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Is there such a thing as International Copyright?

Arnór Sigmarsson

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Instructor: Timothy Murphy

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Lokakaverkefni til 90 eininga B.A. prófs í Hug- og félagsvísindadeild

Leiðbeinandi: Timothy Murphy

Ég lýsi því hér með yfir að ég er einn höfundur þessa verkefnis og að það er ágóði eigin rannsókna.

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Undirskrift

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A. prófs í Hug- og félagsvísindadeild.

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Undirskrift

Útdráttur

Í þessari ritgerð er leitast eftir því að svara spurningunni hvort það sé yfir höfuð til eitthvað sem kallast getur alþjóðlegur höfundaréttur. Því hefur verið haldið fram og er almennt talið í Bandaríkjunum að alþjóðlegur höfundarréttur sé ekki til og það sé bara undir hverju ríki fyrir sig komið að setja sínar eigin reglur um það hvernig og hvort þau vernda hugverk erlendra höfunda. Staðreyndin er reyndar sú að það eru til fjöldi alþjóðlegra sáttmála og samninga sem hafa þann tilgang að setja viðmiðunarreglur fyrir ríki til að verja verk erlendra höfunda. Verkfæri eins og Bernar – sáttmálinn, alþjóðasáttmálinn um höfundarrétt og fleiri miða að því að ríki sem gangast undir hann skuldbindi sig til þess að vernda verk erlendra höfunda til jafns við hvernig þau vernda verk þeirra eigin þegna. Einnig er ætlast til að ríki innleiði reglur sáttmálanna í þeirra eigin lög til þess að tryggja það betur að farið sé eftir þeim. Almennt er talið í heiminum að höfundar hafi þann siðferðislega rétt að hugverkum þeirra sé ekki breytt eða misnotuð á nokkurn veg sem þeir gefa ekki leyfi fyrir auk þess að aðrir hagnist þarf af leiðandi ekki á verkum þeirra þannig að það komi niður á efnahagslegum rétti höfundanna. Í lok ritgerðarinnar mun höfundur svo komast að niðurstöðu og taka afstöðu um það hvort það sé til eitthvað sem við getum kallað alþjóðlegan höfundarrétt.

Abstract

The subject of this dissertation is to try to find an answer to the question whether there is such a thing as international copyright. It has been claimed and is the general view of the United States that there is no such thing and that it is up to each country to set their own rules about how and if they intend to protect intellectual works of foreign authors. However it is a fact that there exist a number of conventions, treaties and agreements with the sole purpose to protect the intellectual works of authors around the world. Instrument such as the Berne Convention, the Universal Copyright Convention and more provide that states that decide to adhere to them are obligated to protect works of foreign authors to the same extent as they protect works of their own nationals. These conventions expect that the copyrights are given national treatment where the states incorporate the rules of the convention to their own national law and give at least the minimum protection that is provided for by the convention. There is a common view by the people of the world that authors have moral rights over their works so they cannot be changed or distorted in any way that the author does not allow, also that the authors have an economic right so others cannot profit on the work of the author at his expense. This dissertation will consider the evidence and come to a conclusion about whether international copyright exists or not.

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Introduction

On the internet homepage of the United States Copyright Office it says:

> "There is no such thing as an 'international copyright' that will automatically protect an author's writings throughout the world. Protection against unauthorized use in a particular country basically depends on the national laws of that country. However, most countries offer protection to foreign works under certain conditions that have been greatly simplified by international copyright treaties and conventions."[1]

The claim "there is no such thing as international copyright" is particularly interesting; the United States look at it as being up to each country to set their own national copyright law and to decide whether to extend that right to foreigners as well, and if so, to what extent. They look at it like it is entirely up to each country to set their own rules about copyright and no one else can tell them how to do it. However, the fact is that there are a number of international treaties, conventions and agreements on both copyright and neighboring rights that have the aim of securing that authors of works can have their works published in countries throughout the world and not be afraid that their work will be exploited in any way. It also seems that the position of the United States is rather unique and that most countries acknowledge that international copyright law exists in at least some form. European countries have, for example, for the most part all adhered to most of the conventions, treaties and agreements and seem to recognize that works of foreign authors should be protected in their own country and that they should not only protect their own nationals. The fact is that the United States has also eventually adhered to most of these as well and therefore they protect foreign works as well as the work of their citizens. They seem, however, not inclined to recognize it is an international right of authors to expect that their work will be protected against exploitation anywhere in the world.

