmissions made from recordings.

3. RIGHTS OF COMMUNICATION AND MAKING AVAILABLE TO THE PUBLIC

The last right to be discussed here is the right of 'communication to the public' and its development into covering also what is termed 'making available to the public' in interactive transmission, typically on the internet. As regards the *terminology*, under the **Berne Convention** 'communication to the public' is an inclusive term covering broadcasting, cable transmission and any other communication to the public which by means of a transmission can be perceived by a public, not present at the place of origin; see, for example, Article 11*bis*(1)(i).⁷ To some extent even certain forms of public performance seem to be included under the term as used in the Convention, because the said Article uses it in the context of transmitting by loudspeaker or other devices signs, sounds or images of broadcasts of works, too (paragraph (1)(iii)). In practice, cable retransmission is the most important technical transmission form, except for broadcasting, but the concept also covers certain wireless transmission which is not broadcasting. This includes in particular point-to-point transmissions by radio chain or satellite that are aimed at being received by an audience so wide that it is public in the sense of the Convention, but not the public at large, such as transmissions of high-value content to be viewed by a paying audience in a cinema or the like.

The **WCT** seems to follow the same terminology, but Article 8 further adds, or possibly clarifies, that the concept of 'communication to the public' shall include 'the making available to the public of [...] works in such a way that members of the public may access these works from a place and at a time individually chosen by them'. This right aims at transmissions in interactive networks (the internet) where the content is not communicated simultaneously to the entire receiving public but placed at the disposal of the public, in order that it may be sent in individual transmissions to the individual members of the public, at their request.

⁷ *Ficsor 2004 275ff.*

The concept of ‘communication to the public’ is narrower under the **Rome Convention** where Article 7(1)(a) does not include broadcasting under communication to the public, but instead understands the two rights as complementing each other. Article 12, however, uses it in the same way as Article 11*bis*(1)(iii) of the Berne Convention to cover the performance by means of a loudspeaker (the provision covers sound recordings only) for an audience present at the location, such as in a discothèque, as discussed under (2), above.

So far, the **WPPT** uses the same terminology as the Rome Convention. It further adds, in Articles 10 and 14, exclusive rights of ‘authorizing the making available to the public of their performances fixed in phonograms [or in Article 14: of their phonograms], by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them’. In the WPPT, this right is not categorized as a subset of the right of communication to the public, and such a general right is not granted to the beneficiaries under the Treaty; they only enjoy the optional right of equitable remuneration under Article 15.

The *protection of the right of communication to the public for literary and artistic works* under the **Berne Convention** is spread over a number of Articles and reflects both the technological realities before the internet and the historic development of the Convention. It protects in:

- Article 11(1)(ii) against any communication to the public of performances of dramatic, dramatico-musical and musical works;
- Article 11*bis*(1)(i) and (ii) against communication to the public of literary and artistic works by any means of wireless diffusion of signs, sounds or images;
- Article 11*bis*(1)(ii) against any communication to the public by wire of the broadcast of literary and artistic works, when this communication is made by an organization other than the original one;
- Article 11*ter*(1)(ii) against any communication to the public of recitations (including such public recitations by any means or process) of literary works, a rights which according to paragraph (2) also covers translations of the works;
- Article 14(1)(ii) against communication to the public by wire of literary and artistic works cinematographically adapted or reproduced; and
- Article 14*bis*(1) against the same use of the cinematographic work itself.

The protection granted under Article 11*bis*(1) is subject to the same limitations under paragraph (2) as the right of broadcasting, and may therefore under certain conditions be replaced by non-voluntary licenses. As regards the details reference is made to the discussion of that paragraph under (2), above.

This minimum protection is carried on without changes by means of the incorporation by reference of the economic rights under the Berne Convention in Article 9(1) of the **TRIPS Agreement**.

When the **WCT** was negotiated, it had become clear that technological development necessitated a revision of the protection. Digitization enables all categories of works to be communicated to the public, not least over the internet, and the distinct areas of coverage of the Berne Convention were no longer considered sufficient. Doubts might also be raised whether the interactive communication over the internet would be covered by the concept of 'communication to the public'. One might argue that when a person clicks on a link and thereby receives a work or recording in the computer and then perceives it from the screen or sound system, it is not a question of a communication to the public, but rather a private and closed communication from the website to the requesting individual.

There was, however, broad agreement that even though the right of reproduction would cover essential elements of the process as a whole, the very act of transmission should in itself be covered by exclusive rights. There was, on the other hand, not agreement as to which right should apply. The majority supported the use of the right of communication to the public, which eventually turned out to be the result, but a minority, notably the USA, wished in addition to base the protection on the right of distribution of copies. This preference is not just a theoretical exercise. It has practical implications, for example, in relation to whether those rights in musical works are to be managed by the performing rights societies, as is normally the situation in Europe and many other industrialized and developing countries, or as mechanical rights by music publishers (as is normally the case in the USA, but also in other countries) and/or collective management organizations dealing with the so-called mechanical rights.

The solution which came out of the negotiations was nicknamed 'the umbrella solution' and consists of a technically neutral description of the acts that the protection covers, namely that works or objects of related rights are '[made] available to the public [...] in such a way that members of the public may access them from a place and at a time individually chosen by them'. Then it is up to national law to choose which specific right to apply in order to obtain that result. That solution

is well in line with the traditions in the field, where, for example, the Berne Convention requires a certain protection regarding broadcasting but allows national law to determine whether this shall be accomplished as a subset of a general right of public performance or communication to the public, as defined in national law, or as a specific independent right. In this context the agreed statement to Articles 6 and 7 is of importance. It limits the field of application of the rights of distribution and rental granted in those Articles to tangible copies. Accordingly it is not possible by referring to those provisions to implement the making available right as a right of distribution that can be exhausted, that is extinguished by the first dissemination made with the consent of the rights owner. See the discussion on that issue in Chapter 14.

An agreed statement to Article 8 further clarifies that the right must be seen as separate from the rights of broadcasting and cable retransmission in Article 11*bis* of the Berne Convention. It clarifies that nothing in Article 8 precludes a contracting party from applying Article 11*bis*(2) of the Berne Convention. Accordingly the possibility of instituting non-voluntary licenses for broadcasting and simultaneous cable retransmission of broadcasts, which is discussed under (2), above, is unaffected by the exclusive right of making available.

A highly disputed question during the negotiation of the WCT was the possible responsibility for infringements of copyright that may rest with telecommunication companies and others who are in charge of the establishment and operation of the internet and individual websites. An agreed statement to Article 8 therefore clarifies that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the WCT or the Berne Convention. No explicit treaty provision on responsibility for acts contributing to infringements by others was adopted. While one may, indeed, argue that a certain international harmonization in this field might be useful, it would also face significant difficulties. They would be due partly to the different legal traditions and rules in national law, partly to the fact that in many countries the rules are not codified but based on jurisprudence.

Another point of contention is whether the right to make available covers only the act of making available in itself, or also the subsequent dissemination, possibly in other countries, as mentioned in Chapter 6 (2).

Copyright and related rights protection is a legal regulation of economic activities and as such must be understood in line with the underlying economic realities. The restricted act is not solely 'making available', but 'making available to the public' and therefore must also cover the dissemination, or potential dissemination in other countries

where it is actually reaching that public, or at least where it is intended to be received to a non-negligible extent and, certainly, where through local marketing, or distribution of special equipment, access facilities through password controlled gatekeepers or the like is marketed or otherwise disseminated, enabling or promoting the reception of the protected subject matter.

It should be noted, though, that against this view it may be argued *inter alia* that such extension of the scope of protection does not rely on explicit wording in the WCT or the WPPT and causes complications in determining exactly when a transmission is so much directed towards a country that it must be considered as covered by rights in that country. Furthermore practical considerations may speak for facilitating the clearing of rights of internet transmission by only requiring permission from the rights owners in, and governed by the law of, the country in which the transmission originates. As it may be understood from the discussion above, the question is controversial.

Regardless of this discussion relating to the right of making available, there is another right triggered by the downloading made by the recipient, that is, the reproduction which technically is an inevitable element of any making available through a computer, even if it does not manifest itself in the making of a permanent copy. Such reproduction is covered by the rights of the international instruments in the field and depending on the circumstances also by the limitations and exceptions permitted therein, including in particular the three-step test. The situation may accordingly very well be that, depending on national law in the country of reception, an infringement is made by a person who, for example, downloads a work which has been uploaded in the originating country in an obviously unlawful way. If the law of the country of reception has rules concerning assisting or abetting infringements, which extend to acts made abroad, the person responsible for the uploading may also be responsible on that basis in that country.

Specifically as regards the protection of *performing artists* against communication to the public, it should be noted that the protection of live performances under Article 7(1)(a) of the **Rome Convention** exempts cases 'where the performance used in [...] the public communication is already a broadcast performance or is made from a fixation'. Accordingly, as in the case of broadcasting, the protection covers solely simultaneous transmissions taking place while the performance is being made, such as cable transmission from a live music venue to an audience at another location, probably in addition to simultaneous (live) internet transmission. Cable and internet redistribution of broadcasts in which the performances are included, whether live or rendered from recordings, is

not covered by the protection of the performing artists. Article 14(1) of the **TRIPS Agreement** grants the same protection, albeit dressed up in a different wording and substantially similar protection is granted under Article 6(i) of the **WPPT** and the **BTAP**.

A similar protection against communication to the public is neither granted by the **Rome Convention**, the **Phonograms Convention** nor the **TRIPS Agreement**, as far as the *producers of phonograms* are concerned.

The protection of the *performing artists* and the *producers of phonograms* under the **Rome Convention** does, however, encompass communication to the public in the shape of the *optional right of equitable remuneration* under Article 12, which is briefly discussed in relation to its public performance aspects under (1), above, and more in-depth in relation to broadcasting under (2), above, but which was not carried on in the **TRIPS Agreement**. As regards those forms of communication that were covered by Article 12 of the Rome Convention, the same protection was carried on unchanged by Article 15 of the **WPPT** and in a slightly different form by Article 11 of the **BTAP** as discussed under (2), above.

As regards the *making available* to the public of performances or phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, **WPPT** Articles 10 and 14 and **BTAP** Article 10 elevate the required protection level to exclusive rights. These provisions very much resemble Article 8 of the WCT which is discussed above, but with the notable difference that where the right under the WCT is an extension to an already existing and rather broad protection by exclusive rights, the rights under the said Articles are insular and do not supplement any general exclusive right of communication to the public.

The protection of *broadcasting organizations* under Article 13 of the **Rome Convention** covers solely rebroadcasting made by another broadcasting organization, and thus there is no protection against simultaneous cable retransmission or internet retransmission of their broadcasts. The same applies as regards Articles 14(3) and 14(6) of the **TRIPS Agreement**, even though WTO member states that do not grant such rights to broadcasting organizations are obliged to protect owners of copyright in the subject matter of broadcasts with the possibility of preventing those acts, subject to the provisions of the Berne Convention, as discussed above. The **Satellites Convention**, on the contrary, grants in its Article 2(1) a relatively broad protection against 'the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended'. The term 'distribution' is defined in a broad way in Article 1(viii) as 'the

operation by which a distributor transmits derived signals to the general public or any section thereof". It would therefore seem obvious to consider live internet transmissions covered by that provision.

SUGGESTIONS FOR FURTHER STUDY

See in general *Ricketson and Ginsburg 2006* 702–54 and 819–24; *Goldstein and Hugenholtz 2013* 324–36 and 349–53. Regarding the WCT and the WPPT *Ficsor 2002* 145–254, 493–509, 628–30, 634–40 and 633; *Reinbothe and von Lewinski 2002* 100–13, 303–07, 333–41, 364–86. Regarding Article 7 of the Rome Convention *Ulmer* in (1962-1963) 10 Bull. Copyright Soc'y USA 219, 219–24 and regarding its Article 15 *ibid* at 225–32. Regarding satellite broadcasting, see *Fabiani 1988* Copyright 17.

17. Moral rights

The protection of moral rights for *literary and artistic works* was introduced in the **Berne Convention** at the 1928 Rome revision conference. Already then, national law contained a rather broad spectrum of different moral rights, including the right to control the first making available to the public of the work (the right of divulgation); the right to withdraw the work from the public sphere if the author had changed his or her conviction (the right to repent); the right to claim ownership (the right of paternity); and the right to resist inappropriate modifications of or use of the work (the right of respect). Only the two latter rights, however, were included in the Convention. The right of divulgation was not included indirectly either, as it can be seen in some national legislation where limitations and exceptions apply only to works that are either published or made available to the public with the consent of the author. Such requirements are occasionally, but not generally, included in the provisions of the Convention such as, for example, the non-voluntary license for mechanical reproduction of musical works and their possible lyrics in Article 13, which applies only to works recorded with the consent of their authors.

According to the moral rights provision in Article *6bis*(1) of the Berne Convention, the protection of moral rights applies '[i]ndependently of the author's economic rights and even after the transfer of the said rights'. This presupposes that the economic rights at least as a starting point are transferable, even though it seems generally recognized that national law in countries of the Union may determine that copyright cannot be assigned, but only licensed. This should probably be understood as a kind of protection going beyond the minimum requirements of the Convention, or possibly as an exercise of legislative authority, which is not affected by its norms. Further it clarifies that the Convention deals with the economic and moral rights as two separate categories. They are not conceptually tied together in such a way that one cannot interpret the scope of economic rights without taking the moral rights into account, as is claimed in certain countries, such as Germany, following a so-called 'monistic' theory. On the contrary, the minimum protection of moral

rights under the Berne Convention is explicitly defined and, as regards the right of respect, not overwhelmingly broad.

As regards the right of paternity, to 'claim authorship of the work' is understood as a right to demand that the author is identified by name in connection with the reproduction of the work. It means that his or her name must be indicated on the copies or in connection with other use, such as by mentioning the author's name in concert programs or when works are broadcast. There cannot, however, be any doubt that this provision in its very broad wording must be understood with the administration of a solid measure of common sense. The educated and distinguished personalities who adopted the provision in 1928, and with much care revised it in Brussels 20 years later, obviously had books, theatre plays, symphony concerts and similar highbrow phenomena on their minds. They may very well have feared that a too strong reference to the necessities of practical life might have exposed this landmark of protection, as it was seen at the time, to an unacceptable risk of erosion.

What they did make clear, though, was that the provision had deliberately been worded in a general way leaving ample room for its adaptation in practical jurisprudence.¹ Even an international convention cannot escape the realities of everyday life, including that in neither supermarkets nor discothèques would it be possible for all composers, lyric writers, translators, arrangers, and so on to be credited for each work performed as background or dancing music. In the same way a meticulous enforcement of the rule in modern commercial radio would be not only impractical, but in reality would be unbearable for the listening public. This must be kept in mind in the implementation of the provision, not only in national legislation but also in daily application. Of course, this is not the same as ignoring the rule; it is important not only for the authors' self-esteem, but also because a good work serves as publicity for the author and his or her other works. There is, and there should be, ample room for national law and jurisprudence to find a reasonable balance.

As regards the right of respect, the provision grants authors the right to 'object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the [...] work, which would be prejudicial to his honor or reputation'. That wording clearly indicates that not any modification or adjustment of the work may be relevant for this protection. The words used are quite strong, and in this logical setup the

¹ *Records Rome 1928 181; 1886 – Berne Convention Centenary – 1986 165* (report of the Sub-committee).

stronger the words the weaker the protection. The choice of the words 'distortion' and 'mutilation' and the qualification that other modifications must be 'prejudicial to [the author's] honor or reputation' clearly limit the scope of protection to modifications or adjustments that have a distinct negative effect on the perception of the work and/or its author. The reference to 'honor' has to do with the author's self-esteem, whereas 'reputation' deals with the perception of him or her among other people.

These qualifications also apply to the protection against 'other derogatory action' in relation to the work, which deals with the use in an unchanged form but in an unsuitable context. This, too, clearly has to be a use that is capable of causing significant harm to the honor and reputation of the author. That element of the protection was added at the 1948 Brussels revision where it was clarified that what is aimed at is the honor and reputation of the author 'not only in his capacity as a writer, but also in the role that he plays on the literary stage'.²

The rights apply 'even after the transfer of the [economic] rights', but that does not mean that they must be exempted from any disposal by the author. Certainly they will not go along with an assignment or license of the economic rights, but it is generally accepted that national law may allow authors to waive the rights. One may very well argue that an assignment of moral rights would run counter to their status as a protection of the personal integrity of the author, but the possibility of such assignments does not seem to be excluded by the text of the Convention, and it might in some cases be in the interest of the author if made to, for example, a collective management organization which is dedicated to act in his or her interest. Also for ghostwriters a transfer of the right of paternity may occasionally seem reasonable.

The protection lasts for the same term as the economic rights, as indicated in paragraph (2), but national law in the country of protection may determine which persons or institutions are entitled to exercise the rights after the author's death. This means that the relevant authority of the country where the author is a national is not granted authority by the Convention to pursue infringing uses of the work abroad. Such an authority must, on the other hand, while administering national treatment, enforce in its territory moral rights infringements of both national and foreign authors, pursuant to its mandate under national law.

Article 6*bis*(2) further includes a grandfather clause permitting countries that do not protect moral rights after the death of the author at the

² *Records Brussels 1948 97; 1886 – Berne Convention Centenary – 1986* 180.

time when they become bound by that protection under the Convention not to grant some of those rights. The provision was included to help countries following the common law tradition where there was, and in a few cases like the USA still is, a tendency to abstain from granting moral rights as specialized provisions in the copyright legislation. Instead such countries apply various torts under common law to obtain the same result. Not least, the provisions on 'defamation' are used to protect the right of respect and in some countries that right does not apply after the death of the entitled person.

This freedom for the countries of the Union to choose by which legislative means they wish to implement the provisions of the Convention is further underlined by Article *6bis*(3). The provision has its roots back to the 1928 Rome Act where, in particular, the UK and Australia ensured that they could apply torts under common law to implement the provisions. Since then it has been instrumental in enabling the USA to join the Berne Convention in 1989 with only few modifications of its domestic law in respect of moral rights. That happened in spite of a significant unease, not least in the film industry, regarding the somewhat unpredictable protection which moral rights were perceived to be.

It was also one of the main reasons why the protection of moral rights under Article *6bis* of the Berne Convention and 'the rights derived therefrom' were exempted from the protection under the Berne Convention that was incorporated by reference in Article 9(1) of the **TRIPS Agreement**. Such exemption is compatible with the Berne Convention, including its Article 20 (discussed further in Chapter 4), which permits the countries of the Union 'to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention'. This is due to the fact that Article 2(1) of the TRIPS Agreement declares that the contracting parties do not derogate from their existing obligations under *inter alia* the Berne Convention. Accordingly it is only in the relations between Berne Union members on the one side and non-union members on the other, and among the latter, that there are no requirements for moral rights protection. Conversely, the exemption also implies that even among members of the Berne Union, disputes regarding moral rights cannot be resolved under the rules of the TRIPS Agreement. Those dispute resolution mechanisms are not required under the Berne Convention and their absence therefore does not imply a lower level of protection which would be excluded by Article 20 of that Convention.

Regardless of the separation between economic and moral rights under the Berne Convention that was discussed above, certain provisions of the

Convention reflect the protection of moral rights, namely Article 10(3) on indication of sources of quotations and so on; Article 11*bis*(2) on continued respect for moral rights in connection with the introduction of non-voluntary licenses for broadcasting, and so on; and Article IV(3) in the Appendix regarding indication of the name of the author when using works under a non-voluntary license. Those are the provisions that Article 9(1) refers to with the words ‘the rights derived therefrom [that is, from Article 6*bis* of the Berne Convention]’, and accordingly they are also exempted from both the minimum protection and the dispute resolution system among contracting parties to the TRIPS Agreement.