This thesis will seek to come to some conclusion about whether or not there is such a thing as International Copyright; if there is some law that will protect the right of author in their work in every country. It will look at the conventions, treaties and agreements that exist under international law and what they do. Treaties are one of the most important sources of

[1] U.S. Copyright Office, "International Copyright". http://www.copyright.gov/fls/fl100.html

international law and when countries enter into such agreements they are normally agreeing to implement into their own law the provisions of the treaty or agreement in some way. Because there are so many instruments with the aim of protecting copyright internationally, such as the Berne Convention, the Universal Copyright Convention, the World Intellectual Property Organization Copyright Treaty (WIPO Copyright Treaty) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), to mention a few, it indicates that there is at least an underlying agreement and a common understanding between the countries of the world that it is the right of authors of works that their work will be protected all over the world, or at least have some minimal protection.

The first chapter of this dissertation will focus on giving a general overview of the history of copyright. How the copyright tradition began to appear, and where, will be examined; also what statutes emerged for the protection of rights of authors from the further development of the tradition until it established itself as some kind of natural right. The author's right will also be examined, whether he has the right over every aspect of his creation. Neighboring rights are in some way different from that of copyright because of the appearance of new creations of work when new technologies started to appear in the early twentieth century. They expand the scope of protection to performers, producers, broadcasts and more; with the introduction of neighboring rights these new industries where given authorship over their creations and protection of their rights. Neighboring rights are quite important feature of international copyright and nowadays that is becoming more and more important and therefore to find an answer to the question if there is such a thing as international copyright, neighboring rights have to be examined.

The second chapter will talk about the international conventions, treaties and agreements that are relevant to both copyright and neighboring rights and will offer an introduction to their development in general. This chapter is perhaps the most important chapter in the search for the answer whether there is such a thing as international copyright because it deals with the international instruments that exist. The Berne Convention is probably the oldest and most important of them all and will therefore have to be examined closer than the others, which are; the Universal Copyright Convention, WIPO copyright Treaty and the TRIPS Agreement. Since international copyright is based mostly upon these conventions, treaties and agreements this chapter will take up most of the dissertation.

The third chapter is the first of two short final chapters of the dissertation and will deal with the moral and economic rights that are attached to the copyright. What moral rights do authors have to their works as well as the moral rights they have as authors? What are the economic rights of the authors and what right do they have for economic reasons? These questions are important in the search for the answer to the question of whether international copyright exists because morality and economics are very important in any society and therefore have to be examined when dealing with protection of people's rights.

The fourth and final chapter will examine the national treatment of copyright that the international conventions require from their members; how it is supposed to ensure that foreign authors are guaranteed the same protection of their works that countries give their own nationals as is the aim of international copyright, if there is such a thing. However, with the evidence pointing to that international copyright exists indeed.

Chapter 1 History of copyright

1.1 Copyright Tradition

To find the answer to the question of whether international copyright exists we must first examine how the copyright tradition came to be. The copyright tradition can be traced all the way back to 1476 when William Caxton founded the first printing establishment in England. The English Crown wanted to bring this revolutionary new technology under its control and consequently took measures to do so. The English Crown had two motives; the first was political because they did not want cheap and easy copies to spread dissenting views. The second motive was economic; people favorable to the court and willing to pay the price were granted exclusive rights to publish particular books and by doing so the Crown was able to profit from a growing market for literary works. The Crown continued to have political control over the book publishing industry through the end of the seventeenth century but in the middle of the sixteenth century it had ceded economic control over book publishing.[2] The local printing industries had started to protect themselves; they started to set up guilds and to make sure that only members of the guilds could set up businesses as printers and publishers.[3]

In the sixteenth century the Stationers' Company was established in England and that was a guild of printers, bookbinders and booksellers in London; they had a monopoly over the English publishing trade that was given to them by a printing patent. This also served the political interest of the Crown, because the economic monopoly of the Stationers' Company was secured by suppressing trade of both unauthorized copies of licensed books and unlicensed works. These actions against unlicensed works helped the Crown to suppress dissent.[4] Also state licensing systems were introduced that required books to get state approval so they could be printed and circulated.

Generally the printers and publishers were the beneficiaries of the right to print and sell books but sometimes the printing privileges were granted to the authors of the published works. Discussions and writing in England, France and Germany in the seventeenth century assessed the principle that the authors of works should control copying and publishing of their works

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[2] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 5.

[3] Sterling, J.A.L., *World Copyright Law.* p. 8.

[4] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 5.

but there was no positive result until the late seventeenth century when the position changed dramatically in England. The structure of the system of control over the printing and dissemination of works was dismantled and the royal prerogatives that the printing privileges had been established on were abolished.[5] In 1695 the Licensing Act expired and with it the Stationers' Company lost their power to seize and destroy unauthorized and offending works that was their main weapon in the marketplace. They then shifted their emphasis to the interest of authors over publishers and that effort produced the world's first copyright act, called the Statute of Anne.[6] This statute, established in 1710, was remarkable in many ways; it gave the author of the work the "sole right and liberty" over the printing of his books. The publisher had no longer the right over the printing as the printing trade had probably expected, they could only get it by acquiring the right by assignment. It has been claimed that the statute had been adopted to benefit the publishers in reality but the fact is that the author was the initial owner of the printing right as is said by the statute and the printer could only acquire that right from him by contract. The number of statutes enlarged the scope and duration of the Statute of Anne from 1710 in the eighteenth and nineteenth centuries.[7]

In 1790 the U.S. made its first copyright legislation and that act was enacted under constitutional power and was closely modeled after the Statute of Anne in England. Authors and their successors in title had the sole right and liberty of printing their works under the Act. The initial period of protection was 14 years but with the possibility of a 14 years extension and to be able to obtain the protection, registration was required. However, there was one feature of the U.S. Act that was not in the Statute of Anne; the protection was specifically limited to citizens and residents of the U.S. and there was no protection for foreign works. It states in section 5:

> "…nothing in this Act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any book etc. written, printed or published by foreigners in places outside the United States."[8]

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[5] Sterling, J.A.L., *World Copyright Law.* p. 8-9.

[6] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 5.

[7] Sterling, J.A.L., *World Copyright Law.* p. 10.

[8] U.S. Copyright Office "Copyright Act of 1790" sec. 5, http://www.copyright.gov/history/1790act.pdf

All through the nineteenth century this restrictive policy continued and to a large extent until the United States joined the Universal Copyright Convention in 1955. In 1891, however, the U.S. adopted an Act allowing foreign works to be protected on a reciprocal basis. Because of this reciprocal basis, citizens of other specified countries that had been issued presidential proclamations could enjoy statutory copyright under U.S. law.[9]

1.2 Author's Right

In France, Germany and elsewhere in Europe printing privileges emerged before the author's right just like in England but in France the monopoly on printing ended with the revolution and a new copyright law in 1791 gave authors an exclusive right to perform their works. A year later the French enacted another law that gave authors a broad based right against unauthorized copying of their works. [10] The understanding of the concept was evolved by the French in the nineteenth century, the rights of the author in his work stemmed from his personality and that the economic and the moral were the two aspects to this right. Because of this French law regarded the author's right as "dualist" in nature - with economic and moral attributes.[11]