Even though one might very well argue that moral rights, whether they are included in explicit rights under copyright or are parts of more general principles of protection of the human integrity or personality, are so closely linked to the latter that they should apply to all natural persons, no moral rights for *performing artists* were included in the **Rome Convention**. Such rights were only introduced through Article 5 of the **WPPT**, which to some extent was copied from Article 6*bis* of the Berne Convention, but certainly not without modifications. The field of protection is limited to ‘live aural performances [and] performances fixed in phonograms’. The right to be identified as the performer applies ‘except where omission is dictated by the manner of the use of the performance’. This very much resembles a reference to the realities of real life which, as discussed above, must also be interpreted into the right of paternity granted under the Berne Convention. The protection under the WPPT is also limited to cover only ‘distortion, mutilation or other modification’, not ‘other derogatory action’, and use in contexts that would be prejudicial to the performer are not covered, either, as they are for authors under the Berne Convention. In addition, the qualification of the ‘other modification’ that is covered by the protection is limited to prejudice to the ‘reputation’ of the performer, with the omission of his or her ‘honor’ which is included in the Berne Convention. These limitations were introduced mainly to accommodate concerns from countries following the common law tradition and among them, not least, the USA.

Articles 5(2) and (3) of the WPPT correspond to Article 6*bis*(2) and (3) of the Berne Convention, which are discussed above.

In the **BTAP**, Article 5, to quite some extent, resembles Article 5 of the WPPT, except for some editorial changes, but the unease about moral rights, especially in the film industry of the USA, continues to be felt. In particular, the formulation of the right of respect, the wording of which otherwise is identical to that of the WPPT, has been accompanied by the words: ‘taking due account of the nature of audiovisual fixations’. A

further explanation may be sought in the agreed statement accompanying the Article which states as follows:

For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

The right of paternity is identical to the WPPT and so are the other provisions regarding the term of the protection and the means of redress for safeguarding the rights in paragraphs (2) and (3).

None of the treaties discussed here contain any moral rights for *phonogram producers* or *broadcasting organizations*.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 585–620 and 1252–9; *Goldstein and Hugenholtz 2013* 357–69. See also *Adeney 2006* 103–27, 133–49 and 153–9 as well as *Davies and Garnett 2010* 41–65. On the moral rights in the WPPT, see *Ficsor 2002* 616–18 and *Reinbothe and von Lewinski 2002* 290–302.

18. Limitations and exceptions

1. GENERAL REMARKS

Since its very first incarnation in the 1886 Berne Act, the Berne Convention has permitted limitations to and exceptions from the protection of literary and artistic works, and from the beginning this was seen as a normal and natural thing, just as it was under national legislation. Numa Droz, the Swiss president of the diplomatic conference which prepared and finally adopted the Convention in its original Berne Act, stated in his closing speech to the 1884 conference that ‘limitations on absolute protection are dictated, rightly in my opinion, by the public interest’.¹

All later international instruments in the field contain such provisions as well, at times even in a broader and less restrictive form than the Berne Convention. In the general debate on the subject, as it is conducted, for example, at WIPO, a distinction is sometimes made between limitations (which are seen as exclusions from the rights granted, such as the possibility of quoting in accordance with good practice or making a single copy for private study or research), and exceptions (which are seen as exclusions from the protected subject matter, such as the possibility of abstaining from protecting statutes, court decisions and other official texts).² More commonly, however, the terms are used interchangeably and/or together with no apparent distinction. If, however, one adopts the said terminology, what it refers to as exceptions are discussed in Chapter 10 in connection with the discussion of the object of protection of the various instruments, and the present Chapter deals with the limitations. As in normal parlance in the field, however, the distinction is not vigorously carried through in this book, and certain deviations occur, such as the discussion of Article *2bis* of the Berne Convention under (2), below.

Perhaps more importantly, there may be good reasons for distinguishing between the specific limitations which concern a use described in

¹ *Records Berne 1884* 68; *1886 – Berne Convention Centenary – 1986* 105.

² *Ricketson 2003* 3.

more or less specific terms in the text of the instruments, discussed under (2), below, and the general limitations which, for example, are contained in the treaties on related rights when they in general refer to the limitation and exceptions which apply to literary and artistic works, discussed under (3), below together with the so-called minor reservations, and the very important limitations and exceptions which are included under the so-called 'three-step test' in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT, Article 16 of the WPPT, Article 13 of the BTAP and Article 5(4)(b) of the Marrakesh VIP Treaty, and to which Article 11 of the latter Treaty also refers. That rule is separately discussed under (4) below.

2. THE SPECIFIC LIMITATIONS AND EXCEPTIONS

The **Berne Convention** is the international instrument in the area which contains the most diverse specific limitations and exceptions. Like so many other provisions in the Convention they are marked by the development of the Convention through several revision conferences over the years, reflecting technological developments and the demands of changing times. If we examine these limitations in the order they appear in the Convention, we note that after the general exception from protection of political speeches and speeches delivered in the course of legal proceedings in Article *2bis*(1), which is discussed in Chapter 10 (1), a somewhat related limitation is included in paragraph (2). According to this

[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article *11bis*(1) of this Convention, when such use is justified by the informatory purpose.

The reference to Article *11bis*(1) seems to partly overlap the forms of transmission and communication that are mentioned immediately before, but in particular it seems to aim at rebroadcasting of broadcasts, retransmission of broadcasts by wire and communication of broadcasts by loudspeaker, and so on. It also encompasses wireless transmission that is not broadcasting, which seems to include phenomena such as wireless fixed service (or point-to-point) transmissions to a public audience which is not as broad as the general public, as discussed in Chapter 16 (3). As regards the limitation of the right of reproduction, which Article *2bis*

implies as well, a modification is contained in paragraph (3) which reserves for the author the exclusive right of making a collection of this kind of work.

The provision on *quotation* in Article 10 is important from both a practical and principal point of view. Where other limitations and exceptions normally are facultative and may or may not be introduced in national legislation, it is disputed whether the rule on quotation is mandatory for the countries of the Union. The provision states that '[i]t shall be permissible to make quotations from a work which has already been lawfully made public, provided that their making is compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations in the form of press summaries'. The words '[i]t shall be permissible' (*'[s]ont licites les citations'* in the French text which in case of doubt prevails over the English, Article 37(1)(c)) may be read in the context of other provisions on limitation and exceptions where an undisputed facultative element is expressed in the way that 'it shall be a matter for legislation in the countries of the Union' to enact certain provisions. However it is not evident from the text of the Convention that the opposite applies to the rule on quotation. Article 19 contains a general rule, according to which '[t]he 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'. Article 5(1) on national treatment as well as Article 20 on special agreements between countries of the Union are also clearly built on the understanding that protection may be granted above and beyond the minimum requirements of the Convention. The provision regarding quotation is a limitation to the protection, and the absence of such rule in national law would therefore mean that a level of protection higher than the minimum required by the Convention is granted. If the intention behind the provision were to make it mandatory, it would have been obvious to indicate that through a reference from Article 10 to, at least, Article 19.

Historically the provision was originally included in the Convention through the 1948 Brussels Act in which the text indicates that quotation should be permissible 'in all the countries of the Union', and the General Report explicitly refers to the differences in the structure of the various provisions. The quotation rule was described as a '*tolérance*' contrary to the '*permission*' of most other provisions, but this distinction seems neither particularly clear nor explained in further detail.³

³ *Records Brussels 100; 1886 – Berne Convention Centenary – 1986 180.*

Without further comments or explanations, the words ‘in all the countries of the Union’ were not repeated in the Stockholm or Paris Acts. In a parallel development, however, the special rule on reproduction by the press was moved from Article 9(2) of the Brussels Act, which was also worded as a general permission without reference to a possible implementation in national law, to Article 10*bis*(1) of the Stockholm Act, where it remains unchanged in the Paris Act, now clearly worded as a faculty for national legislation. In the General Report it was noted that through the changing of the wording in this respect it was intended to avoid the impression that ‘it is compulsory for countries to insert in their legislation such a restriction on the author’s right of reproduction’.⁴ Whether a similar intent was behind the removal of the words ‘in all the countries of the Union’ in Article 10 is not crystal clear, but it would seem odd, though, if another intention had been on the drafters’ mind without being mentioned. The new wording was introduced in the Program of the conference, without being further elaborated or explained.⁵ The provision is characterized as an obligatory limitation by some commentators,⁶ but as facultative by others.⁷ The latter interpretation seems to have been followed in practice by the International Bureau of WIPO which prepared for a Committee of government experts a draft model copyright law which limits the scope of the exception to cover published works only,⁸ amounting to ruling out quotation of some works covered by Article 10, and by Article 5(3)(d) of the European Information Society Directive.⁹

Even though it seems rather doubtful that the rule on quotation is obligatory, it is often referred to as ‘the right of quotation’, an expression which signals that it is also a right for the independently creating author to quote the works of others, at least within certain limits. This harmonizes well with the particular importance the provision has for free, precise and well documented public discourse. In the same way as the

⁴ *Records Stockholm* 1149.

⁵ *Records Stockholm* 116ff.

⁶ *Ricketson and Ginsburg* 2006 788ff.

⁷ *Ficsor* 2004 61; *Nordemann, Winck, Hertin and Meyer* 1990 75ff.

⁸ Committee of Experts on Model Provisions for Legislation in the Field of Copyright, First Session, Geneva, 20 February to 3 March 1989, Draft Model Provisions for Legislation in the Field of Copyright, WIPO document No. CE/MPC/I/2-II (1988) 8.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society; see also *Blomqvist* 2011 6ff.

scope of protection allows for free use of ideas, motives and mere information, the right of quotation gives authors a facility to exercise their independent creativity in a world where others, both contemporary and in past generations, have already created countless works.

The concept of 'quotation' is not defined or explicitly explained in the text of the Convention and its understanding must therefore be based on the general understanding of the word. That understanding seems to be to repeat an excerpt of a larger work. Most often it will be a short excerpt, but an explicit provision to this effect was deliberately not included in the Convention. That was also because, under the circumstances, longer excerpts may be acceptable, notably in critical reviews and scientific contexts, subject to the general conditions that the extent of the quotation does not exceed that justified by the purpose and is compatible with fair practice.¹⁰

Contrary to the subsequent paragraph on use of works by way of illustration for teaching, which only covers 'literary and artistic works', Article 10(1) on quotation only indicates 'works' as its field of application. Thus, by omitting to mention 'artistic works' the drafters of the Convention elegantly avoided the delicate question whether, and to which extent, one may quote from images or sculptures, and so on, which do not represent a continuum such as is the case regarding texts, film, choreography, and so on. What must be assumed, however, is that the Convention does not rule out such quotation, provided that the safeguards regarding fair practice and extent are observed with due respect for the special conditions regarding such works.

The rule on quotation only applies to works that have 'lawfully' been made available to the public. Accordingly, quotes are permitted from works that have been made available without the consent of the author, such as on the basis of a limitation or exception. The condition of 'fair practice' was not elaborated on when the provision was adopted, apart from that the use in question can only be accepted after an objective appreciation,¹¹ and accordingly this task lies with the judicial system in the countries of the Union.

In the first place, the provision limits the exclusive right of reproduction, but it is not limited to that right and applies to public performance, broadcasting and communication to the public as well. The demand for compatibility with fair practice, however, implies that the provision makes no incursion in the moral rights according to Article 6*bis*. This is

¹⁰ *Records Stockholm* 1147.

¹¹ *Records Stockholm* 117.

further underlined by the demand for indication of source and the name of the author which is inscribed in Article 10(3).

Another rule of the same character as the rule on quotation is the rule on *use by way of illustration for teaching* in Article 10(2), which does not use the word 'quotation' but in general permits that literary and artistic works 'to the extent justified by the purpose' may be utilized 'in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice'. The provision is clearly facultative, and it also allows for agreements between countries of the Union, possibly at regional level, but that faculty has apparently not been used in practice. It allows for limitations and exceptions regarding anthologies for teaching as well as other uses of works in the context of teaching, which do not necessarily have to be limited to extracts of works but also may apply to works in their entirety, including illustrations. There is a limitation, though, that the use must be for 'illustration'. Normally this concept probably narrows the scope of application to excerpts of larger works or entire works of small extent. It further indicates that the work in some way must illuminate, depict, elaborate on or demonstrate something that goes beyond the utilized work itself.

The word 'education' includes, according to the General Report of the Stockholm conference, 'teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the public but not included in the above categories, should be excluded'.¹² The provision must be assumed to cover not just materials used for traditional face-to-face teaching in classrooms, but also those used in distance and internet based teaching.¹³ The demand for indication of source in paragraph (3) also applies to the rule concerning use by way of illustration for teaching.

The provisions of Article 10*bis* of the Berne Convention aim at facilitating *use of works in the press* and other media containing news and debate. Elements of the rule on borrowing by the press in paragraph (1) stem from the original 1886 Berne Act, but it has undergone some technological updates over the years. It allows national legislation to 'permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of

¹² *Records Stockholm* 1148.

¹³ *Ricketson and Ginsburg* 2006 793; *Ficsor* 2004 64.

broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved'. With this wording it permits in general the 'borrowing' of articles and (possibly short) broadcasts on news and topical issues within the economic, political and religious domains.

While it is clear that 'broadcasting' includes both sound radio and TV, it is less obvious whether internet based media are included. As regards the character of the use it may rather convincingly be argued that the internet is a communication to the public by wire, but it seems less clear whether works of the kind dealt with in the provision, which have been made available on the internet, may also be 'borrowed' by other media. In view of the general rationale of the provision that the press plays an immensely important role in the communication of news and other information on important issues, such interpretation should certainly be accepted. In this respect there is also reason to recall the agreed statement concerning Article 10 of the WCT according to which the provisions of that Article 'permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention'.

The provision further contains a remainder of the formalities, which once were used as a condition for protection, in that the limitation may be taken out of force by explicitly reserving the right. It is not obvious what is required in this respect, such as whether the reservation must be linked to the individual work or may be made for a publication, such as a newspaper, in its entirety. While historically a reservation with the wording 'all rights reserved' is reminiscent of the Pan-American Copyright Convention and therefore might be interpreted as not aiming at the Berne Convention, such a reservation should probably be considered sufficient today. This provision also requires indication of the source, and even if it is not specifically indicated that the name of the author must be mentioned, this should probably be considered the case, at least when that name is indicated in the source.

The provision on *incidental use while reporting* in Article 10bis(2) is of more recent date, tracing its origin to the 1948 Brussels Act. It states that

[i]t shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the

course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

The rule does not encompass the printed press but rather, and notably, the electronic, in particular since film revues and the like have gone out of use since the adoption of the provision. At the Stockholm revision, the provision was reworded to the effect that it clearly also covers the showing of works of art in their entirety and the rendering of complete (while typically short) works, provided that it is compatible with the general demand for justification by the informatory purpose. The use of the work and the reported event must be linked and, for example, a musical work performed at a reported event cannot be used as general background music in the reporting.¹⁴ The provision does not contain any specific provisions regarding indication of source, which would probably not be very practical in the context of reporting current events, but the moral rights in their general form according to Article 6*bis* obviously apply here as well.

A very important and wide-ranging limitation or exception to the rights of broadcasting and communication to the public is included in Article 11*bis*(2) which permits non-voluntary licenses for broadcasting and communication to the public of broadcasts of the work, as well as public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. While this provision clearly reduces the protection granted under paragraph (1) of that Article, it may also be seen as so wide-ranging that in reality it amounts to the granting of a more limited right than an exclusive right. In order to facilitate the overview and comparison with the parallel provisions for related rights, notably Article 12 of the Rome Convention, Article 15 of the WPPT and Article 11 of the BTAP which to some extent only grant rights of a more limited scope, these limitations and exceptions are discussed in detail in Chapter 16 (2).

The rule in Article 11*bis*(3) deals with so-called *ephemeral recordings*, that is, sound and video recordings made by broadcasting organizations with a view to broadcasting their contents later. It contains both a rule of presumption regarding the interpretation of agreements on broadcasting of works and a limitation of rights. The rule of presumption indicates that a permission to utilize a work in a way covered by paragraph (1) (that is, broadcasting or other communication of the work to the public by any other means of wireless diffusion of signs, sounds or images; communication to the public by wire or by rebroadcasting of the broadcast of the

¹⁴ *Records Stockholm* 118ff.

work, when this communication is made by an organization other than the original one; and public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work) shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. Agreements on such rights must therefore deal with the reproduction rights separately, if they are desired by the user, and if the permission to broadcast is not granted by agreement but by legislation through a compulsory or legal license, it will in principle only cover the rights of broadcasting or communication to the public.

To this rule paragraph (3) adds the following possibility of enacting a limitation to the rights:

It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

The provision covers both such cases where national law grants an exclusive right to control the broadcast, and so on, but where an agreement on the right of reproduction has not been made, and cases where the broadcast has taken place without the rights owner's permission by way of a non-voluntary license as permitted in paragraph (2).

The provision establishes a number of conditions to be included in the permitted limitations in national law. First they can only be applied to 'ephemeral' recordings. The meaning of that term is 'lasting a very short time; short-lived; transitory' or 'lasting but one day'.¹⁵ The provision was the object of intense negotiations both at its original adoption at the 1948 Brussels conference and at the 1967 Stockholm conference. This rather special term was therefore not chosen by coincidence. Significantly the General Report from the Brussels conference abstained from clarifying the implication of the term in detail, but left this for national legislation.¹⁶ At the Stockholm conference attempts were made to clarify the provision, but at the end those proposals were withdrawn.¹⁷ The core field of application, however, is the time-shifted broadcast which for practical reasons is produced and recorded first and broadcast later when it has been finalized both technically and administratively, including as regards

¹⁵ <http://dictionary.reference.com>, visited 23 January 2014.

¹⁶ *Records Brussels* 102; 1886 – *Berne Convention Centenary – 1986* 181.

¹⁷ *Records Stockholm* 1168.

clearing of rights, and so on, and when it fits into the broadcasting schedule. It would seem natural also to include rebroadcasts within a short time aiming at those members of the potential audience who may have been prevented from partaking at the time of the first broadcast, such as workers on night shifts and the like, and rebroadcasts made in order to accommodate the population in different time zones. Hereafter, and in light of national legislative practice and the opinions of prominent commentators, this means that after some months' time, possibly a year, the provision will no longer be applicable.¹⁸ Certainly a reasoning that the broadcasting organizations should be allowed to keep copies of recordings made as long as they are entitled to broadcast the recorded content is ruled out by the presumption that recordings rights are not included when broadcasting is permitted, which is laid down in the first sentence of Article 11*bis*(3).

Even so, Article 11*bis*(3) leaves quite some flexibility to national legislation regarding how long time ephemeral recordings may be kept. Furthermore it allows national legislation to authorize indefinite preservation in official archives of such recordings on the ground of their exceptional documentary character. It bears noting that these quite restrictive conditions were formulated as a compromise, reached during difficult negotiations. They were first formulated in Brussels and later confirmed in Stockholm, which was at a time when the costs involved in such storage alone established some natural limitations on what would be stored that hardly apply in the same way today. At the same time there is reason to believe that the understanding of what may be considered of documentary character may have changed during the past 60 years or more, where the electronic media have assumed important functions in society and culture which earlier were undertaken by the printed media. The most important function of the provision was to regulate the effects of the non-voluntary licenses issued under paragraph (2) (and *de facto*, by virtue of the application *mutatis mutandis* on related rights, the absence of exclusive rights in the field of application of Article 12 of the Rome Convention). At any rate, where exclusive rights apply, the parties may freely agree on reproduction and storage when they agree on the broadcasting rights. A more extensive preservation, on the other hand, does have a significant public and historic interest, and the provision is therefore of more practical importance than ever. That being said, parties should endeavour to reach practical solutions by way of collective

¹⁸ Masouyé 1978 72; Ficsor 2004 80; Ricketson and Ginsburg 2006 828; von Lewinski 2008 165.

agreements between rights owners and their organizations and the broadcasters, public libraries and archives.