German law also recognized the two aspects of protection of the author's right but they however regarded it to be single in nature with the economic and moral attributes coming from the same stem.[12] The sovereign of printing privileges in Germany lasted well into the nineteenth century and in 1837 the first German copyright legislation was an act coming from Prussia that gave protection against reproduction of works of science and art. Copyright of literary works, illustrations, musical compositions and dramatic works was granted by a national copyright act that was passed when the Second German Reich was established in 1871. Several more acts extended the copyright until an act from 1965 revised the copyright law in Germany comprehensively.[13]

In the latter part of the nineteenth century the natural rights strain emerged and is commonly associated with the author's right tradition and at that time the whole European continent had

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[9] Sterling, J.A.L., *World Copyright Law.* p. 11-12.

[10] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 8.

[11] Sterling, J.A.L., *World Copyright Law.* p. 16.

[12] Ibid, p. 16.

[13] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 9.

enacted copyright laws. Otto von Gierke is traditionally associated with the rationale for the author's right; he expanded Immanuel Kant's connection of literary creation to the personality of the author. He claimed that the author had control over every aspect, personal as well as material, of his work and because of that the author has copyright over the exploitation of his work.[14] Despite this difference of approach by the French and German systems it is clear that these countries, as well as other Continental Europe countries, regard the theory of protection of the rights of the authors as linked to the personality of the authors; that the work comes from the author's mind and is not a mere commerce like a pen or a paintbrush. This theory of the author's right has greatly influenced the development of copyright law, not only in the European continent but also the law in countries in other continents that have derived from the European model.[15]

1.3 Neighboring Rights

Early in the twentieth century problems began to appear in the new industries of film, sound recordings and broadcasting regarding what protection should be given to them. These new technologies challenged assumptions regarding authorship because, for example, people might be able to think of photographs as a mechanical process and not the creative vision of the artist. Films could be seen as a product of corporate organizations and not the visionary work of some author. Finally it was decided that photographs and films were to be protected by author's right; however, for performances, sound recordings or phonograms and broadcasts there had to be created some other form of protection and from that sprang the regime of neighboring rights. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, also known as the Rome Convention, is the principal neighboring rights treaty. In his book *International Copyright* (2001) Paul Goldstein says:

> "The difference between countries that apportions protection between author's right and neighboring rights and countries that bring both classes of subject matter under the rubric of copyright is mainly symbolic. Few sound recordings, performances, or broadcasts that are protected by copyright will in fact enjoy an economic life that begins to approach the copyright term of protection; indeed,

[14] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 9.

[15] Sterling, J.A.L., *World Copyright Law.* p. 16.

> their economic value will typically be exhausted even before expiration of the shorter, neighboring rights term of protection."[16]

International obligations are the main consequential difference between systems of author's right and neighboring rights on the one hand and systems of copyright on the other. For example, if one country defines a performance, phonogram or broadcast as being something other than literary or artistic, the subject matter is that the country is not obliged to follow the minimum standard of protection that is obligated to them under the Berne Convention and national treatment requirements of productions coming from another country. However, if the latter country defines the same productions as being protected by copyright because they are literary or artistic, that country is obliged to give protection for such works that originate from the other country because of the minimum standards of the Berne Convention and national treatment requirements.[17]

When a distinction is made between author's rights and neighboring rights that has far reaching consequences. In the civil law systems the author's right is conceived to be related to personality and therefore the high protection that is normally granted to such rights is automatically imported. However with regard to neighboring rights of producers, they are believed to have their basis in protection of investment and organizational skills. There is an absence of the concept of personality and economic and commercial considerations are likely to be the assessment terms of the protection of neighboring rights.[18]

[16] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 11.

[17] Ibid, p. 10-11.

[18] Sterling, J.A.L., *World Copyright Law.* p. 77.

Chapter 2 International Conventions, Treaties and Agreements

2.1 Introduction

It should be remembered that the question of this dissertation is if there exists such a thing as international copyright and to find the answer to that international instruments regarding copyright must be examined. Copyright is genuinely a national law, that is to say every country has the right to determine how much protection it is willing to grant to authors within its border unless the country has bound itself by an international instrument. Since the nineteenth century international agreements have begun to appear to provide harmonization in signatory countries to a certain degree.[19] The general evolution of international copyright norms has been in the form of increasing the minimum standards of protection for both the subject matter and the exclusive rights. The norms for copyright and neighboring rights are formed in an interlocking network by the Berne Convention, the Universal Copyright Convention and the WIPO Copyright Treaty for copyright; and the neighboring rights treaties, the Rome Convention, Geneva Convention, Brussels Convention and the WIPO Performances and Phonograms Treaty. Also, both copyright and neighboring rights are affected by the substantive and procedural norms of the TRIPS Agreement.[20]

Most countries of the world adhere to one of these treaties today and all of them aim to ensure that foreign authors enjoy the same protection as national authors in a signatory state with regard to national treatment and non-discrimination. They also provide a minimum standard of protection regarding scope and duration, among other things. However, when copyright protection is sought one must consult the copyright law of the country because it is possible for national legislations to comply with international prescriptions in different ways.[21]

A serious complication for determination of rights in any case is the fact that international copyright norms have evolved over time and one of the reasons for that is partly because contemporary copyright and neighboring rights are not universal. While some countries

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[19] UNESCO, "Basic notions about Copyright and related Rights", p. 8. http://portal.unesco.org/culture/en/files/30671/11443368003faq_en.pdf/faq_en.pdf

[20] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 13.

[21] UNESCO, "Basic notions about Copyright and related Rights", p. 9. http://portal.unesco.org/culture/en/files/30671/11443368003faq_en.pdf/faq_en.pdf

follow all the latest treaty standards other countries still only follow lower standards from the texts of previous treaties.[22]

The principal means for international ordering of copyright and neighboring rights are bilateral, regional and multilateral treaties. The treaties have the principles of territoriality, national treatment and choice of law as mechanisms to determine jurisdiction and applicable law.[23] The concept choice of law is a subject of the conflict of laws and it means that a certain issue can be governed by some foreign law, if for example a contract was made in that country because both parties were there at that time. However it will only become an issue if one of the parties raises the question in the pleadings. This is an important issue when determining in what jurisdiction a case should be heard and therefore what law applies.[24] The TRIPS Agreement has put a spotlight on relationship between copyright and trade; the fact is that the connection between copyright and trade measures dates at least back to the mid-nineteenth century. The decisions as to whether a country shall and to what countries it will extend its copyright relations has been a trade decision from the start.[25]

2.2 Copyright Treaties

Private rights can come directly from copyright or neighboring rights and they can also depend upon legislation implementing the treaty. When courts decide from where a certain private right derives it will in any case come down to the nature of the treaty and the constitutional traditions of the country providing the protection. In many civil law countries and in fact most countries in the world, treaties are viewed as self-executing; applying directly as a source of rights to private parties. On the other hand, some countries follow the constitutional traditions of Britain and Scandinavia that hold treaties as not self-executing and therefore domestic legislation has to come into play implementing the treaty so that the source of rights can apply to private parties. Because of this difference of approach by countries an owner of worldwide rights in a work that has his work exploited without his consent can directly invoke as governing law the terms applicable of the Berne Convention in a civil law country like for example Italy. However, if the same scenario arises in a country that follows

[22] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 13-14.

[23] Ibid, 14.

[24] Morris, J.H.C., *The Conflict of Laws*. p. 9.