The additional modifications of the faculty to make ephemeral copies were also thoroughly discussed in Brussels and Stockholm, namely that the recordings must be made 'by means of [the broadcaster's] own facilities and used for its own broadcasts'. If the broadcasters outsource the production to subcontractors, such as film studios or the like, the recording rights must be cleared separately. This is probably not the case when the facilities are under the full control of the broadcaster but technically not owned by it, such as when they are rented from a facilities house. This seems reasonable, based on the need for the rights owners to ensure an efficient control over the exploitation of their works and at the same time the desirability of a level playing field between those production houses that work on own productions and those who undertake to make productions for broadcasters. Conversely, though, one may question why today broadcasters should have such competitive advantage over independent producers when it comes to the clearance of synchronization rights.

In addition to the faculty to introduce compulsory or legal licenses for broadcasting, and so on under Article 11*bis*(2), Article 13 permits the introduction of non-voluntary licenses for the *recording of musical works with or without words*. Judged on a strict reading of its wording, the Article seems to cover all musical works, regardless of whether they have been recorded earlier with the author's consent, but only such accompanying lyrics which have been recorded with the music with the consent of their writer. It would, however, be highly unusual if national law were to apply a compulsory or legal license to the recording of an unpublished musical work or even more such a work that has never been made available to the public with the author's consent.

In many respects the permitted non-voluntary license resembles the provisions in Article 11*bis*(2), including by being applicable only in the country that has instituted the license. This is further underlined in Article 13(3) according to which copies produced under a non-voluntary license shall be liable to seizure in other countries 'where they are treated as infringing recordings'. The interaction between those two paragraphs leaves something to be desired, because if the license may only be applicable in the country that has imposed it, one would normally deduce that copies could not be distributed in any other countries whatsoever, whereas the wording of paragraph (3) ('imported into a country *where they are treated as infringing recordings*' (emphasis added)) could be understood as indicating that they may circulate among and within countries that have all introduced such non-voluntary licenses. Absent a

general right of distribution under the Berne Convention, it seems to be the correct interpretation that such circulation is permissible and that the limitation of the application to the country imposing the licenses only means that the technical production cannot be outsourced to another country. In addition, and in line with the provisions on seizure of infringing copies in Article 16, copies made under such licenses must be liable to seizure in countries where similar non-voluntary licenses have not been enacted.

The rights holders are entitled to equitable remuneration which, in the absence of agreement, shall be fixed by competent authority. There is no specific reference to the moral rights as is the case in Article 11*bis*(2), but since these rights apply by virtue of Article 6*bis* anyway, this plays no role in practice. As discussed further under (3), below, there was no agreement at the Stockholm conference as to whether the permitted use also includes use in translation.¹⁹

The **TRIPS Agreement** contains no specific limitations and exceptions of its own, but by virtue of the general incorporation by reference of the substantive provisions of the Berne Convention in Article 9(1), the limitations and exceptions of that Convention apply as well under the Agreement, except for those clauses that are derived from the protection of moral rights in Article 13*bis* of the Convention, as discussed in Chapter 17. The **WCT** contains no new specific limitations or exceptions either, but refers without modifications to the existing ones under the Berne Convention (Article 1(4)).

The 2013 **Marrakesh VIP Treaty** represents a new way of dealing with limitations and exceptions in international copyright in the way that it is the first, and so far only, treaty entirely dedicated to regulate a specific area in that respect. As its title indicates, it aims at facilitating access to published works by visually impaired persons and persons with print disabilities. This is accomplished by establishing limitations and exceptions to the rights of reproduction, distribution, performance and communication to the public enabling the making, dissemination and use of works in alternative formats that may be perceived by persons with vision or other reading impairments.

The Treaty builds on the existing structure in the sector, where public or private non-profit institutions normally undertake the production and dissemination of alternative format copies, including books in textured print, such as Braille or Moon, audio books and other formats. It refers to such institutions as ‘authorized entities’, a term defined in Article 2(c)

¹⁹ *Records Stockholm* 1165.

which leaves it to the national governments to authorize or recognize such institutions. Both government institutions and non-profit organizations fulfilling such tasks may be included. An operative rule linked to the definition clarifies certain tasks of the authorized entities, notably concerning the control and security regarding the special format copies produced and their circulation solely among the ‘beneficiary persons’.

The ‘beneficiary persons’ are defined in Article 3 as covering not only blind persons but also persons with substantially reduced vision and persons who otherwise, through physical disability are unable to hold or manipulate books or to focus or move the eyes to the extent that would be normally acceptable for reading.

In terms of covered subject matter, the Treaty contains a definition in Article 2(a), according to which, for the purposes of the Treaty, “‘works” means literary and artistic works within the meaning of Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media’. This is further clarified through an agreed statement according to which ‘[f]or the purposes of this Treaty, it is understood that this definition includes such works in audio form, such as audiobooks’. The reference to ‘notation’ as an alternative to ‘text’ must mean that sheet music is covered, but the term ‘notation’ probably does not bring phonograms under the scope of the provision. This is important in the light of the agreed statement concerning Article 10(2), which further expands the coverage to certain related rights by providing as follows:

It is understood that when a work qualifies as a work under Article 2(a), including such works in audio form, the limitations and exceptions provided for by this Treaty apply *mutatis mutandis* to related rights as necessary to make the accessible format copy, to distribute it and to make it available to beneficiary persons.

Accordingly performers reciting literary works on ‘talking books’, as well as the producers of such phonograms, are covered by the provisions of the treaty, whereas phonograms containing music and their participating performers and producers are outside its reach. So also are audiovisual works, falling entirely outside the concepts of ‘text, notation and/or related illustrations’.

The actual description of the operative provisions on limitations and exceptions follows a two-track pattern. First a general wording circumscribes the net result that the limitation or exception is expected to obtain, and then a more detailed provision, more or less phrased as a

model law, indicates how that objective may be reached. This pattern is followed as regards the provision regarding the making of the copies in Article 4 and the cross-border exchange of such copies in Article 5. Thus, the general clause in Article 4(1) provides as follows:

- (a) Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. The limitation or exception provided in national law should permit changes needed to make the work accessible in the alternative format.
- (b) Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.

The general clause concerning cross-border exchange of accessible format copies in Article 5(1) in its turn reads as follows:

Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.

This is further elaborated by an agreed statement according to which '[i]t is further understood that nothing in this Treaty reduces or extends the scope of exclusive rights under any other treaty'.

The 'accessible format copies' which are permitted to be produced and distributed under these provisions are defined in Article 2(b) as:

a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons.

Typical examples of such copies are recordings in which literary works are recited as well as literary works or musical notation printed in textured prints, using special notation for this purpose, such as Braille or Moon. The second part of the definition is in reality an operative provision which should have been included elsewhere in the Treaty, important as it is. It should also be seen in connection with the scope of the limitations and exceptions mandated by the Treaty, which cover

reproduction, distribution and certain other making available and performance rights, including recitation, but neither translation nor adaptation beyond the changes needed to make the work accessible in the alternative format. However, it may in certain cases be permitted to translate works, or parts thereof, on the basis of the provisions of the Berne Convention, as pointed to in the agreed statement concerning Article 4(3) (allowing the use of other limitations and exceptions as well, subject to the provisions of the three-step test) according to which '[i]t is understood that this paragraph neither reduces nor extends the scope of applicability of limitations and exceptions permitted under the Berne Convention, as regards the right of translation, with respect to persons with visual impairments or with other print disabilities'. The possibility to translate works in connection with their use under limitations and exceptions is discussed under (3), below.

Contracting parties may choose whether to implement these general clauses by more or less adopting the detailed optional provisions that follow in Article 4(2) and 5(2), or by formulating their own limitations and exceptions. This is explicitly stated in paragraph (3) of both Articles, which in that respect further refers to the provisions of Articles 10 and 11 and, as far as Article 5(3) is concerned, to Article 5(4) which is discussed below. The references to Article 10 deal with the general principles for implementation of the obligations under the Treaty, which are discussed in Chapter 21, and Article 11 deals with the relations to other treaties, notably the three-step test, and is discussed in Chapter 4.

The limitations and exceptions regarding reproduction, and so on in Article 4 may be confined to works which cannot be obtained commercially in the particular accessible format under reasonable terms for beneficiary persons in the market, but countries availing themselves of that provision must notify the Director General of WIPO (Article 4(4)). It is further left for national law to decide whether limitations or exceptions under the Article are subject to remuneration (paragraph (5)).

Article 5(4) deals with the specific situation of countries party to the Marrakesh VIP Treaty, but not members of the Berne Union (item (a)) or party to the WCT (item (b)). When an authorized entity in one of the former countries receives accessible format copies pursuant to Article 5(1) that country shall ensure, consistent with its own legal system and practices, that the accessible format copies are only reproduced, distributed or made available for the benefit of beneficiary persons in that contracting party's jurisdiction. As regards the latter countries, the distribution and making available of accessible format copies by an authorized entity pursuant to Article 5(1) shall be limited to that jurisdiction unless the contracting party is a party to the WIPO Copyright

Treaty or otherwise limits limitations and exceptions implementing the Marrakesh VIP Treaty to the right of distribution and the right of making available to the public in accordance with the three-step test under the WCT.

Two agreed statements concerning this provision clarify that nothing in the Treaty requires or implies that a contracting party adopt or apply the three-step test beyond its obligations under that Treaty or under other international treaties; and that nothing in the Treaty creates any obligations for a contracting party to ratify or accede to the WCT or to comply with any of its provisions and nothing in the Treaty prejudices any rights, limitations and exceptions contained in the WCT.

As regards the importation of accessible format copies, Article 6 states that '[t]o the extent that the national law of a contracting party would permit a beneficiary person, someone acting on his or her behalf, or an authorized entity, to make an accessible format copy of a work, the national law of that contracting party shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder'. An agreed statement clarifies that 'the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6'. While not completely self-evident, this statement seems to refer to a number of different elements in Article 4, including those provisions of the Article which use 'may' language and therefore must be considered optional rather than mandatory. It also seems to refer to the possibility under Article 4(3) of applying other limitations and exceptions which are permitted within the confines of, *inter alia*, the three-step test, as well as the provisions of Article 4(4) and (5) regarding whether copies can be obtained commercially and whether the limitations and exceptions are subject to remuneration.

It should further be noted that the Marrakesh VIP Treaty in Article 8 obliges implementing states to endeavour to protect the privacy of beneficiary persons on an equal basis with others, and Article 9 deals with international co-operation to facilitate cross-border exchange of accessible copies, *inter alia* by setting up an information access point at WIPO.

In the field of *related rights*, Article 15(1) of the **Rome Convention** broadly permits exceptions to the protection as regards private use; use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research. These provisions correspond to some of the exceptions and limitations already known from the Berne Convention.

However at the time of adoption of the Rome Convention, the 1948 Brussels Act of the Berne Convention was in force, so the similarity was only partial and, for example, the limitation regarding private use would not be introduced in the same form for copyright in literary and artistic works through the later Stockholm and Paris Acts. Probably one should therefore interpret these limitations independently and in a relatively broad manner, also in the light of a number of additional proposed specific exceptions and limitations which were rejected by the Rome diplomatic conference, typically with the argument that they were already covered by the adopted specific limitations and exceptions or by the general rules of Article 15(2), which are discussed under (3), below.

The **Phonograms Convention** contains no specific exceptions or limitations, whereas Article 4 of the **Satellites Convention** excepts from protection the distribution of signals that:

- (i) carries short excerpts of the programme carried by the emitted signal, consisting of reports of current events, but only to the extent justified by the informatory purpose of such excerpts, or
- (ii) carries, as quotations, short excerpts of the programme carried by the emitted signal, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations, or
- (iii) carries, where the said territory is that of a Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, a programme carried by the emitted signal, provided that the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research.

As regards related rights, the **TRIPS Agreement** carries on the specific limitations and exceptions of the Rome Convention through the general reference contained in its Article 14(6) without adding any further such limitations or exceptions. A similar reference to the Rome Convention was not included in the **WPPT** which contains only general provisions on limitations and exceptions.

3. GENERAL LIMITATIONS AND EXCEPTIONS

Next to the specific limitations and exceptions for *literary and artistic works* under the **Berne Convention** it is normally assumed that an unwritten principle applies according to which national legislation may make certain narrow exceptions to exclusive rights other than the right of

reproduction (which is discussed separately in the context of the three-step test under (4), below). These are the so-called '*petits réserves*' or 'minor reservations'. They were first discussed during the Brussels revision conference at a time when the text of the Convention did not contain any general rules on limitations and exceptions, and where the level of protection was strengthened by the elevation of public performance of dramatic, dramatico-musical and musical works from just being covered by the Convention into a fully-fledged exclusive minimum right. In the General Report of the conference the following is stated:

Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the Delegate of Hungary have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to Articles 11*bis* [the rights of broadcasting and communication to the public of broadcast works], 11*ter* [the right of public recitation of literary works], 13 [the rights of mechanical reproduction of musical works and public performance by means of such mechanical recordings] and 14 [the rights of audiovisual adaptation and reproduction of works and the public presentation and performance of works thus adapted or reproduced]. You will understand that these references are just lightly penciled in here, in order to avoid damaging the principle of the right.²⁰

The report from the sub-committee of the conference which dealt with Articles 11 and 11*ter* referred to the exceptions and limitations that had emerged in national legislation under the Berlin and Rome Acts. They had been generally accepted, and that had been possible under the rules of the Convention because under the said Acts only a requirement of national treatment applied. It was generally agreed that such limitations and exceptions should remain admissible also under the new Brussels Act, but it was added that they should apply only in clearly defined cases and that they should have no international import.²¹

The question was raised again at the Stockholm conference where the following is stated in the General Report with reference to the work of Main Committee I of the conference which dealt with the substantive provisions of the Convention:

In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of

²⁰ *Records Brussels* 100; 1886 – *Berne Convention Centenary – 1986* 181.

²¹ *Records Brussels* 258; 1886 – *Berne Convention Centenary – 1986* 191.

what it has been agreed to call “the minor reservation” of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands and the requirements of education and popularization. The exceptions also apply to Articles 11*bis*, 11*ter*, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle of the right [...]. It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference. It accordingly seems necessary to apply to these “minor reservations” the principle retained for exceptions to the right of translation, as indicated in connection with Article 8 [...].²²

In relation to the right of translation, the General Report refers to the lively discussions that had taken place in the Committee regarding limitations and exceptions to the right of translation, which gave rise to some declarations regarding the general principles of interpretation. About this, the Report states the following:

While it was generally agreed that Articles 2*bis*(2), 9(2), 10(1), and (2) and 10*bis*(1) and (2), virtually imply the possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice and that here too, as in the case of all uses of the work, the rights granted to the author under Article 6*bis* (moral rights) are reserved, different opinions were expressed regarding the lawful uses provided for in Articles 11*bis* and 13 [...].²³

The ‘minor reservations’ may be seen as a specific application of the general *de minimis* principle according to which the law should not be bothered with unessential details. These reservations may only be used in specific situations where limitations and exceptions do not compromise the protection or otherwise in any significant way reduce its value for the rights owners. This also corresponds to the general rule of interpretation that an exception inserted in the preparatory works cannot set aside an otherwise clear and unambiguous text in the treaty itself. The examples provided also indicate that the exceptions permitted were presupposed to serve the public interest in one or another way. Even if a later addition in other treaties in principle does not affect the interpretation of an earlier treaty provision, the ‘minor reservations’ today probably in terms of practical policy must be understood in the light of the extension of the three-step test in Article 9(2) of the Berne Convention by Article 13 of

²² *Records Stockholm* 1166.

²³ *Records Stockholm* 1165.

the TRIPS Agreement and Article 10 of the WCT to cover also economic rights other than the right of reproduction, as discussed under (4), below. It seems to be a plausible possibility that the latter provisions express a subsequent practice among the members of the Berne Union to consider the three-step test an equivalent rewording of the principle of the 'minor reservations'.

As earlier indicated, a lively discussion took place in Stockholm concerning the extent to which the limitations and exceptions are directly applicable to *translation of works*. The delegates agreed that the provisions of Article 2*bis*(2) (certain uses of lectures, addresses and other works of the same nature which are delivered in public); 9(2) (limitations and exceptions to the right of reproduction); 10(1) (quotation) and (2) (utilization by way of illustration for teaching); and 10*bis*(1) (reproduction by the press and others of articles on current economic, political or religious topics) virtually imply the possibility of using the work not only in its original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice and that here, too, as in the case of all uses of the work, the rights of the author under Article 6*bis* (moral rights) are reserved. Different opinions, however, were expressed regarding the lawful uses provided for in Article 11*bis*(2) (non-voluntary licenses for broadcasting, and so on.) and Article 13 (non-voluntary licenses for recording of musical works and accompanying lyrics, if any). A group of countries of some importance, including Belgium, France and Italy, managed to get included in the General Report that they considered that the wording of those articles in the Stockholm text did not permit of the interpretation that the possibility of using a work without the consent of its author also included, in those cases, the possibility of translating it. In this connection, the said delegations pointed out on the level of general principles that a commentary on the discussion could not result in an amendment or extension of the provisions of the Convention.²⁴ On the basis of this discussion and recorded disagreement at the diplomatic conference, it would seem risky to assume that translation of works against remuneration for broadcasting or recording purposes is permitted under those provisions. This is also supported by the fact that according to the established distribution rules for musical works, applied by the collective management organizations, the addition of a translator will imply that the shares for other owners of rights in the work, notably the author of the original lyrics, are reduced by the share paid to the translator. In addition, for some musical lyrics it

²⁴ *Records Stockholm 1165.*

would seem to be a rather brutal incursion into the author's legitimate interests, if he or she were left without any influence on the character or quality of their translations.

Finally Article 17 of the Berne Convention contains a general provision on *public order* according to which the provisions of the Convention:

cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

The provision covers the prohibition of the dissemination of certain works, such as pornographic works or works containing hate speech, racism, blasphemy and other unlawful expressions, but also their enforcement through censorship. The permissibility of such arrangements is to be determined under the appropriate international human rights instruments; it is not dealt with under copyright law. So far one may consider the provision superfluous because matters of free speech and freedom of expression and their limits and enforcement by nature are categorically separate from the private rights granted under copyright, and the two legal institutes neither presuppose nor exclude each other. The provision, however, has held its place in the Convention since its first Act.

It did, however, cause some discussion at Stockholm where an overwhelming majority wished to clarify that the use of the words 'to permit' was only intended to cover permissions to disseminate works with the consent of their authors. It did not in itself allow countries of the Union to introduce any kind of compulsory license, nor did it make it possible for such countries to permit dissemination without the consent of the author.²⁵ From the general context it is clear that the control of possible abuses of dominant position in the market and other measures under competition law must be exercised in such a way that it respects to the widest possible extent the minimum rights granted under the Convention, national treatment, and so on. Such provisions cannot be used as a basis for replacing essential exclusive rights with mere rights of remuneration, just because those rights are managed in practice by collective management organizations, which are dominating the market or have a factual or legal monopoly. Here various systems of supervision and complaints procedures normally can alleviate possible problems without affecting the fundamental exclusive right. In another context, a WTO

²⁵ *Records Stockholm* 1174ff.

panel has interpreted the provision, as incorporated into the TRIPS Agreement by reference, as not permitting national legislation to refuse protection of unlawful works.²⁶

When the **Rome Convention** was negotiated and adopted, the delegations had the advantage of setting up the protection of *related rights* against the backdrop of the existing system of copyright protection of literary and artistic works. Therefore there was no need to reinvent the already negotiated and carefully worded provisions on limitations and exceptions. In general, delegations did not, as a matter of principle, want the protection of related rights to be stronger than, nor influence the exercise of, the rights in literary and artistic works. Consequently a general reference was used regarding limitations and exceptions in that Article 15(2) permits a contracting state in its domestic laws and regulations to provide for the same kinds of limitations, with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However compulsory licenses may be provided for only to the extent to which they are compatible with the Rome Convention.