[25] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 14.

the British or Scandinavian tradition, such as Canada, the rights of the owner of the work has to be measured exclusively by the terms of the Canadian Copyright Act.[26]

In the United States it is contemplated by the U.S. Constitution that some, but not all, treaties are self-executing. Several factors weighed by U.S. courts determine whether a treaty is self-executing or not; some treaties may expressly provide for legislative action and that weighs against direct application. For example the Berne Convention calls for that, as it provides that "any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention". In the course of consenting to a treaty the United States Senate has also made reservations that may in themselves refer to that the treaty will not be self-executing. Furthermore when the United States passed the Berne implementation amendments in 1988, Congress made it clear that its view was that the Berne Convention was not self-executing and generally it is accepted in the United States that the Convention is not a self-executing treaty although that is not universally accepted.[27]

If a protecting country views a treaty to be self-executing, that does not necessarily mean that the text of the treaty governs every aspect of exploitation of the particular work in that country. As Paul Goldstein states in his book *International Copyright* (2005):

> "National legislation may encompass forms of subject matter and extend exclusive rights that are not contemplated by the treaty's minimum standards; remedial provisions, only sparely described in the usual copyright or neighboring rights treaty, will often be more elaborately prescribed in domestic law. In addition to determining whether and in what ways local law augments directly applicable treaty provisions, a copyright claimant should determine in any case whether the country imposed one or more reservations at the time it adhered to the treaty text."[28]

In the nineteenth century most bilateral arrangements rested on some form of reciprocity and in some cases material reciprocity was required for the treaty, "meaning that Country A would protect works originating in Country B only if Country B gave comparable protection to

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[26] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 14-15.

[27] Ibid, p. 15.

[28] Ibid, p. 15-16.

works coming from Country A."[29] Again in other cases natural treatment may be required for the treaty, "meaning that Country A would protect works originating in Country B on the condition that Country B gave works originating in Country A protection on the same terms it gave to works of its own nationals."[30]

These early bilateral arrangements, which were for the most part between net copyright importing countries and France and the United Kingdom, had little success in securing protection for works of their nationals through bilateral agreements based on reciprocity. However, in 1852, France decided to try a different approach by extending copyright protection to all foreign works. They did that without any regard of whether other countries would offer protection for French works in return. This action of France has sometimes been claimed to be both altruistic and progressive but it also reflected a fair measure of shrewdness. Performance of foreign dramas in France was not covered in the decree and the protection of foreign works in France would not be more extensive than the protection the work would get in its own country. The decree also provided that publishers could collect revenues in France and that action may have encouraged them to give support to bilateral agreements with France in their country. France entered into a bilateral agreement with Belgium, which was the largest market of unauthorized copies of French works. In the same year as they issued their decree and in the years to come many bilateral agreements with other foreign countries followed.[31]

Eventually the other major copyright exporter of the nineteenth century, the United Kingdom, managed to gain success in securing bilateral agreements with countries in Europe but the largest market for unauthorized works from the United Kingdom was the United States and the U.K. did not manage to secure an agreement with them. Only works of authors who were citizens or residents of the United States were given protection by the first U.S. Copyright Act, as it says the Act was not to "be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."[32]

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[29] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 16.

[30] Ibid, p. 16-17.

[31] Ibid, p. 16-17.

[32] Ibid, p. 17.

In 1891, the U.S. congress passed the so called Chase Act because of pressure from both English and American publishers. The Chase Act authorized that works of citizens or subjects of foreign states or nations would be protected in the United States, but only

> "when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement."[33]

At first principally European countries, including France, Germany and the United Kingdom where issued presidential proclamations and bilateral arrangements under the Chase Act. The governing principle of the bilateral agreements was national treatment which meant that foreign work had to comply with formal features of U.S. copyright law to qualify for protection. Those were typically absent from foreign law such as affixation of copyright notice, registration and deposit of copies, and renewal. A manufacturing clause was also in the Chase Act and that clause demanded that all printing of books and other specified materials would be performed in the United States.[34]