The applicable limitations and exceptions are those which actually have been implemented in national law regarding literary and artistic works, not those that in principle would be permissible under the Berne Convention, but which have not been implemented. On the other hand, no identity is required. It suffices that the limitations on the related rights are of 'the same kind' as those applying to works. Indeed countries that so wish may even renounce on limitations and exceptions for related rights, thereby granting them a stronger protection than works. The reference to compulsory licenses has particular relevance for the provisions of Article 11*bis*(2) of the Berne Convention, which, *inter alia*, permits non-voluntary licenses for broadcasting and Article 13 of that Convention, which permits non-voluntary licenses for recording and reproduction of musical works and any words the recording of which together with the musical work has already been authorized by the author of the words. If those rules could be applied *mutatis mutandis* to the protection granted under the Rome Convention, they would compromise important elements thereof, not least the protection of performers against live broadcasting under Article 7(1)(a) and the protection of performers

²⁶ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, WTO panel decision of 26 January 2009 29.

and producers of phonograms against reproduction under Article 7(1)(b) and (c) and Article 10.

A similar provision was introduced in Article 6 of the **Phonograms Convention**, but it does not refer to the limitations and exceptions that actually have been implemented in national legislation on copyright in literary and artistic works. It allows ‘the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works’. Thus, it is not a condition that the limitations or exceptions under the national legislation apply to works as well. In the subsequent sentence, the Article deals with the possibility of introducing compulsory licenses, but again in a different way compared to the Rome Convention in that the Phonograms Convention explicitly permits compulsory licenses for reproduction for use solely for the purpose of teaching and scientific research. In practice, this does not imply much difference compared to the Rome Convention when the broad provision of Article 15(1)(d) of the latter concerning use solely for the purpose of teaching and scientific research is taken into consideration. The Phonograms Convention further requires that compulsory licenses shall apply to duplication only within the territory of the contracting state whose competent authority has granted the license and shall not extend to the export of duplicates, and furthermore reproduction shall give rise to an equitable remuneration fixed by such authority taking into account, *inter alia*, the number of duplicates which will be made.

There is no corresponding rule in the **Satellites Convention**, whereas the **TRIPS Agreement** by means of its general reference in Article 14(6) to, *inter alia*, the limitations and exceptions under the Rome Convention in reality corresponds to the latter. In the TRIPS Agreement, however, the provision is supplemented by the three-step test, which will be discussed under (4), below.

Terminologically it is interesting to note that both the **Rome Convention** and the **Phonograms Convention** refer to ‘compulsory licenses’, not the broader term ‘non-voluntary licenses’ which today is commonly used to denominate both compulsory licenses (where the license has to be applied for and, if not granted on reasonable terms by the rights owner, may be granted by a court or other authority authorized under national law) and legal – or statutory as they are also called – licenses (where the license is granted in the text of the statute and therefore does not require a request for license from the user to the rights owner before the utilization takes place). One should not, however, attach importance to this, because the terminology has been refined in the years since the adoption of those Conventions. At the time, the words ‘conditions of exercise of rights’ in the Berne Convention were seen as an euphemism

for ‘compulsory licenses’²⁷ and the terms ‘legal’ or ‘statutory license’ were referred to in the Records of neither the Rome nor the Phonograms Convention, at all. It therefore seems safe to assume that the references to ‘compulsory licenses’ in these Conventions refer to all kinds of non-voluntary licenses.

The **WPPT** contains in its Article 16(1) a general reference for both *performers* and *producers of phonograms* to the kinds of limitations and exceptions that national law in each contracting state has provided for in its national legislation in connection with the protection of copyright in literary and artistic works. Thus in this case the wording of the Rome Convention has been carried on, rather than the more liberal one of the Phonograms Convention.

Finally an agreed statement to Article 10(2) of the **Marrakesh VIP Treaty**, which deals with the implementation of the provisions of that Treaty, states as follows:

It is understood that when a work qualifies as a work under Article 2(a) [that is, literary and artistic works within the meaning of Article 2(1) of the Berne Convention, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media], including such works in audio form, the limitations and exceptions provided for by this Treaty apply *mutatis mutandis* to related rights as necessary to make the accessible format copy, to distribute it and to make it available to beneficiary persons.

Even if contained in a treaty otherwise dealing with copyright in literary and artistic works only, and referring to instruments granting such rights only, this agreed statement mandates a general limitation or exception to related rights. One may, indeed, argue that such a rule is not quite appropriate in a treaty purportedly only dealing with copyright in literary and artistic works, or even less so within an agreed statement. Realistically, on the other hand, it is well in line with the other provisions of the Treaty by not permitting anything that is not already permitted anyway by the various relevant international protection instruments.

4. THE THREE-STEP TEST

When the minimum right of reproduction was introduced in the Berne Convention at the revision conference in Stockholm in 1967, delegates faced the same situation as their predecessors had done 19 years earlier

²⁷ *Records Rome 1961* 46.

in Brussels when they introduced exclusive rights as the minimum protection concerning certain rights of public performance. Over the years when the obligations under the Convention had been only a requirement of national treatment, a non-harmonized practice of establishing limitations and exceptions to the right had developed in national law. These limitations and exceptions, it turned out, could not be subsumed under a few specific exceptions and many of them were too wide-ranging to be handled under the *de minimis* doctrine. Instead delegates decided to add in Article 9(2) a general clause on exceptions and limitations to the minimum protection, assured in paragraph (1).

The provision was given the following wording:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [that is, literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

In the General Report of the conference, the provision was explained in the following way:

If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, for individual or scientific use.²⁸

This statement is instructive, although today the practical examples in its second part must be read with a pinch or two of salt. At the time photocopying was a complex and expensive undertaking, which cannot be compared to the fast and inexpensive technologies of today. Therefore technology in itself established certain limits as to how much and in how many copies reproduction was made, for example for educational use,

²⁸ *Records Stockholm 1145ff.*

which differ from the situation today. Collective management of reprographic rights (such as photocopying, duplication by means of stencils and computer scanning and printing) was also unknown at the time. However, as also illustrated by the nickname of the rule, 'the three-step test', the statement clarifies that the three conditions regarding 'certain special cases', 'does not conflict with a normal exploitation of the work' and 'does not unreasonably prejudice the legitimate interests of the author' are cumulative. All three therefore have to be fulfilled, if a limitation or exception is to be considered admissible under the Convention.

It is interesting to note that a similar provision regarding human rights, which in principle also covers copyright protection, was adopted by the international community just seven months before the adoption of the three-step test in Stockholm. Article 4 of the International Covenant on Economic, Social and Cultural Rights, which was adopted on 16 December 1966, reads as follows:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Also here we have three cumulative steps, dealing with certainty (determined by law), compatibility with the nature of the rights, and linkage to a public policy purpose, and to some extent one might interpret the three-step test as a specific implementation of this general rule. On the other hand there are also differences; in particular the balancing of interests in the third step is somewhat further developed in the three-step test.

Before discussing further the details of the three-step test, it should be noted that it was carried on almost unchanged in Article 13 of the **TRIPS Agreement**. Here, however, its field of application was no longer limited to the exclusive right of reproduction, but was expanded to all the economic rights under copyright, whether taken over from the Berne Convention by virtue of the reference in Article 9(1) of the TRIPS Agreement, or independently granted in the latter. One of the reasons for this move was the uncertainty that was perceived to exist regarding the scope of the minor reservations, and in that way they were codified. It does not mean that the TRIPS Agreement expands the application of those reservations. Negotiators were fully aware that they were preparing

a ‘special agreement’ covered by Article 20 of the Berne Convention and they could therefore not agree to a lower level of protection than what was granted under the Convention, including the minor reservations.²⁹

Important aspects of Article 13 of the TRIPS Agreement were discussed in the WTO panel decision in the case *United States – Section 110(5) of the US Copyright Act*, which is considered in the following discussions. Obviously one may rightly point out that such a decision, made within the framework of another international treaty, has no legal effect regarding the interpretation of the Berne Convention, but realistically it is unimaginable that the international community would choose to apply several different interpretation standards for the same rule, expressed in different treaties, and for this reason in the following the panel decision is included in an overall discussion of the rule in all the international instruments on copyright and related rights in which it appears.

The rule was repeated in Article 10 of the **WCT** where paragraph (1) makes it applicable on the rights granted under that Treaty and paragraph (2) makes it applicable to all the rights granted under the Berne Convention and incorporated into the Treaty by way of the reference in Article 1(4). It was also repeated in Article 16(2) of the **WPPT**. In connection with the implementation of the rule in those treaties its implementation in a digital context was considered, an issue which is discussed below.

The rule also takes a prominent place in the **Marrakesh VIP Treaty** where its importance is stressed in the Preamble and several operative articles refer to it. Thus in Article 5(4) it is linked to the use made of imported accessible format copies, and in Article 11 it is explicitly mentioned, with particular references to each occurrence of it in the Berne Convention, the TRIPS Agreement and the WCT, as a norm that must be observed when contracting parties implement the Treaty while complying with their obligations under other international instruments on copyright.

The three-step test rule permits limitations and exceptions to the rights to be introduced *in certain special cases*. Accordingly there has to be if not actual ‘certainty’ then at least a significant level of clarity regarding the field of application of the limitation or exception. Furthermore the limitation or exception must be in ‘special’ cases, that is, of limited reach, both quantitatively and qualitatively, but under this step of the test it does not have to be justified by particular circumstances or based on

²⁹ *Gervais 2012 279ff; Implications 1996 22ff.*

public interests. Such considerations belong under the subsequent two steps.³⁰ About the latter point, however, commentators have expressed diverging opinions.³¹

Another and perhaps more practical issue is the extent to which the demand that exceptions and limitations be narrowed down to ‘certain special cases’ prevents the enactment of broad and indeterminate exceptions and limitations. In this respect the interest centres on certain legislative rules of a general reach, which are expected to be fleshed out more precisely along the way by jurisprudence, such as rules on ‘fair use’ or ‘fair dealing’. Of those, the latter were generally accepted and well entrenched in national legislation at the time of the drafting of the three-step test. In the national law of a number of countries following the British dialect of the common law tradition, fair dealing is, at least to some extent, a caption for a list of quite specifically circumscribed limitations and exceptions. However, fair dealing is also frequently permitted in more general terms regarding criticism, teaching, research, and so on. That was also the case at the time of the Stockholm conference, so there is every reason to assume that a sufficient clarification is available in the text of such national statutes.

The case may possibly be assessed differently regarding ‘fair use’ as granted in the national legislation of the USA.³² It is a statutory provision, originally developed in jurisprudence, which permits a certain free use of works for purposes such as criticism, comment, news reporting, teaching, scholarship or research. The use is controlled by some general factors, such as the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. One may probably argue that the scope of this provision was so well-defined in jurisprudence when the USA joined the Berne Convention that it fulfils the demand for certainty and special scope. However the compatibility with the three-step test of newly enacted provisions of a correspondingly broad scope in cases where a comparable clarity, based for example on existing jurisprudence, is not at hand may seem doubtful.

³⁰ *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, WTO panel decision of 15 June 2000 33ff.

³¹ *Ficsor* RIDA 192 (2002) 110–251; *Ricketson and Ginsburg* 2006 765ff; *Senftleben* 2004 138ff.

³² USC Title 17 § 107.

A similar question may arise concerning broad extended collective licenses. The extended collective license is sometimes described solely as an arrangement ‘concerning the management of rights’,³³ but without questioning its validity as a construction under European law, this view may not withstand scrutiny under international copyright and related rights law. The extended collective license is a license granted under national law to use protected subject matter without the consent of the owner of rights. It applies to rights owners who are not represented by a collective management organization, and it applies on the condition that there is a collective agreement between the user and such an organization concerning the use in question. For the license to apply, the organization must represent the majority, or at least a significant part, of the right owners in question. In other words, when a collective agreement is made between the user and the organization, a statutory license ‘drags along’ the works, and so on of non-represented rights owners, provided, at least in most cases, that they have not explicitly prohibited the use in question.

Such license is, certainly, linked to collective management, but in the eyes of the rights owner who is not a member of the contracting collective management organization, it looks very much like a non-voluntary license. The possibility of prohibiting the use individually could also easily be mistaken for a formal requirement for protection. There seems, in other words, to be very good reason and consequence in also submitting extended collective licenses to the requirement that they apply only in ‘certain special cases’. The fact that such licenses represent a very ‘mild’ form of limitation or exception, because collective management organizations are not likely to agree on use of the works, and so on that they represent unless reasonable conditions are offered, does not help in this respect, because the cumulative nature of the three-step test excludes the reasoning that if the prejudice under step three is particularly limited, then one may disregard the first step.

The limitations and exceptions may not *unreasonably prejudice the normal exploitation of the work*. This wording obviously aims at the exploitation made, or expected to be made, by the author him- or herself or by his or her contracting partners, not the exploitation by the beneficiaries of the limitations and exceptions. Consequently the term ‘normal exploitation’ must be considered normative, rather than descriptive, because the existence of a limitation or exception granted under

³³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Recital 18.

national law frequently may lead to the termination, or lack of initialization, of the right owner's own economic exploitation in that particular field. On the other hand, the term must clearly be considered as covering those areas where important economic exploitation actually is taking place, but it must also cover other areas where this is not the actual case, but where one with a certain degree of probability or sound reason may assume that they have or are likely to acquire, considerable economic or practical importance for the right owners.³⁴

The English wording 'does not conflict with' is based on the French term '*ne porte pas atteinte à*'. They both imply that the influence of the limitation or exception must be more than marginal, and that makes good sense because otherwise the provision would not be particularly useful. The uses covered by limitations and exceptions may not be allowed to enter into competition with the ways in which rights owners normally derive the economic outcome from the copyright in the work and thereby curtail an essential or significant commercial income, whether actual or potential at the given point in time or within the near future.³⁵ This determination must be made independently for each separate way of exploitation in such a way that a free use of music from the radio cannot be considered compensated by the royalty paid for the broadcasting.³⁶ The determination, however, cannot solely be based on economic factors, because not all forms of exploitation of works, and so on give an economic outcome. It must also take into consideration the channels through which authors otherwise mainly get their works disseminated to the public, including through making the works available at university websites or in publications such as subsidized journals, which are typically not remunerated, but still represent the normal exploitation of certain works.

Accordingly this is an assessment that will change over time, not least as a consequence of commercial and technological development. Today one would probably attach significantly more importance to the existence or possibility of collective rights management in a given field of exploitation, also outside the area of music where there are old and strong traditions for this, than was the case at the time when the three-step test was first formulated, almost half a century ago. There is

³⁴ *United States – Section 110(5) of the US Copyright Act* 47ff, with reference to the preparatory work of the Stockholm revision of the Berne Convention.

³⁵ *United States – Section 110(5) of the US Copyright Act* 48ff; *Senftleben 2004* 168ff; *Ricketson and Ginsburg 2006* 767ff.

³⁶ *United States – Section 110(5) of the US Copyright Act* 45ff.

also reason to assume that the exploitation of works in digital networks will continue to develop worldwide, also in countries where they are not yet widespread, and such use may therefore be considered part of the normal exploitation even if that is still not the commercial reality everywhere.

Finally the limitations and exceptions may not *unreasonably prejudice the legitimate interests of the author*. This means that they are permitted to cause a certain prejudice – a limitation or exception always will – but only within reason. Such a demand for reason may be made at several levels. The exemplification from the General Report of the Stockholm conference quoted above³⁷ points at the weight of the limitation or exception in the economic picture. A modification of the rights of certain, but not overwhelming, weight may be acceptable if it is linked to payment of equitable remuneration, but not otherwise. There is not much guidance to be found here for the more detailed determination, which is left for national legislation, but it is clear, though, that this criterion only applies when the question concerning the normal exploitation has been settled. The interest at stake is that of getting a supplementary remuneration for forms of utilization of the works that are at a lower level of the scale than the normal exploitation.

At another level the demand for reason may be made in relation to the balancing of the interests of the rights owner against the interest of society, or those special groups of beneficiaries that may be aimed at in the various limitations or exceptions. The WTO panel award in the case *United States – Section 110(5) of the US Copyright Act* postponed, as mentioned above, the question whether the limitations or exceptions should have a public policy purpose from the first to the subsequent two steps.³⁸ Without pointing fingers, one may objectively note that the decision was made in a case about legislation with a particular element of *quid pro quo*, or political bargaining. In order to accept a general prolongation of the term of protection in the US Copyright Act, some politicians had conditioned their support on the addition of legislation that further weakened the already somewhat limited rights of composers and lyric writers regarding the public performance of their works in restaurants and bars. Nevertheless the WTO panel decision stuck to the economic analysis of the limitations and exceptions, and it did not discuss questions such as the reasonableness of holding a specific group of authors ‘hostage’ on behalf of all the copyright industries. Certainly it

³⁷ *Records Stockholm* 1145ff.

³⁸ *United States – Section 110(5) of the US Copyright Act* 33ff.

would not be a comfortable task for an international arbitration panel to judge on complicated political processes in foreign countries, so there is probably good reason to assume that national legislation has quite some leeway to balance such interests, and in practice they are only likely to be questioned in cases of qualified lack of reason.

At a third level the legitimate interests of the authors and performing artists may be of an ideal character, but in that respect the provision in Article 9(1) of the TRIPS Agreement must imply that restraints that may be based on or derived from the moral rights under Article 6*bis* of the Berne Convention do not apply under that Agreement. This does not mean, though, that all non-economic factors are cut off in this respect.³⁹ There may be perfectly good reasons for showing restraint regarding limitations and exceptions for non-published works, or works that have never with the consent of their author been made available to the public, even if the three-step test does not categorically exclude such works from the reach of limitations and exceptions. As regards the other international instruments discussed here, the provisions of Article 6*bis* of the Berne Convention, Article 5 of the WPPT and Article 5 of the BTAP must be read as exhaustively indicating which moral rights are granted, and accordingly the third step of the three-step test cannot be seen as an extension of those rights. However the interplay between the provisions may seem to indicate that one cannot draw a line between moral and economic rights quite as sharply as the TRIPS Agreement seems to presuppose.

When determining whether a limitation or exception can be considered within reason one should keep in mind the French wording of Article 9(2) of the Berne Convention which according to Article 37(1)(c) prevails over the English in case of differences of opinion on the interpretation of the various language versions. By using the wording '*préjudice injustifié*' it signals that the limitation or exception cannot be balanced against the interests of the owner of rights without some sort of reference point. It must be justifiable, and it must therefore be possible to point out a specific purpose which it is suited to fulfil. Then the purpose must be balanced against the interests of the owner of rights and an assessment must be made of the proportionality, that is, whether the depth and effect of the limitation or exception corresponds to the purpose and the strength of the means that according to an objective assessment would be sufficient to reach such end.

³⁹ *United States – Section 110(5) of the US Copyright Act 58.*

When the three-step test was repeated in Article 10 of the **WCT** and Article 16(2) of the **WPPT**, it was in the light of discussions on the importance of new, and in particular digital, technology. The rule was therefore clarified with the following agreed statement linked to the WCT and to which there is also a reference in the WPPT:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

In view of the flexible and technology-neutral nature of the three-step test, one may very well state that the agreed statement does not add much that is new. At least part of the point of making a general rule, rather than a number of specific provisions, was to avoid binding national law to a complex, but also static set of norms, which could not be changed when technology developed further. In this respect it must also be recalled that the agreed statement is only a contribution to the interpretation of the text of the treaty; it does not replace the text of the treaty.⁴⁰ Accordingly national law may change or expand existing limitations and exceptions or develop new such rules as technology advances, but that can only be done to the extent the amended or new rules are compatible with the three-step test. Both the determination of what is the normal exploitation, the (economic) analysis of the effect on that exploitation and the assessments of reasonableness and of proportionality of the prejudice to the legitimate interests of the rights owner must be directed towards the situation in the new digital and networked universe, or whatever other universes the rule may have to cope with in the future.

The second part of the agreed statement concerning the use of the three-step test regarding the provisions on limitations and exceptions in the Berne Convention is also well in line with what was assumed already during the negotiation of the TRIPS Agreement, namely that when correctly interpreted there is no contradiction between the three-step test and the specific limitations and exceptions provided for in the Berne Convention.⁴¹

Having said all this, one may conclude the discussion by noting that all in all a relatively liberal interpretation of the test seems to be in order, not

⁴⁰ Vienna Convention on the Law of Treaties, Article 31(2)(a).

⁴¹ *Implications 1996* 22ff.

least in the light of the rather extensive provisions on non-voluntary licenses in Article 11*bis*(2) and Article 13 of the Berne Convention, dealing with broadcasting, and so on and recording of musical works with lyrics, respectively. If non-voluntary licenses for broadcasting, rebroadcasting or third-party cable retransmission, or for recording of musical works on phonograms do not collide with the 'normal exploitation' one may well argue that a very strict policy has not been outlined for the understanding of that concept, and the practice under the TRIPS Agreement does not change that picture significantly. Voices have been raised, however, calling for a 'balanced' interpretation of the rule, notably from certain prominent academic commentators.⁴²

5. THE APPENDIX TO THE BERNE CONVENTION WITH SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES

During the preparations of the 1967 Stockholm revision conference it had already become clear that copyright was changing from being an isolated area of interest to a few specialists to becoming a battlefield of political interests. This mainly turned out to be the case during the regional consultations which were organized by the BIRPI Secretariat (BIRPI was the forerunner of the present-day WIPO). After World War II a large number of developing countries had changed from being colonies to being independent, and those countries did not consider themselves able to immediately accept further strengthening of the international protection of copyright. On the contrary, they envisaged significant difficulties even in the implementation of the requirements of existing treaties.

For this reason the delegations in Stockholm negotiated and adopted a Protocol to the Berne Convention with provisions that permitted compulsory licenses for translation and reproduction of works in developing countries. The result, however, did not turn out a success, in the sense that it could not gather support from all important stakeholders. Notably, the International Publishers Union could not accept the compromise reached, and it managed to gather support for its views from a number of developed countries. This way the Protocol caused an international crisis, because it became an obstacle to the entry into force of the other provisions of the Convention about which agreement had been reached.

⁴² *Christophe Geiger, Jonathan Griffiths and Reto M. Hilty*, 30 EIPR 2008 489–99.

However, the ratification of the new administrative provisions which transferred the administration of the Convention from BIRPI (Bureaux internationaux réunis pour la protection de la propriété intellectuelle) to WIPO could progress, because that process had been separated from the ratification of the substantive provisions of the Convention and of the Protocol.

The crisis eventually came to an end when a new diplomatic conference was convened in Paris in 1971 which adopted a revised set of rules regarding developing countries, which could be accepted by all stakeholders. In this connection the rules changed their designation from a Protocol to an Appendix, but this hardly implies anything other than the usefulness of a new word to signal that a new text had been negotiated. Formally the Appendix constitutes an integrated part of the Paris Act (Article 21(2)).

Political tension such as that dominating the negotiations on the Appendix rarely lead to short, succinct and concise texts, and this is amply illustrated in this case. The rules are complex, packed with details and difficult to overview, and this may very well be part of the explanation why they are only used very little in practice, if ever. Other reasons may be that the rules by their mere existence motivate publishers in developed countries to accept the moderate fees that their business partners in developing countries are in a position to offer, and that publishers in developing countries, regardless of the possibility of a compulsory license, may see their advantage in free-market negotiations with the rights owners, not least in order to be able to publish translations of technical and scientific literature at the same time as, or as quickly as possible after, the publication in the original language. Finally one may also imagine that the further development and availability of reprography has enabled reproduction and dissemination of works (whether licensed or not) which has made the publishing of local editions less attractive than it was when the Appendix was adopted.

Against this background, it does not make sense to discuss the provisions of the Appendix in all their horrifying details. The following paragraphs only aim at giving a simplified overview which may assist the interested reader in finding his or her way to the relevant provisions, should a need ever occur.

According to Article I only countries that are regarded as developing in conformity with the established practice of the General Assembly of the United Nations may benefit from the Appendix, and they need to make a notification deposited with the Director General of the WIPO (paragraph (1)). Such notifications are limited in time, but in the particular (and peculiar) way that they last during ten year intervals which are the same for all, and which started when the Paris Act entered into force on 10

October 1974 (paragraph (2)). They are renewable within certain time limits, but absent renewal existing notifications expire on the next 10 October of a year ending with the digit four. Thus the first notification made by a country is likely to require renewal even before ten years have passed. There does not seem to have been much attention to this in practice, and as a matter of fact all notifications expired in 1994 without necessarily causing the abolition of the corresponding provisions in national law. The present situation regarding which countries have declarations in force may be checked at www.wipo.int. The fact that a country avails itself of the possibilities under the Appendix does not allow other countries of the Union to apply national reciprocity. This already follows from the general rules on national treatment in Article 5(1) of the Convention, but is further underlined in Article I(6) of the Appendix which also excludes application of the specific provision on reciprocity concerning the right of translation in Article 30(2)(b), as discussed in Chapter 13 and below.

The Appendix contains provisions on limitations and exceptions in two main relations, the right of translation in Article II and the right of reproduction and publication in Article III. Countries wishing to avail themselves of these possibilities may choose either of them, or both (Article I(1)). Article IV contains common provisions for licenses under both Articles, and Article V contains alternative provisions for developing countries regarding the right of translation.

According to Article II, compulsory licenses may be granted for translation and publication in print of such translations for purposes of teaching, scholarship or research of works, published in printed or analogous form (paragraphs (1) and (5)), provided they have not within three years of the first publication been translated and published by the owner of rights in a language in general use in the country of protection, or, if such publication has taken place, it is out of print (paragraph (2)). The term is reduced to one year if the translation is into a language which is not in general use in one or more developed Union countries, and for other languages the affected countries may agree on shorter terms among them, however not shorter than one year and not for translation into English, French and Spanish (paragraph (3)). To those terms are added: for the three-year term, six months; and for the one-year term, nine months, after the completion of various formalities concerning notification of the rights owners, and within those time limits the rights owner can avert any compulsory license by publishing or reissuing the work (paragraph (4)). Subsequently the owner of rights may bring a compulsory license to an end by publishing or reissuing the work in translation, but copies already made under the license may continue to be

distributed until the stock is exhausted. A compulsory license cannot be granted if the author has withdrawn the work (paragraph (8)). As regards works which are composed mainly of illustrations, the compulsory translation licenses cannot be used on their own, but only if the conditions for a compulsory license for the right of reproduction under Article III are fulfilled as well (paragraph (7)).

Furthermore Article II(9), under the conditions outlined above, also permits compulsory licenses for broadcasting organizations in developing countries to translate works, published in printed or analogous forms of reproduction, provided that the translation is made from a lawfully made and acquired copy; that it is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession; that the translation is used exclusively for those purposes through broadcasts made lawfully and intended for recipients on the territory of the country of protection, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts; and that all uses made of the translation are without any commercial purpose. Recordings made specifically for such use may under the same conditions also be used by other broadcasting organizations in the country of protection. Likewise under the same conditions the provision also permits compulsory license for translations with the purposes of sub-titling or dubbing of educational programs.

According to Article III compulsory licenses may be granted for local editions for teaching purposes of works that have not within certain time limits been distributed in the country to the general public or in connection with systematic instructional purposes at a price reasonably related to that normally charged in the country for comparable works, or if such an edition is out of print (paragraphs (1) and (2)). The time limits are three years for works of the natural and physical sciences, including mathematics, and of technology; seven years for works of fiction, poetry, drama and music and for art books; and five years for other works (paragraph (3)) to which is added various time limits in connection with obligatory notifications of the owners of rights, and also here the rights owners have the possibility of averting the license by publishing the work themselves, and the withdrawal of the work by its author must be respected (paragraph (4)). Also (existing) translations may be printed and distributed under a compulsory license, provided that they are made with the consent of the owner of rights and are in a language in general use in the country of protection (paragraph (5)). Subsequently the rights owner may terminate a compulsory license by publishing the work at a

reasonable price, but copies already made under the license may continue to be distributed until their stock is exhausted. The compulsory licenses under Article III are limited to works published in printed or analogous forms of reproduction, but they may also be applied to audiovisual reproduction of lawfully made audiovisual fixations for systematic instructional purposes including any protected works included therein and to the translation of any incorporated text into a language in general use in the country of protection (paragraph (7)).

For licenses both under Articles II and III, Article IV provides that the applicant of a license must establish having requested and been denied permission for the use, or after due diligence not having been able to find the owner of rights (paragraph (1)) and in the latter case copies of the request must be sent to the publisher indicated on the publication or possibly to a national or international information centre in the presumed home country of the publisher, which has been notified to the Director General of WIPO by the government of that country (paragraph (2)). So far, no such centres seem to have been notified. The name of the author and the title of the work, or the original title if it is translated, must be indicated on all copies published under a license. The licenses only allow use in the country of protection, and copies may not be exported. Under certain conditions, however, exchange of translations into other languages than English, French or Spanish may take place between countries that have all made the necessary notifications (paragraph (4)). Such territorial constraints must be indicated on the copies made in the relevant language (paragraph (5)). The license fee must correspond to what normally is paid for freely negotiated agreements between parties in the countries concerned, and due provision shall be made by national legislation to ensure a correct translation of the work or an accurate reproduction of the particular edition, as the case may be (paragraph (6)).

Article V(1) enables a developing country to make a declaration when it joins the Paris Act that instead of applying Article II on translation it will apply Article 30(2)(a) of the Berne Convention even though the country in this connection is not becoming a new member of the Union. As mentioned in Chapter 13, that Article allows countries acceding to the Union to make a reservation according to which, temporarily at least, Article 8 regarding the right of translation is replaced with the provisions of Article 5 of the original 1886 Berne Act, as completed at Paris in 1896, under the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. A developing country that has already made a declaration under Article II cannot later make a declaration under Article V, but a developing country which has ceased to be regarded as a developing

country may within certain time limits make a declaration regarding the application of Article 30(2)(a). Specific rules regulate how the eventual transition of a country from being developing to developed is to be handled, which apply to all the rules of the Berne Appendix discussed here.

Article VI finally contains certain particular rules linked to the fact that the Paris Act of the Berne Convention, according to its Article 28, may be adhered to either in its entirety or exclusively as regards its administrative provisions. For the countries that have opted for the latter solution, whether developed or not (in particular countries of the Union that supported the transfer of the Bureau of the Union from BIRPI to WIPO but were not yet in a position to implement the substantive provision in Articles 1 to 21 and the Appendix) Article VI allows for the Appendix to enter into force for them separately.

SUGGESTIONS FOR FURTHER STUDY

See, in general, *Ricketson and Ginsburg 2006* 755–878 and *Goldstein and Hugenholtz 2013* 371–407. Concerning the 1971 Paris diplomatic conference and the negotiations of the provisions of the Appendix, see *Ferney (1971)* 70 RIDA 1–45, and *Ricketson and Ginsburg 2006* 879–963. Regarding the three-step test, see *Senftleben 2004*. Regarding the TRIPS Agreement, see *Gervais 2012* 276–92 and *Correa 2007* 146–55. Regarding the WCT and the WPPT, see *Ficsor 2002* 255–357, 514–44 and 640–3 and *Reinbothe and von Lewinski 2002* 118–34 and 387–403. For a detailed comment on the Marrakesh VIP Treaty, including its relation to the three-step test, see *Ficsor 2013*.

19. The term of protection

The term of protection under Article 7(1) of the **Berne Convention** is the lifetime of the author plus 50 years. Originally this term was not even indicated in the Convention. It solely contained a provision on comparison of terms, as discussed below, and the present term was only adopted as a facultative provision in the 1908 Berlin Act. In the 1948 Brussels Act the provision was made binding with certain transitory rules, that will be discussed below. For audiovisual works the shortest term of protection was fixed at 50 years from the end of the year in which the work is first made available to the public with the consent of the author, or, if the work has not in this way been made available, 50 years after the making (paragraph (2)). A special rule for anonymous and pseudonymous works in paragraph (3) also grants 50 years of protection, but requires in that respect that the work has been 'lawfully' made available to the public. For this category of works it is in reality not possible to ascertain whether the consent of the author has been given. When a pseudonym leaves no doubt as to his or her identity, or if the author of an anonymous or pseudonymous work discloses his or her identity, the normal term according to paragraph (1) applies.

In practice it may be difficult to determine when a work, for example a traditional cultural expression (an expression of folklore) first was made available to the public, because such acts are often not documented in the same way as commercial publications, and Article 7(3) of the Convention therefore clarifies that countries of the Union are not obliged to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for 50 years. For such works certain rules of presumption apply under Article 15(4), as discussed in Chapters 5 (2), 6 (3) and 11 (1).

For works of joint ownership, Article 7*bis* states that the term of protection shall be calculated from the death of the last surviving author. This provision does not necessarily settle all doubts, notably because national law diverges when it comes to defining which works qualify in that respect. The main bone of contention has been whether musical works and the lyrics written for the music qualify as works of joint ownership or should be understood as separate works, which may just be

used together. The Convention does not furnish the response and leaves the issue to national law. In Europe, for example, the issue was harmonized through Article 1 of the Terms Amendment Directive¹ which applies the rules for works of joint ownership to musical works and their lyrics, provided that both contributions were specifically created for the respective musical composition with words.

For works of photography and works of applied art, to the extent the latter are protected as works of art, Article 7(4) permits that the term of protection is reduced to 25 years from the making of those works. This is due to the ambivalent attitude the Berne Convention has had to the protection of photographs over the years (see also below regarding the WCT) and as regards works of applied art the shorter term of protection should be seen in the context of the possibility under Article 2(7) of choosing to protect such works as industrial designs, rather than under copyright. A number of difficulties have been averted in this way as designs protection normally lasts for a much shorter period than copyright protection.

All terms of protection, which are either linked to the lifespan of the author or otherwise last a certain number of years, are calculated from 1 January in the year following the event that triggers the term (Article 2(5)).

Rules of transition in paragraph (7) permit countries that have adhered to the 1928 Rome Act to maintain their possibly shorter terms of protection permitted under that Act, when they adhere to the Paris Act. This provision is probably rarely used, if ever, today.

Considering that the term of protection is a minimum level of protection, countries of the Union are free to grant longer terms of protection, as stated explicitly in Article 7(6), and a significant number of countries have chosen to do that. If, however, a country chooses to prolong the term of protection beyond the 50 years, it is not obliged to grant national treatment in that respect to authors of other countries of the Union granting a shorter term of protection, the so-called ‘comparison of terms’, permitted in paragraph (8). This provision states that ‘the term 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

¹ Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

of the work'. The country of origin is defined in Article 5(4) which is discussed in Chapter 5 (2).

The tendency to prolong beyond the 50 years was seen sporadically during the twentieth century, for example in Spain and in connection with certain prolongations of terms intended to alleviate the hardship of the World Wars. Most importantly, however, when the copyright law of the Federal Republic of Germany was revised in 1965 a compromise was reached in which a proposal to introduce so-called 'paying public domain' (*domaine public payant*, a way of funding public support for the arts by levying a fee on the use of works for which the term of protection is expired) was traded off against a prolongation of the ordinary term of protection from 50 to 70 years. Politically and constitutionally it would not be possible to reduce that term in connection with the European harmonization of the terms of protection which was an element in the high profile establishment of the Single European Market in the early 1990s. As a matter of practical politics there was no other option than to prolong the term of protection throughout the European Union, and even with the effect that works that had fallen into public domain were protected anew, if the 70-year term had not yet expired.

Later the USA followed suit with a somewhat similar prolongation of terms. Conventional wisdom in the copyright discourse has it that this was due to lobbying, not least from the Walt Disney Corporation whose copyright in the Mickey Mouse character was about to expire. Without trying to deny that such lobbying may have taken place, attention should also be drawn to the importance it may have for a strongly export-oriented cultural industry if its foreign competitors get their protected backlist of works prolonged with 20 years' worth of repertoire. In addition, the provisions on points of attachment in Articles 3(4) and 5(4)(a) together with the comparison of terms under Article 7(8)² also imply that simultaneous international publication in several countries means that the term of protection will be that of the country with the shortest term. In other words, a country not prolonging its term of protection in line with important foreign trading partners will encourage even works of its national authors to be published abroad first and only in the domestic market more than 30 days later.

Whether it was politically wise and economically well founded to prolong the term and whether it has contributed to the general respect for and acceptance of copyright as a legal institute is another matter which has been the subject of lively discussion elsewhere.

² von Lewinski 50 J Copyright USA (2002-2003) 581, 595ff.

Apart from incorporating the rules of the Berne Convention through the reference in Article 9(1), including the provision on the term of protection, the **TRIPS Agreement** adds a rule in Article 12 according to which terms of protection of a work, other than a photographic work or a work of applied art, that is calculated on a basis other than the life of a natural person, shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the calendar year of making. The term ‘publication’ is defined in Article 3(3) of the Berne Convention with reference to the manufacture and dissemination of copies, whereas the normal starting point for the calculation of terms not related to the lifetime of the author in Article 7 of that Convention is when the work lawfully has been made available to the public, an act which does not necessarily fall under the definition of Article 3(3).

In a case where a work, for example a TV drama, has been made available to the public through broadcasting but only been published on DVD in a later calendar year, less than 50 years after the year of making, the provision of Article 12 of the TRIPS Agreement prolongs the term of protection, as compared to the term under the Berne Convention. On the other hand, the protection under the TRIPS Agreement would be shorter than under the Berne Convention if the drama is broadcast in a later calendar year than that in which it was produced, and never subsequently published, because the protection under the TRIPS Agreement would expire 50 years after the year of making, whereas under the Berne Convention it should expire 50 years after the year of the first broadcast.

In principle, the rule thus means that national law of a country party to both the Berne Convention and the TRIPS Agreement must protect, for example, an anonymous work for at least the longest of the following terms: 50 years after the year of making; 50 years after the year of first making available to the public or, 50 years after the year of publication. Since such complicated rules have not been introduced in the national legislation of several important countries that all actively participated in the negotiations of the TRIPS Agreement (or domestic legislation in the European Union³), one might be tempted to guess that the provision is an ill-conceived attempt to ‘neutralize’ the provisions of the Berne Convention in relation to the reference to the year of publication, which applies

³ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (consolidated in Directive 2006/116/EC of 12 December, 2006), Article 1(3).

in domestic law in the USA.⁴ If this were the case, however, it would be solving a local problem by causing global confusion.

Comfortingly those rules were not repeated in the **WCT**, which only carries on the rules of the Berne Convention through the reference in Article 1(4). It did add, however, another modification, which in the relations between the contracting parties of that Treaty excludes the application of the shorter term of protection for photographic works in Article 7(4) of the Berne Convention. The contracting parties are free, though, to continue using the shorter term of protection for works of applied art.

As far as related rights are concerned, Article 14 of the **Rome Convention** grants a minimum term of protection of 20 years from the end of the calendar year of: the recording (for phonograms and for performances, recorded on phonograms); the performance (for performances that have not been recorded on phonograms); or the broadcast (for broadcasts). It is not quite obvious why there is a distinction between recording (for phonograms) and performance (for other recordings which in practice must be audiovisual recordings), because a performance cannot physically be perceived after it has taken place, unless it was recorded, so logically the two points in time must be identical.

The Rome Convention does not allow limiting the protection of broadcasts by calculating its term from the first broadcast of a given programme. It is the emission of the signal as such which is the object of the protection. Accordingly a rebroadcast will trigger a new protection of its own, because a new signal is emitted, but certainly not a prolongation of the term of the first broadcast of the content in question. This is completely in parallel to the protection of performing artists who are not granted protection only for their first performance of a work while denied it for any later performances of the same work.

The Rome Convention contains no provisions on comparison of terms as they are known from Article 7(8) of the Berne Convention, but as regards the right of equitable remuneration for broadcasting and other communication to the public under Article 12, such a comparison may nevertheless be made on the basis of Article 16(1)(a)(iv). As regards the right of reproduction, a faculty of comparison of terms was considered unnecessary, because most countries at the time granted protection under the rules of unfair competition and therefore did not have any firmly defined term of protection.⁵ This has changed since then, and now most

⁴ USC Title 17 § 302(c).

⁵ *Records Rome 1961* 50.

countries have explicit rules of protection under copyright or related rights with a precisely determined term of protection. However, this would not seem to warrant the introduction of unwritten rules on comparison of terms by way of mere interpretation.

The **Phonograms Convention** protects under its Article 4 for 20 years as well, to the extent that countries choose to establish a fixed term at all, but provides an optional calculation from either the year of fixation or the year of publication. Logically the latter year must be either the same year as the year of fixation, or a subsequent year, so the rule cannot lead to a shorter term of protection than that, granted under the Rome Convention.

The **Satellites Convention** does not provide for any minimum term of protection, but states in its Article 2(2) that countries may limit the rights in time, and if they do they shall notify the Secretary-General of the United Nations. Such notifications have been made by Germany (25 years) and Trinidad and Tobago (20 years)⁶ but one should probably not consider this a reliable expression of all applicable limitations in time in national legislation.

For *performing artists* and *producers of phonograms* Article 14(5) of the **TRIPS Agreement** grants a longer term of protection lasting 50 years after the year of fixation or performance. In that way the Agreement adopted a general trend towards a longer term of protection in significant parts of the world. On the other hand, the 20-year term after the year of broadcasting was maintained for *broadcasting organizations*.

The **WPPT** grants in its Article 17 protection for 50 years, but the provision makes a distinction between the two categories of rights covered. For *performing artists* the term according to paragraph (1) is calculated from the end of the year in which the performance was recorded on a phonogram whereas the term for *producers of phonograms* according to paragraph (2) is calculated from either the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made. That way the calculation principles, but not the term of protection, of producers of phonograms correspond to those of the Phonograms Convention. No matter what one feels about prolongations of terms of protection, it must be noted that it can hardly be considered satisfactory for ageing performing artists to watch their rights expire while the protection continues for their business partners, the phonogram producers, for those recordings that were not published immediately after the fixation. Like the Rome Convention and the

⁶ www.wipo.int, visited 23 January 2014.

Phonograms Convention, the WPPT contains no provisions on comparison of terms, other than what follows from the general provisions on material reciprocity concerning the right of equitable remuneration under Article 15.

The **BTAP** grants protection to performers regarding audiovisual fixations of their performances until the end of a period of 50 years computed from the end of the year in which the performance was fixed. In a way similar to the Rome Convention and the WPPT there are no general rules concerning comparison of terms, but according to Articles 11(3) and 4(2) and (3) material reciprocity may be applied as regards shorter terms of protection as far as the rights of broadcasting and communication to the public are concerned.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 526–77; *Goldstein and Hugenholtz 2013* 283–300; *Gervais 2012* 272–6 and 308; *Correa 2007* 131–4 and 166; *Ficsor 2002* 510–14 and 643; and *Reinbothe and von Lewinski 2002* 114–17 and 404–08.

PART III

Enforcement, dispute resolution and final provisions

20. Technological protection measures and rights management information

During the preparation of the WCT and the WPPT, it became clear that it would not be sufficient to clarify the field of application of the existing protection in relation to the newly developed technologies. Certain new forms of protection, going beyond the known categories of exclusive rights and rights of remuneration, were called for. First and foremost there was a need for provisions in two areas, namely a protection against circumvention of technological protection measures used by the owners of rights as a practical supplement to their legal protection, partly a protection against removal or distortion of the electronic information on, or surrounding, works or recordings which serve their identification, licensing, and so on. Later on, that protection was further expanded in the ACTA Agreement.

The *protection against circumvention of technological protection measures* was formulated as follows in Article 11 of the **WCT**:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Similar provisions were included in Article 18 of the **WPPT** and Article 15 of the **BTAP** which refer to the provisions of those Treaties only, not to the provisions of the Berne or Rome Conventions. In addition Article 7 of the Marrakesh VIP Treaty contains clarifications regarding the relationship between Article 18 of the WPPT and the exceptions and limitations provided for in the Marrakesh VIP Treaty. These provisions are discussed in that context, below.

In interpreting those provisions one should keep in mind that their wording was negotiated and adopted at a time when only very little national legislation contained provisions to this effect and such existing provisions had mainly been formulated on the basis of the discussions that had taken place during the preparation of the diplomatic conference

which adopted the WCT and the WPPT. In this sense the treaty provisions were a pioneering work and one should therefore probably be cautious not to base their interpretation too much on how they were later implemented in national law. Where clear trends may be pointed out, one may possibly find a subsequent practice which can be considered an element to be taken into account in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, but the application of that provision further requires that such practice ‘establishes the agreement of the parties regarding its interpretation’. In reality the theme is even more controversial now than it was when the provisions were adopted in 1996. This is also reflected in the agreed statements that were added to the practically identical provision in the BTAP and to the provision in Article 7 of the Marrakesh VIP Treaty.

The object of the provision is ‘technological protection measures’ which are capable of ‘restricting’ certain ‘acts’ regarding works, performances or phonograms. There are no limitations in respect of their nature, so they may presumably be either physical or logical (as elements of computer programs or the like) or a combination thereof. It is required, however, that they are ‘effective’. In that respect one cannot demand that they must be 100 per cent circumvention proof, because then the provision would be superfluous – why legislate against what people cannot do anyway? On the other hand, one cannot expect the law to protect purely symbolic measures, so the requirement must mean that the measure has a certain effect, in the way that when used in a normal way certain data, processes or treatments are necessary for obtaining the protected access to works, and so on, or otherwise to perform the act covered by the protection, and that such data, processes or treatments can normally be obtained only with the consent of the owner of rights.¹

Not all technological measures are covered by the provision. They must have been used by the owner of rights. This is further elaborated by an agreed statement to Article 15 of the BTAP which has the following wording:

The expression ‘technological measures used by performers’ should, as this is the case regarding the WPPT, be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.

¹ *Ficsor* 2004 216.

The measures must have been used in connection with the exercise of the rights under WCT, WPPT or BTAP, respectively, and, as far as the WCT is concerned, the Berne Convention. Notably this does not involve any obligation for the rights owners to use such measures. Furthermore it is clarified that when such measures are used, they are only covered by the treaty provisions to the extent that they secure rights covered by the minimum protection of the treaties referred to. Technological measures used to control access to, or acts in relation to, unprotected material, including works and recordings for which the term of protection has expired, are not covered. This is further clarified in an agreed statement regarding the BTAP which is discussed below in the context of the relation between this protection and limitations and exceptions to the rights. Circumvention of measures protecting geographical partitions of the right of distribution, such as the zone system for DVDs is not covered either, because such protection is excluded from the distribution rights under WCT and WPPT (Article 6(2) and Articles 8(2) and 12(2), respectively), and neither can it be considered included in the distribution rights granted for audiovisual works under the Berne Convention, as discussed in Chapter 14. Another matter is that national legislation at any time may go beyond the minimum protection of the Treaties and grant such protection if this is considered appropriate, both as regards these rights as such and likewise their protection against acts of circumvention.

The protection against circumvention of technological protection measures under the Treaties does not reach into such areas either, where national law may enact limitations and exceptions to the rights. This issue, however, brings about a difficult balancing of the various elements of the treaty provisions. The general requirement of the provisions is that contracting parties shall provide 'adequate legal protection and effective legal remedies'. This certainly implies that national legislation has considerable leeway as to how the provisions can be implemented. It does not have to be in the copyright and related rights legislation, and it does not necessarily have to be through private rights. Provisions under criminal or administrative law or in other legislation may also be used, depending on the circumstances. The requirement that 'adequate' legal protection is granted, however, must certainly be read as meaning that the protection must be of such nature that it is suited to prevent circumvention in practice.

The practical reality is that the overwhelming majority of the inhabitants of any country cannot on their own circumvent even relatively simple technological measures of protection. For this purpose, information and programs are required which certain particularly knowledgeable persons seem keen to develop: tools which in a more or less

user-friendly way enable the less technically sophisticated to circumvent. Accordingly it is difficult to imagine how an effective protection may be accomplished in today's society without in one way or another addressing the dissemination of circumvention tools.

If this reasoning is correct, one is also led to accept that not all exceptions and limitations to the rights should override the provisions on circumvention. If, for example, everybody might produce copies for personal use and therefore also acquire the necessary circumvention tools, it would not be possible to restrict their availability, and whenever they are available they will also be used for circumvention for other purposes, including those covered by the minimum rights. This is probably the explanation why many countries meticulously have singled out some specific limitations and exceptions for which circumvention is permitted, typically limitations and exceptions that do not open up for circumvention by the general public, such as reproduction in libraries, archives and museums, reproduction for the benefit of persons with visual or other impairments, use in the judiciary and for purposes of national security, whereas circumvention is not permitted for purposes of reproduction for private or personal use, quotation and the like.

In an agreed statement to Article 15 of the **BTAP** the issue of the relation between limitations and exceptions and the protection against circumvention of technological measures is addressed as follows:

It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party's national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.

This statement contains a useful clarification, expressed through the commas surrounding the words 'in accordance with Article 13', that the three-step test in that Article must be applied to both the limitations and exceptions referred to, as such, and to the measures that ensure the enjoyment of such limitations and exceptions despite the deployment of technological protection measures. It further clarifies that in order to

legally circumvent such measures, the beneficiary must have legal access to the performance. The final sentence of the agreed statement, referring to unprotected subject-matter, is superfluous as the protection against circumvention is linked to the exercise of rights, but read as a clarification it may be considered harmless, unless it is used to deduce that the situation should be different as regards the WCT or the WPPT, which it certainly is not.

In the **Marrakesh VIP Treaty** the provisions granting protection against circumvention of technological protection measures are not repeated, but a provision dealing with their application to limitations and exceptions regarding persons with visual and other reading impairments is included as Article 7:

Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty.

An agreed statement linked to this provision states as follows:

It is understood that authorized entities, in various circumstances, choose to apply technological measures in the making, distribution and making available of accessible format copies and nothing herein disturbs such practices when in accordance with national law.

The latter statement may be considered superfluous, because it addresses measures applied by or on behalf of other persons or entities than the authors, performers or other owners of rights, and accordingly is outside the scope of Articles 11, 18 and 15 of the WCT, WPPT and BTAP, respectively. The clarification may be useful, however, as such measures would seem a highly useful way of ensuring that special format copies are distributed to be beneficiaries of the limitations and exceptions, only, and not to a wider public. It seems somewhat doubtful, however, whether those measures may be considered as applied on behalf of the rights owners in such a way that they are covered by the prohibition against circumvention.

When looking at the acts which the protection is intended to restrict, the same line of reasoning regarding the requirement of an adequate legal protection and effective legal remedies, as is developed above, will imply that the protection against 'circumvention' is understood as directed not solely towards the act of circumvention in itself, but also towards preparatory and ancillary acts, such as manufacture, import and offering

for sale, rental or lending of implements or services which are primarily suited for circumvention of the technological measures covered by the provision. This reasoning also leads to interpreting the provision as possibly covering not only circumvention of blockages relating to the exercise of rights in a narrow sense, that is reproduction and the like, but also blockages concerning individuals' access to read, see or hear the work. This would appear to be based on a reasoning that even if an individual person's access to a work, for example listening to the radio at home, is not in itself covered by the right of broadcasting, the circumvention of the encryption of a broadcast, made by the same person at home, must be seen as targeting a measure used in connection with the exercise of the right of broadcasting or other communication to the public. Against this, however, speaks that traditionally reception and perception of works, and so on has been kept outside the scope of copyright and related rights, and for good reasons. Freedom of expression covers also the right to seek and receive information.

There is also some leeway for national law as regards when a device or service 'primarily' serves the purpose of circumvention. Obviously nobody ever intended to prevent the trade in general purpose computers, even if they are an essential tool for many acts of circumvention. A certain specific targeting is required, and in that sector the rules will mainly be aiming at software and specific hardware which serve circumvention purposes. On the other hand, one cannot demand that the tool exclusively serves the purposes of circumvention, because then the interdiction could easily be escaped by building in a digital calendar, clock, or similar symbolic additional function without real economic importance. The obligations under the Treaties lie somewhere in between and the proof of correct implementation will be that circumvention, if not totally excluded, is by and large under control. Therefore it is also highly probable that the practical implementation will have to change over time, in line with developments in technology and real life.

In Article 27(5) of the **ACTA Agreement** the protection against circumvention of technological protection measures has been repeated using by and large the same wording as Article 11 of the WCT and Article 18 of the WPPT, but the subsequent paragraph (6) establishes an interpretation of 'adequate legal protection and effective legal remedies' which means that:

each Party shall provide protection at least against:

- (a) to the extent provided by its law:
 - (i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and

- (ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and
- (b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:
 - (i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or
 - (ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.

The provision is supplemented in various ways through footnotes. As regards the words ‘technological measures’ this term is clarified in a note which, much in line with Article 6(3) of the European Information Society Directive² clarifies that:

technological measures means any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances, or phonograms, which are not authorized by authors, performers or producers of phonograms, as provided for by a Party’s law. Without prejudice to the scope of copyright or related rights contained in a Party’s law, technological measures shall be deemed effective where the use of protected works, performances, or phonograms is controlled by authors, performers or producers of phonograms through the application of a relevant access control or protection process, such as encryption or scrambling, or a copy control mechanism, which achieves the objective of protection.

In addition, a footnote to Article 27(6)(b)(ii) states that:

no Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise contravene its measures implementing these paragraphs.

Paragraph (8) further clarifies that the protection against circumvention of technological protection measures is without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a contracting party’s law.

Another new feature in international copyright and related rights law, which came about through the **WCT** and the **WPPT** in 1996, was the

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

introduction of *obligations concerning rights management information*. Article 12 of the WCT has the following wording:

- (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
 - (i) to remove or alter any electronic rights management information without authority;
 - (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
- (2) As used in this Article, 'rights management information' means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

A corresponding provision without references to the Berne Convention and with slight adaptations was included in Article 19 of the WPPT. Article 16 of the **BTAP** contains a similar provision.

The provisions aim at establishing legal protection against removal or distortion of 'rights management information', so-called 'metadata', which is defined in paragraph (2), that is, information about the work, performance or recording, its author, performer or producer or other rights owner and licensing information which is attached to a copy of the work or recording or appears in connection with its communication to the public.

It is not obvious what is required for the information to be 'attached to a copy'. In particular there may be uncertainty as regards websites where a work is made available to be acquired, but where the relevant metadata is situated on the website, rather than on the works or recordings themselves, which very well may be located in a completely different place. Even though much here would speak for a functional assessment, where importance is attached to whether the information in the eyes of the user appears in connection with the work, to be in line with the wording of the definition one must probably demand that it is 'attached to' the work or recording itself and follows along when it is downloaded in order to be covered by the protection. Likewise information placed elsewhere, such as in collective management organizations, must be

considered beyond the reach of the provision. In the case of communication of the work, such as streaming, the connection between the protected subject matter and the information may be looser in the sense that the information does not have to be fixed to the work or recording, but there still has to be a rather close link between them.

The definition does not require that the information is available in computerized form, but that might be read into the operative provisions of paragraph (1) according to which only ‘electronic’ information is covered. Of course some information might be considered ‘electronic’ but not computerized, such as spoken credits on traditional sound radio, but with modern technology that distinction is probably losing its practical importance.

The acts covered by the provision fall into two groups, partly the unauthorized removal or alteration of metadata, partly certain acts – distribution, importation for distribution, broadcasting or communication to the public – of works or copies of works, or recordings, from which electronic rights management information has been removed or altered without authority. ‘Without authority’ refers to both the rights and their limits and the possible consent of the owner of rights. Thus the removal may be authorized either under the legislation, including its provisions on limitations and exceptions, or in accordance with a license from the owner of rights. One should probably not extend this interpretation too far by stating that removal or alteration normally may take place when a work or recording is used under a limitation or exception in the law. If it is not technically necessary, there would not seem to be any need for permitting it, because it would increase the risk of further dissemination of the work or recording without the metadata, and the very point of the provision is to avoid such dissemination.

The provision operates in a somewhat complicated way with different levels of knowledge in different relations. The very acts of removal or alteration of rights management information, or distribution or communication, and so on of works or recordings must be done knowingly. Furthermore a certain knowledge component must be present as regards the consequence of the act, namely that it ‘will induce, enable, facilitate or conceal an infringement [...]’. Here, a distinction is made between civil remedies, where only ‘reasonable grounds to know’ are required, and other remedies. The latter may by way of logic exclusion be criminal and possible administrative remedies, and here actual knowledge is required. Furthermore actual knowledge is required regarding the fact that rights management information has been removed or altered without authorization from works or recordings or copies thereof which are

distributed, communicated, and so on, in order for liability under paragraph (1)(ii) to come about.

As with the protection against circumvention of technological protection measures, the protection of rights management information gives national law quite some leeway in its implementation. What is required is only that ‘adequate and effective legal remedies’ are provided against persons responsible for the acts covered. That way they differ from those regarding technological protection measures where adequate legal protection and effective legal remedies are required. This ensures more leeway for national law in terms of implementing the provisions solely through provisions in the framework of criminal law, for example.

An agreed statement to Article 12 of the WCT, which is applicable *mutatis mutandis* to Article 19 of the WPPT and Article 16 of the BTAP, makes the following clarification:

It is understood that the reference to ‘infringement of any right covered by this Treaty or the Berne Convention’ includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

The first paragraph of the agreed statement has to do with the fact that using the word ‘infringement’ in the text of the Treaty could lead to the understanding that only exclusive rights were targeted and not mere rights of remuneration, and that was not the intention. The second paragraph clarifies what already follows from Article 1(1) of the WCT, read in connection with Article 20 of the Berne Convention, and Article 1(1) of the WPPT and the BTAP, read in connection with Article 22 of the Rome Convention, namely that there was no intention to establish a lower level of protection than what follows from those Conventions. Accordingly, the protection against removal or alteration of rights management information cannot be used as a backdoor for introducing formal conditions for obtaining or exercising the rights that would not be permitted under those international instruments. The further reference to prohibiting the free movement of goods or impeding the enjoyment of rights under the Treaties must be read in the specific context. Such an agreed statement is not a provision of the Treaty and it does not in itself outlaw such prohibition or obstruction. For that purpose specific international instruments are readily available. The agreed statement only clarifies, by using the words ‘will not rely on’, that countries that may

wish to introduce such prohibition or impediment cannot justify them by reference to Article 12 of the WCT, Article 19 of the WPPT or Article 16 of the BTAP.

The **ACTA Agreement** contains provisions on rights management information in Article 27(7), which essentially repeat the corresponding provisions of the WCT and WPPT. Technically however, the definition of 'rights management information' has been moved from the wording of the Article to a footnote. Furthermore the provision in Article 27(8) of the ACTA Agreement, dealing, *inter alia*, with the relationship between the protection against circumvention of technological protection measures and exceptions and limitations to the rights, is also made applicable to the protection of rights management information in paragraph (7).

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 872–8 and 964–92; and *Goldstein and Hugenholtz 2013* 345–8. Regarding the WCT and the WPPT, see *Ficsor 2002* 359–406, 544–66 and 644ff; *Reinbothe and von Lewinski 2002* 135–60 and 409–32; and *Ginsburg (2005)* 29 *Colum J L & Arts* 11–21. Regarding the ACTA Agreement, see *Blakeney 2012* 296–308. The agreed statement to Article 15 of the BTAP is commented by *Ficsor 2012* 14ff.

21. Enforcement

Before the adoption of the TRIPS Agreement, there was no tradition for doing much internationally about the enforcement of the copyright and related rights granted under the various instruments. That was left to national law. It was only through the adoption of the TRIPS Agreement in 1994 that detailed explicit international rules in that respect were introduced.

Article 36(1) of the **Berne Convention** did point out, though, that '[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention'. A similar provision was included in Article 26(1) of the **Rome Convention**. These provisions may be read as implying an obligation to ensure the application of the protection under the Conventions through appropriate remedies against those who infringe the rights as granted under national law, but the preparatory works of the Conventions do not seem to contain statements confirming such a possible intention. It seems rather likely that the provisions are intended to clarify that the obligation to implement the provisions of the Conventions applies not solely to adhering countries by virtue of Article 36(2) of the Berne Convention and Article 26(2) of the Rome Convention, but also to countries that have already joined the treaties.¹ Similar obligations for adhering states in Article 9(4) of the **Phonograms Convention** and Article 9(4) of the **Satellites Convention** are related to the domestic law in general of those countries, rather than their constitutions, and in Article 14(1) of the **WCT**, Article 23(1) of the **WPPT** and Article 20(1) of the **BTAP** it was decided to refer to the 'legal systems' of the contracting parties. Article 10 of the **Marrakesh VIP Treaty** differs slightly by providing as follows:

1. Contracting Parties undertake to adopt the measures necessary to ensure the application of this Treaty.
2. Nothing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of this Treaty within their own legal system and practice [reference to agreed statement omitted].

¹ *Ricketson and Ginsburg 2006* 1148.

3. Contracting Parties may fulfill their rights and obligations under this Treaty through limitations or exceptions specifically for the benefit of beneficiary persons, other limitations or exceptions, or a combination thereof, within their national legal system and practice. These may include judicial, administrative or regulatory determinations for the benefit of beneficiary persons as to fair practices, dealings or uses to meet their needs consistent with the Contracting Parties' rights and obligations under the Berne Convention, other international treaties, and Article 11.

These provisions must be read in the context that they form part of a Treaty that does not grant any rights, but only mandatory and optional limitations and exceptions. An agreed statement linked to paragraph (2) deals with the applicability of those limitations and exceptions on related rights in certain cases, and is discussed in Chapter 18 (3).

Detailed provisions regarding obligations to provide remedies against infringement of the granted minimum rights under national law have only been included in the TRIPS and ACTA Agreements. In general it may probably be assumed that in line with the principle that lawfully made agreements are binding and must be faithfully fulfilled, *pacta sunt servanda*, certain obligations must apply to countries that adhere to international treaties on copyright and related rights to ensure that the rights are given existence in real life and that the owners of rights are granted the necessary remedies, and so on. Several provisions in the Berne Convention also presuppose that such remedies exist under national law, such as Article 5(2) which points at the national law of the country where protection is claimed as regards 'the means of redress afforded to the author to protect his rights'; Article 6*bis*(3) on the means of redress for safeguarding the moral rights; and Article 15(1) on the entitlement to institute infringement proceedings. Furthermore Article 16 requires that '[i]nfringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection' and this provision 'shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected'.

The **TRIPS Agreement**, however, added a completely new element to international copyright and related rights (and other intellectual property rights as well) through a detailed Part III of the Agreement containing minimum substantive requirements for national law regarding effective enforcement of the protection. The Part is entitled 'Enforcement of intellectual property rights'. In the following only the main features of this comprehensive complex of rules are outlined. In particular the many general provisions regarding the organization, procedure and working of the legal system which are contained in the Part are not discussed.

The provisions are structured around an introductory Section 1, outlining the general obligations (Article 41), followed by separate sections dealing with civil and administrative procedures and remedies (Articles 42–49), provisional measures (Article 50), special requirements related to border measures (Articles 51–60) and criminal procedures (Article 61).

In the *general provisions* Article 41 states that enforcement procedures must be available under the law of member states so as to permit effective action against any act of infringement of intellectual property rights covered by the Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. In particular it is clarified that the Agreement does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general or to allocate special resources to this area, nor does it affect the capacity of member states to enforce their law in general.

As regards the rather detailed provisions on *civil and administrative procedures and remedies* it should be noted that Article 42 in general states that right holders (which also includes such federations and associations having legal standing to assert such rights) shall have available civil judicial procedures concerning the enforcement of any intellectual property right covered by the Agreement. The protection, however, is balanced by a number of general procedural requirements, aimed at securing the legitimate interests of both right owners and alleged infringers.

Of particular practical importance is Article 44 which provides that the judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Article 45 further states that the judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of his or her rights, provided that the infringement has been committed knowingly or with reasonable grounds to know. Those authorities shall also have the authority to order payment of the expenses of the right holder, inclusive of appropriate attorney's fees. As an option, recovery of profits and/or payments of pre-established damages may be provided for in national law, even where the infringer did not knowingly, or with reasonable grounds to know, engage in the infringing activity.

Article 46 deals with infringing copies which without compensation of any sort may be disposed of by the judicial authorities outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements, taking duly into account the need for proportionality between the seriousness of the infringement and the remedies ordered, as well as the interests of third parties.

Article 47 states as a possibility, but not binding for member states, that the judicial authorities under the circumstances may order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

On the contrary, it is binding under Article 48 that the judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse, in addition to payment of expenses to the defendant, which may include appropriate attorney's fees. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, member states may only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of the law. Finally Article 49 clarifies that also where any civil remedy may be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in Articles 42 to 48.

Article 50 regarding *provisional measures* states that the judicial authorities shall have the authority to order prompt and effective measures, partly to prevent an infringement, including dissemination of infringing goods, partly to preserve relevant evidence. Where appropriate the authorities may adopt such measures *inaudita altera parte*, that is, without informing the alleged infringer in advance, in particular when any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed. They must also be granted authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree

of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent. They shall also be authorized to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse. Where provisional measures have been applied *inaudita altera parte*, the parties affected shall be given notice without delay, and a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed. The judicial authority must, if national legislation so permits, determine a reasonable period within which proceedings leading to a decision on the merits of the case must be initiated, and absent such determination the period must not exceed 20 working days or 31 calendar days, whichever is longer. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures. Also here the principles laid out in those rules shall apply in cases where provisional measures are ordered as a result of administrative procedures which may be applied in some countries.

The rules on *special requirements related to border measures* likewise contain a vast richness of detail and in the following only the main features are mentioned. In general, Article 51 states that member states shall adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with the competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Further it is instituted that member states subject to the same requirements may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights. The further detailed rules deal with elements such as evidentiary requirements and identification of the goods in question (Article 52); security or equivalent assurance (Article 53); obligations to notify importers and applicants of suspensions made (Article 54); duration of suspensions, including the significance of proceedings leading a decision on the merits of the case (Article 55); indemnification of the importer and owner of wrongfully detained goods (Article 56); access for the right holder to inspect the detained goods in order to substantiate their claims and to

obtain information on the name and address of the consignor and importer, and so on (Article 57); and the rights and obligations of competent authorities in those cases where national legislation enables them to suspend the release of goods on their own initiative (Article 58). According to Article 59, competent authorities shall have the authority to order the destruction or disposal of infringing goods outside the channels of commerce in such a manner as to avoid any harm caused to the right holder. Finally Article 60 permits that member states exclude from the application of the rules on border controls small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

According to Article 61 member states shall provide for *criminal procedures and penalties* for at least willful trademark counterfeiting or copyright piracy on a commercial scale. In this respect it is relevant that the Agreement in a footnote to Article 51 defines 'pirated copyright goods' as:

any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

The remedies under Article 61 shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Further the provision also permits other infringements of intellectual property rights to be made subject to criminal procedures and remedies, in particular when they are committed wilfully and on a commercial scale.

The **WCT**, the **WPPT** and the **BTAP** also contain provisions on enforcement, and a lively discussion took place during the preparation of the first two of these Treaties as to whether they should repeat verbatim the detailed provisions of the TRIPS Agreement, or whether they should merely refer to them and make them applicable *mutatis mutandis*. Both solutions met opposition for various reasons and the resulting compromise was the provisions in Articles 14(2) and 23(2) of the WCT and the WPPT, respectively, which essentially repeat the first sentence of Article 41(1) of the TRIPS Agreement. In principle this might be understood as

a more general rule which perhaps even with the passing of time and future developments could be interpreted as implying requirements going beyond the existing provisions on enforcement in the TRIPS Agreement. Such interpretation, however, cannot be supported. It was quite clear during the negotiations, and was frequently reflected in the treaties and the agreed statements, that the issues on which agreement had been reached during the preparation of TRIPS were neither to be renegotiated nor to be supplemented with other obligations. The provisions should therefore be read as a mere reference to the norms under the TRIPS Agreement. An identical provision was included in Article 20(2) of the BTAP.

The provisions on enforcement of the **ACTA Agreement** will not be discussed in detail here either, but it should be noted that in a number of respects they are more detailed and of wider range than those of the TRIPS Agreement. Article 6 of the ACTA Agreement contains a general provision, a kind of policy declaration which in many respects resembles Article 41 of the TRIPS Agreement, but with the addition of a general provision in paragraph (3) according to which the parties in implementing the enforcement provisions shall take into account the need for proportionality between the seriousness of the infringement, the interests of third parties and the applicable measures, remedies and penalties. Paragraph (2) also includes a general clause about fair and equitable *procedures*, which are not unnecessarily complicated or costly or entailing unreasonable time-limits or unwarranted delays, and appropriate protection of the rights of all participants subject to such procedures.

In the following articles the Agreement contains provisions regarding *availability of civil procedures* (Article 7), *injunctions* (Article 8), *damages* (Article 9) and *other remedies* such as destruction of infringing goods, and certain materials and implements (Article 10).

The provision in Article 11 on the possibility of judicial authorities to order infringers or alleged infringers to *provide information* in his or her possession or under his or her control has been elaborated somewhat compared to the corresponding provision in Article 47 of the TRIPS Agreement, and its implementation in national legislation has been made obligatory. It is supplemented by a broader clause in Article 4 on *privacy and disclosure of information* according to which nothing in the ACTA Agreement shall require a Party to disclose:

- (a) information, the disclosure of which would be contrary to its law, including laws protecting privacy rights, or international agreements to which it is party;

- (b) confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest; or
- (c) confidential information, the disclosure of which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Where such information is provided from one contracting party to another, the receiving party must also respect the confidentiality (Article 4(2)).

Article 12 of the ACTA Agreement obliges contracting parties to enable judicial authorities to order prompt and effective *provisional measures*, essentially in the same way as Article 50 of the TRIPS Agreement, but with a clarification that such measures may also be imposed on third parties over whom the relevant judicial authority exercises jurisdiction, not solely the infringing party.

The Agreement also contains elaborate provisions regarding *border measures* in Articles 13–22, the application of which is not limited to counterfeit trademark goods and pirated copyright goods, as is the case for the TRIPS Agreement, but still not applicable to patents or the protection of undisclosed information, as indicated in footnote 6 to the Agreement. Furthermore, and contrary to Article 60 of the TRIPS Agreement, according to Article 14(1) of the ACTA Agreement, the provisions of that Agreement are mandatory as regards small consignments of a commercial nature. Small quantities of a non-commercial nature in travellers' personal luggage may be excluded from the provisions (Article 14(2)). There are also certain deviations regarding, *inter alia*, the demand for obligatory provisions regarding indemnification of the importer and owner of goods wrongfully detained in Article 56 of the TRIPS Agreement, which is not repeated in the ACTA Agreement. However, an obligatory demand for the right holder to provide a reasonable security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse still applies under Article 18. That Article also clarifies that a contracting party may, only in exceptional circumstances or pursuant to a judicial order, permit the defendant to obtain possession of suspect goods by posting a bond or other security.

As regards criminal remedies, Article 23 maintains the limitation of such responsibility to wilful trademark counterfeiting and copyright and related rights piracy on a commercial scale, but it adds that 'acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage'.

Paragraph (3) introduces a new offence, albeit facultative for the contracting parties, namely ‘the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public’. Furthermore and mandatory for the contracting parties, paragraph (4) states that with respect to the offences referred to in the Article for which a contracting party provides criminal procedures and penalties, that party shall ensure that criminal liability for aiding and abetting is available under its law. According to paragraph (5), which is obligatory, such measures must be adopted as may be necessary, consistent with the legal principles of the contracting states, to establish the liability, which may be criminal, of legal persons for the offences specified in the Article for which the country provides criminal procedures and penalties. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences. Under Article 26 the competent authorities of the contracting parties shall have the authority to act upon their own initiative to initiate investigations or legal action with respect to the criminal offense referred to in Article 23 of the Agreement for which that contracting party provides criminal procedures and penalties. Article 25 contains detailed provisions regarding seizure, forfeiture and destruction of infringing goods, materials and implements.

Section 5 of the ACTA Agreement consists of Article 27, which deals with enforcement in the digital domain. The provisions in paragraphs (5)–(8) dealing with technological protection measures and rights management information are discussed in Chapter 20. In addition, Article 27(1) states in general that enforcement procedures, to the extent set forth in the Agreement, shall be available so as to permit effective action against an act of infringement of intellectual property rights which takes place in the digital environment, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements. Each contracting party’s enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy (paragraph (2)). A footnote linked to these provisions provides as an example, ‘without prejudice to a Party’s law, adopting or maintaining a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holder’.

The contracting parties are encouraged to promote co-operative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process and privacy (paragraph (3)). According to the facultative paragraph (4), a Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights. That provision seems to be worded in an open manner enabling that both judicial and administrative claims may qualify. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.

Chapter III of the ACTA Agreement contains a number of provisions regarding exchange of information among the contracting states, both specifically about retention at borders, and so on, and more generally concerning national legislation and practice. In addition, the parties to the Agreement are obliged to, as appropriate, promote the adoption of measures to enhance public awareness of the importance of respecting intellectual property rights and the detrimental effects of intellectual property rights infringement (Article 31). This is further elaborated in Chapter IV on international co-operation, which in a programmatic form deals with increased international co-operation, exchange of information and training and capacity building and technical assistance concerning enforcement in the area.

SUGGESTIONS FOR FURTHER STUDY

See *Goldstein and Hugenholtz 2013* 409–21; *Gervais 2012* 558–645; and *Correa 2007* 409–66; *Ficsor 2002* 579–84 and 647ff; and *Reinbothe and von Lewinski 2002* 168–75 and 446–50. Regarding the ACTA Agreement, see *Blakeney 2012*.

22. Settlement of disputes

Before the adoption of the TRIPS Agreement, the general rule for all the conventions discussed here was that a possible responsibility towards other contracting parties to the various conventions could be made under the general rules of public international law only, that is, first and foremost through diplomatic channels. Article 33 of the **Berne Convention**, however, in this respect refers such possible disputes to the International Court of Justice, but at the same time allows member states to declare when signing the Act or depositing their instrument of ratification or accession that they do not consider themselves bound by that provision.

A similar recognition of the jurisdiction of the International Court of Justice is contained in Article 30 of the **Rome Convention**, however, with no possibility of making a reservation. In practice, no cases concerning copyright or related rights seem to have been submitted to the Court.

There are no similar provisions in the **Phonograms and Satellites Conventions** or in the **WCT, WPPT, BTAP or Marrakesh VIP Treaty**.

Contrary to this, Article 63 of the **TRIPS Agreement** provides for notification, publication and review of national implementing legislation in the Council for TRIPS. Article 64 further makes the provisions on settlement of disputes from the 1994 WTO Agreement, as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 of the WTO Agreement applicable to consultations and the settlement of disputes under the TRIPS Agreement except as otherwise specifically provided therein. These detailed and elaborated rules establish a framework and procedures under which disputes among WTO member states can be submitted to binding decisions by international panels and, if necessary, the implementation of such decisions can be enforced by means of trade sanctions. The details of this comprehensive set of rules will not be discussed further here.

The **ACTA Agreement** does not contain any similar set of rules, but it does establish in Article 38 a system of formal, but confidential consultations with respect to any matter affecting the implementation of this Agreement. Such consultations and positions taken by contracting parties

in the course thereof shall be without prejudice to the rights or positions of either Party in any other proceeding, including a proceeding under the auspices of the dispute resolution understanding of the WTO Agreement. It is up to the consulting parties whether they wish to notify the other parties to the Agreement about the outcome of their consultations.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 1152–7; *Goldstein and Hugenholtz 2013* 76ff; *Gervais 2012* 653–77; *Correa 2007* 472–90; and *Blakeney 2012* 357ff.

23. Application in time

The **Berne Convention** contains in its Article 18 transitory provisions which apply both when a country of the Union joins the Paris Act and when a non-Union country first joins the Convention. It also applies to prolongations of the term of protection and to the situation where countries of the Union abandon earlier reservations (paragraph (4)).

Here it is important to clarify that the Convention is fully in accordance with the well-established general principle that an act, which was legal at the time when it was committed, may not be made illegal by means of subsequent legislation. Article 18 presupposes the existence and validity of this *ex post facto* principle, however, without explicitly stating it. It has later been included in Article 19(3) of the BTAP which has the following wording: ‘The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party’. This provision expresses only what has always been considered to be the case and should not in any way be seen as signalling a new rule, which would not be applicable to the Berne Convention or other international instruments in the field.

Accordingly Article 18 of the Berne Convention by no means establishes a ‘retroactive’ protection, even if that word from time to time is used when it is discussed. What Article 18 establishes is rather what one might term a ‘retrospective’ protection, that is, that the protection at the time of the entry into force of the Convention or act covers future acts regarding not only future works, but also regarding works already in existence at that time.

Exceptions from this only apply as regards works that at the time of the entry into force have fallen into the public domain in their country of origin through the expiry of the term of protection (Article 18(1)). Furthermore the protection of the works that through the expiry of the term of protection, which was previously granted, have fallen into the public domain in the country of protection is not revived when that country becomes bound by the Convention (paragraph (2)). For such works, no retrospective protection is required. For works that have fallen into the public domain for other reasons, or which were never protected

at all, for example because their country of origin was not a member of the Union, the exceptions do not apply. They must enjoy full protection under the Convention. A practically important example of works that have fallen into the public domain for other reasons than expiry of the term of protection is works originating in countries where the compliance with formalities is a condition for obtaining protection. Even if, for example, a work first published in the USA is not protected in that country of origin due to lack of or faulty compliance with the local formality requirements, it must be protected in the other countries of the Union.

A related question of some practical importance relates to the renewal of copyright which was earlier required under the national legislation of the USA. The protection was granted for a term of 28 years, and through compliance with certain formalities within various time limits, it could be prolonged for a further term of 28 years. The question here is whether the termination of protection after the first term should be considered expiry of the term of protection or lack of compliance with formalities, because if the formalities had been complied with, protection would have continued. Here, there is reason to assume that the main importance should be attached to the lack of compliance with formalities, because this most closely corresponds to the general structure of the Convention. The Convention does not prohibit formalities as such, Article 5(2) only prevents them from being applied to works from other countries of the Union. On the contrary, in Article 7(8) on comparison of terms the Convention explicitly permits an 'extraterritorial' effect of a shorter term of protection. In the same way, the provisions of Article 18 imply that the term of protection, but not compliance with formalities is given effect for the protection outside the country of origin. The better view must therefore be to consider the term of protection in the country of origin, in this case the USA, two times 28 years, that is 56 years, and to see the demand for renewal as a formality without significance for the protection outside the country of origin.

There is reason to point out that the demand for retrospective protection has not been complied with flawlessly in all cases. Notably the USA did not grant such protection when the country joined the Berne Convention in 1989, which was strongly criticized. Subsequently such protection was granted through the Uruguay Round Agreements Act (URAA).¹ Other countries as well have made reservations regarding retrospective protection, notably Moldova,² the Russian Federation,³

¹ Pub L No 103-465, 103d Cong, 2d Sess, 108 Stat 4809.

² Berne Notification No 170 of 2 August 1995.

Ukraine⁴ and Uzbekistan,⁵ which have all declared that they will not grant retrospective protection for works that have fallen into the public domain in their territory, without clarifying whether this must have happened through the expiry of the term of protection. These reservations are not warranted by the Convention, and arguably they should have been rejected by the International Bureau of WIPO.

This uncertainty regarding the application of Article 18 probably derives from paragraph (3) of that Article which provides that:

[t]he application of this principle [on retrospective protection] shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

This provision seems to have been interpreted as a general permission for national legislation to decide the extent to which the provision shall be applied in each country. Such interpretation, however, does not conform with how the principle came about. The principle is mandatory and must be applied in all countries of the Union, but national legislation may decide on suitable transitory provisions, notably securing certain private interests.⁶ In particular it will often be appropriate to allow for a limited span of time continued distribution of copies that were produced lawfully without the permission of the rights owner while the earlier law was in force, but which subsequently have been covered by the protection under the Convention. Also as regards derivative works, such as audiovisual works, based on novels, or translations, which have been made in good faith while a work was unprotected, there may be good reasons to permit continued use, at least for a period of time, even if the underlying work since then has become protected.

The protection under the **WCT** that incorporates by reference the protection under the Berne Convention also includes the retrospective application thereof, because the reference in Article 1(4) of the WCT includes Article 18 of the Berne Convention. As regards the additional rights granted under the WCT, Article 13 implements the same substantive rules by also in this respect making Article 18 of the Berne Convention applicable.

³ Berne Notification No 162 of 13 December 1994.

⁴ Berne Notification No 169 of 25 July 1995.

⁵ Berne Notification No 244 of 19 January 2005, withdrawn by Berne Notification No 261 of 8 January 2014.

⁶ *Ficsor* 2004 99.

Contrary to those relatively generous provisions under the Berne Convention, Article 20(2) of the **Rome Convention** states that '[n]o Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State'. The first paragraph of that Article further clarifies that '[t]his Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of this Convention for that State'. Accordingly it is up to national legislation in the country of protection to decide how existing rights, or the absence thereof, are to be dealt with after the entry into force of the Convention for it, and the Convention is not applicable to objects of protection that have come about before its entry into force for the country in question.

Comparable provisions refusing retrospective protection are repeated in Article 7(3) of the **Phonograms Convention** and Article 9 of the **Satellites Convention**. This tradition, however, was discontinued in Article 14(6) of the **TRIPS Agreement** where the second sentence states that 'the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms'. Through this wording the provision explicitly exempts any possible rights of performing artists with regard to audiovisual fixations, and neither does it cover the protection of broadcasting organizations. Otherwise, the general rule of the Agreement is not based on retrospective protection, as indicated in Article 70(2), which, however, contains explicit exemptions for the application of Article 18 of the Berne Convention in relation to literary and artistic works, producers of phonograms and performers in existing phonograms.

As regards performing artists and producers of phonograms, the same provision as in the TRIPS Agreement has been repeated in **WPPT** Article 22(1). Paragraph (2), however, permits national legislation to exempt from the application of this rule the protection of the moral rights of performing artists under WPPT Article 5 in such a way that those rights only apply to performances taking place after the country in question has joined the Treaty. Since those references concern Article 18 of the Berne Convention in its entirety, they imply that national legislation may contain transitory provisions in connection with the entry into force of the Treaties for each country, similar to those that are permitted for literary and artistic works.

Article 19 of the **BTAP** does not quite follow the same pattern and contains no reference to Article 18 of the Berne Convention. As regards the general rule in paragraph (1), though, there is no difference; as a starting point also audiovisual performances should enjoy retrospective

protection. That the protection is not retroactive, as was also pointed out in the beginning of the present chapter, is explicitly pinpointed in paragraph (3). The Treaty, however, strongly modifies the principle of retrospective protection by permitting in paragraph (2) contracting parties by notification to the Director General of WIPO to make reservations regarding retrospective protection of existing audiovisual recordings of performances. Such reservation may apply to all or some of the economic rights in this respect, granted in Articles 7 to 11 of the Treaty. Countries making such reservations may be faced with material reciprocity in other contracting parties as regards such retrospective protection, as permitted in Article 19(2) second sentence, even though for some reason it has not been included in the references in Article 4(3) of the BTAP dealing with the reservations under Article 11.

As regards transitory provisions, Article 19(4) of the BTAP contains rules corresponding to Article 18(3) of the Berne Convention, but probably less prone to cause misunderstandings:

Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of the rights provided for in Articles 5 and 7 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

As compared to the general understanding of the corresponding provisions of the Berne Convention that transitory provisions should be of a limited duration it does not seem possible to defend a similar view as regards the BTAP. By explicitly permitting continued exploitation without indicating any time limits, the provision leaves less room for interpretation than the permission to determine the conditions of application of the principle of retrospective provision, as granted in the Berne Convention.

The **ACTA Agreement** contains no provisions regarding its application to works, and so on that have come about before the Agreement enters into force for each country. Enforcement provisions, however, typically apply in the same way to all beneficiaries of protection, and accordingly there is reason to assume that the Agreement likewise is retrospectively applicable.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 332–45; *Goldstein and Hugenholtz 2013* 301ff; *Gervais 2012* 309 and 713ff; *Correa 2007* 167ff and 508–10; *Ficsor 2002* 567–79 and 646ff; and *Reinbothe and von Lewinski 2002* 161–7 and 439–45. Regarding Article 18 of the Berne Convention, see also *Gervais (2011)* 64 VNLRENB 147–63.

24. Administrative provisions

The administrative provisions of the various conventions, treaties and agreements will not all be discussed in full detail as they are of particular interest only to a few government officials, diplomats and employees of the international organizations, but a few main features should, however, be pointed out.

The **Berne Convention** entered into force on 5 December 1887, and the latest act, the 1971 Paris Act, entered into force as far as the substantive provisions are concerned on 10 October 1974.

Since then, on 28 September 1979, a minor adjustment of the administrative provisions took place, moving from triennial to biannual programs and budgets. On 1 October 2003, the WIPO Conference and the Berne Convention Assembly adopted various amendments of the administrative provisions of, *inter alia*, the Berne Convention, notably dealing with: (i) the abolition of the WIPO Conference; (ii) the formalization in the treaties of the unitary contribution system and certain changes in contribution classes that had been practiced since 1994; and (iii) a change in the periodicity of the ordinary sessions of the Berne Union Assembly from once every two years to once every year. These amendments will enter into force when accepted by the required number of the States Members of the Assembly.

Apart from certain amendments of the administrative provisions which are governed by specific rules in Article 26, Article 27 provides that any revision of the Paris Act, including its Appendix, requires the unanimity of the votes cast. This rule must be seen in the context of the rule in Article 20, according to which the countries of the Union may enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to the Convention. Together these two provisions mean that it is difficult to imagine any substantive revision of the Convention within the foreseeable future, because the political climate in the area does not seem to indicate that it would be possible to reach any broad consensus about either a general revision or specific adjustments.

The main rule regarding the interaction of the various acts of the Convention, which have been in force over the years, is that new acts replace the former which thereafter only apply among those members of the Union that have not yet joined the new act (Article 32). The Paris Act, however, permitted that ratifications or accessions did not have to apply to Articles 1–21 and the Appendix (Article 28(1)(b)). That way it was made possible that the administrative provisions could enter into force quickly, which was a necessity for the planned transformation of BIRPI into WIPO to take place, as discussed below. New members of the Union can join only the Paris Act and not earlier acts.

There are no specific limitations in the Convention as to which countries may join the Union. Article 29(1) allows for any ‘country’ outside the Union to join, and the decision when a territory may be considered a ‘country’ is not regulated. However, in view of the fact that the Convention is administered by WIPO which is a specialized agency within the United Nations system of organizations, there is every reason to assume that the organization will follow the practice adopted by the General Assembly of the United Nations, as it has done in the past. In principle, however, decisions are made by the Assembly of the Union. As regards the various national territories, each Union member country makes the necessary decisions which eventually may be reconsidered and changed, and which otherwise are without prejudice for the recognition or tacit acceptance of the factual situation concerning such territory by the other countries of the Union (Article 31).

The countries that have joined the Berne Convention together form the Berne Union, but legally this probably does not imply much other or more than that which applies to other treaties with one or more different assemblies, secretariat, and so on, such as the Rome Convention. Possibly it may imply that countries party to different acts are obliged to protect each other’s works, even in cases where this is not explicitly stated in the text of the Convention,¹ but otherwise the significance is rather political and symbolic. The Union is directed by an Assembly (Article 22) with an Executive Committee (Article 23) and the daily execution of tasks linked to the Convention and the secretarial tasks supporting the governing bodies are undertaken by the International Bureau of WIPO, which is managed by a Director General in accordance with the WIPO Convention.

In practice a number of the administrative provisions are deviated from as a consequence of the large number of conventions, and so on,

¹ *Geller* (1988–1989) 13 Colum-VLA J L & Arts 435, 440ff.

administered by the organization, and normally the Assembly meets every year in September–October as part of the annual meetings of assemblies of member states. Also the rules concerning the finances of the Union and the contributions of member states have to an important extent been replaced by later decisions by the member states within the framework of WIPO, including ‘the unitary contribution system’ under which member states pay their contributions as a single amount to WIPO, independently of how many WIPO administered treaties they have joined.

The **Rome Convention** entered into force on 18 May 1964, and has never been revised. It is jointly administered by UNESCO, ILO and WIPO. The involvement of UNESCO is not least a consequence of the major practical significance the UCC had as a supplement to the Berne Convention at the time when the Rome Convention was adopted. As the UCC was administered by UNESCO, it was only natural that that organization was given a role corresponding to that of WIPO. The ILO came into the picture because the organization for many years had dealt with the position of performing artists on the border between employees, freelancers and independent contractors. Performing artists are also, today, frequently without social security and protection under labour law, which are enjoyed by employees in other trades. The organization had worked in a determined way to secure a suitable protection for performers, and together with UNESCO and WIPO it participated in the preparation of the Convention. It has probably not always been to the advantage of the Convention to have its secretarial functions and the responsibilities belonging to those functions spread over three different international organizations having each their own secretariat and administrative practice. The costs connected with the administration of the Convention are paid by the respective organizations, and the Convention does not have a budget of its own.

The Rome Convention has a governing body, the Intergovernmental Committee, which for many years met every two years. Those meetings are now suspended and the Committee is convened only when this is requested by a member state or at the initiative of the Director Generals of UNESCO, ILO or WIPO if important developments in the area take place, such as the adoption of new treaties. A revision of the Rome Convention may take place with a qualified majority and in accordance with a specific procedure laid out in Article 29.

When the Rome Convention was negotiated, an important goal was to avoid any harm or other prejudice to the protection of literary and artistic works. For this reason, among others, it became a ‘closed’ convention in the sense that it could only be joined by countries that apart from being

members of the United Nations were also members of the Berne Union or had joined the UCC (Article 24).

Neither the **Phonograms Convention**, which entered into force on 18 April 1973, nor the **Satellites Convention**, which entered into force on 2 August 1979, has a governing body or a budget of its own. They are co-administered by UNESCO, ILO and WIPO, however, in such a way that the main responsibility is with WIPO, and, as regards the Satellites Convention, ILO takes a secondary position, together with the International Telecommunications Union (ITU). None of those Conventions contain provisions regarding their possible revision.

The **WCT** and the **WPPT** entered into force on 6 March and 20 May 2002, respectively, after each being adhered to by the required 30 states, and the **BTAP** was adopted on 24 June 2012, but has not yet entered into force. Also for this Treaty, 30 ratifications or accessions are required. The administrative provisions of those Treaties, and those of the **Marrakesh VIP Treaty** as well (adopted on 27 June 2013 and not yet in force; 20 ratifications or accessions are required) reflect the developments in international practice that have taken place during the intervening years. This is, *inter alia*, shown in the rules concerning which countries, and so on may join the Treaties. The Conventions discussed above only allow states to adhere, and as a starting point the WCT, the WPPT the BTAP and the Marrakesh VIP Treaty can be joined by states who are members of WIPO.

However these Treaties may also be joined by intergovernmental organizations, provided that such organization declares that it is competent in respect of, and has its own legislation binding on all its Member States on matters covered by the Treaties and that it has been duly authorized, in accordance with its internal procedures, to become party to the Treaties (Articles 17, 26, 23 and 15, respectively). So far only the European Union has made such declarations and become party to the WCT and the WPPT. As regards the influence on the Treaties, the intergovernmental organizations replace their member states when exercising their right to vote in the Assemblies of the Treaties, Articles 15(3)(b), 24(3)(b), 21(3)(b) and 13(3)(b), respectively.

Otherwise there are no requirements that WIPO member states must be party to other conventions or treaties in order to join those Treaties. In principle this may entail that a country obliges itself to protect related rights without at the same time being obliged to protect copyright proper, or to institute limitations to rights that it is not obliged to grant, but this would be an anomaly which hardly will occur to any significant extent in practice. All treaties are administered by WIPO and each have their own Assembly, but they do not have separate budgets. The Assemblies of the

Treaties are mandated, *inter alia*, to decide on the convocation of any diplomatic conference for their revision and to give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

In general, no *reservations* are permitted for states ratifying or adhering to the various instruments discussed in this book, other than such specific reservations which are explicitly provided for, typically as regards certain contested rights, such as the right of equitable remuneration under Article 12 of the Rome Convention and Article 15 of the WPPT, the recourse to the ICJ for dispute settlement under the Berne Convention and a number of provisions under the BTAP, notably the rights of broadcasting and communication to the public, retrospective protection, and so on. A possible exception in this respect is the **Marrakesh VIP Treaty** which contains no provision in this respect, which depending on the circumstances might imply certain possibilities of making reservations not specifically provided for in the Treaty, as regulated in Articles 19 to 21 of the Vienna Convention.² Another, and possibly better view, may be that a general provision ruling out reservations would be superfluous in view of Article 16 of the Treaty according to which, '[s]ubject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty'. That wording seems to have the same effect of ruling out reservations as, for example, Article 22 of the WCT. If this view is correct, it would be a precious example of reduced redundancy in this instrument.

WIPO in itself is a continuation of the former Bureaus for the Paris Convention for the Protection of Industrial Property and the Berne Convention. These Bureaus were operated by the Swiss Government in order to undertake the secretarial functions of the Conventions, and eventually they were joined into the BIRPI, the *Bureaux internationaux réunis pour la protection de la propriété intellectuelle* which was located in Berne, the capital of Switzerland. At the Stockholm conference in 1967, the WIPO Convention was adopted which aimed at relinquishing the organization from the Swiss Government and turn it into an inter-governmental organization under the auspices of the United Nations, which happened at the entry into force of that Convention on 26 April 1974, at which time the organization had moved to Geneva where most other UN organizations in Switzerland are also located.

² *Ficsor* 2013 61ff.

Like other 'specialized agencies' of the United Nations, WIPO has its own members and its own governing bodies, but the organization is part of the United Nations 'common system' which in particular regulates the working conditions, salaries and pensions for the employees of the Secretariat. Furthermore general and cross-cutting decisions made by the United Nations General Assembly are normally as a matter of routine made applicable to WIPO by the WIPO General Assembly and Co-ordination Committee.

Over the years an increasing number of treaties have been adopted under the auspices of WIPO which also administers those treaties. Of the treaties discussed in this book, only two are fully outside the realm of WIPO, the TRIPS Agreement which is administered by the World Trade Organization (WTO) and the ACTA Agreement which apparently is supposed to have an administration of its own, which, if the Agreement eventually enters into force, might possibly be placed with an existing organization such as the WTO.

Apart from the Headquarters of WIPO in Geneva, Switzerland, the organization further has a liaison office in connection with the UN Headquarters in New York and smaller offices in Rio de Janeiro, Singapore and Tokyo. Further local offices are under consideration.

Among the important tasks undertaken by WIPO is to receive and notify member states about accessions and other notifications regarding the various international instruments, administered by the organization. The organization also makes such information available concerning other treaties relevant to intellectual property where this part of the administration is placed wholly or partially with other organizations. This is notably the case regarding the Rome Convention, the Phonograms Convention and the Satellites Convention, which are jointly administered by ILO, UNESCO and WIPO, for which reason the administration of accessions and so on, is placed with the Secretary General of the UN. Information about the present status for all the various international instruments in the field can be found at the WIPO Internet site (www.wipo.int). Several of the instruments administered by WIPO further require that contracting parties communicate their national legislation to WIPO, and where such texts are available in one or more of the official languages of the organization (Arabic, Chinese, English, French, Russian or Spanish) they are also made available on the Organization's internet site.

Things are somewhat different as regards the **TRIPS Agreement** because this Agreement was made in another context. It came about as part of the so-called 'Uruguay Round' of trade negotiations under the General Agreement on Tariffs and Trade, GATT, which was launched in September 1986. The round of negotiations was concluded by the signing

of a major complex of agreements in Marrakesh, Tunisia, in April 1994, through which the GATT was restructured into the World Trade Organization (WTO), an intergovernmental organization which is not a specialized agency of the UN system of organizations, but belongs to the 'Bretton Woods' group of organizations which also includes the International Monetary Fund (IMF) and the World Bank.

The Agreement is administered by the TRIPS Council, which monitors the application of the Agreement and the members' implementation of their obligations under it. This is done through reviews of national legislation and by giving member states opportunities to ask questions regarding how other member states specifically have implemented the provisions. For this purpose there is also an obligation to notify national legislation which in accordance with a co-operation agreement with WIPO is also made available for the latter Organization. The two Organizations also co-operate in organizing development assistance, including not least advice, training and human resource development regarding the various international instruments and their implementation in national law. The Agreement entered into force on 1 January 1995, albeit with grace periods for certain countries of which those for least-developed countries are still applicable.

The **ACTA Agreement** was adopted on 3 December 2010, and it will enter into force 30 days after it has been ratified by six countries. Only WTO member states may join the Agreement. It is administered by 'the ACTA Committee' which is established under the Agreement and which has a number of tasks specified in Article 36, including deciding the conditions for adherence to the Agreement for WTO member states. Apart from Article 45, which provides that the depositary of the Agreement, that is the administrator of notifications concerning ratification and adhesion, and so on, is the Government of Japan, the Agreement contains no further provisions regarding its administration and secretarial functions and about their possible execution by an existing international organization, such as the WTO. In view of the resistance the Agreement has been met with, not least in the European Union, it is not certain that it will enter into force at all.

SUGGESTIONS FOR FURTHER STUDY

See *Ricketson and Ginsburg 2006* 994–1166; *Ricketson* [1988] 7 EIPR 199–202, [1988] 8 EIPR 267–74 and [1989] 2 EIPR 58–65; *Gervais 2012* 700–07 and 722–8; *Correa 2007* 504ff and 517–19; *Ficsor 2002* 649–61; *Reinbothe and von Lewinski 2002* 176–231 and 451–61; and

Blakeney 2012 321–62. Regarding the practical application of the different acts of the Berne Convention, see *Geller* (1988–1989) 13 *Columbia J L & Arts* 435–76.

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