Even though bilateral copyright treaties established a pattern of international norms for the protection of literary and artistic works, they were still inherently limited. The fact that the terms of bilateral agreements could vary widely was a drawback that required publishers to take on a cumbersome and piecemeal analysis of whether and to what extent Countries B, C and D would protect works coming from Country A. Another limitation on bilateral agreements was the fact that they often included a clause about a most favored nation and because of that, each time a treaty partner entered into a bilateral relation with a new partner the level of copyright protection could change. Furthermore, because these bilateral treaties had brief terms and could be denounced on a short notice, authors were in considerable danger of forfeiting protection of their rights.[35]

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[33] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 18.

[34] Ibid. p. 18.

[35] Ibid, p. 18.

2.3 The Berne Convention

In 1852 the first bilateral copyright agreement was made but even before that there had been claims for a universal law of copyright, by French legislators, that would invoke the familiar principle of natural right. Starting with an International Congress of Authors and Artists in Brussels in 1858 a universalist movement started to evolve in France but also other places.[36] At that time Brussels had been the principal international center for piracy of French works and it was quite ironic that the Congress should be held in that city.[37] This International Congress was attended by delegates of literary societies and universities and also by authors, artists, journalists, librarians and lawyers.[38]

In 1878 a Universal Exhibition was held in Paris and consequently an international literary congress was held there. Victor Hugo presided over the congress that started on June 17 and lasted for 12 days; many other distinguished authors, publishers and prominent figures from three continents were present at the congress. At first the congress focused on fundamental questions of principle and finally a number of resolutions were passed after rather lengthy and unstructured debates. In their book *International Copyright and Neighboring Rights – The Berne Convention and Beyond* (2006), Sam Ricketson and Jane C. Ginsburg mention the most important resolutions:

(i) The right of the author in his work constitutes, not a concession by the law, but one of the forms of property which the legislature must protect.
(ii) The right of the author, his beneficiaries and legal representatives is perpetual.
(iii) …
(iv) All literary, scientific and artistic works will be treated, in all countries other than their country of origin, according to the same laws as those applicable to works of national origin. The same system will apply to the performance of dramatic and musical works.

[36] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 19.

[37] Ricketson, Sam and Ginsburg, Jane C., *International Copyright and Neighboring Rights: The Berne Convention and Beyond.* p. 45.

[38] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 19.

(v) For this protection to be assured, the author need only comply with the formalities of the country in which the work was first published.[39]

The last two resolutions call for simplification of formalities and, more importantly, national treatment and are the same as they were in the 1858 Congress, while the first two resolutions reflect more of an absolute approach than had been taken in the earlier congress. A second congress was held in 1878, also in Paris, which called for constitution of a general Union that would adopt a law in relation to artistic property between European countries as well as elsewhere in the world. A request was made to the French government to summon an international conference with the intention to regulate a uniform convention of the use of international property. The French government, however, ignored this request which Switzerland then picked up six years later and became the first government to take the international lead in this direction. Eventually this initiative of Switzerland gave rise to the Berne Union.[40]

In the meantime, in its session on 27 June, the 1878 literary congress took an immediate and practical decision to establish the International Literary Association that was to be open to literary societies and writers from all countries that had the following objects:

1. The protection of the principles of literary property.
2. The organization of regular relations between the literary societies and writers of all countries.
3. The initiation of all enterprises processing an international literary character.[41]

Since the foundation of the International Literary Association it has played a very significant a catalytic role in developments of international copyright, it has held regular congresses in many cities in the world since its founding, beginning with a congress in London in 1879. Five years later its name changed, when membership of artists were included, to its present

[39] Ricketson, Sam and Ginsburg, Jane C., *International Copyright and Neighboring Rights: The Berne Convention and Beyond.* p. 49-50.

[40] Ibid, p. 49-50.

[41] Ibid, p. 50.

name, the International Literary and Artistic Association, or ALAI, as it is commonly known.[42]

At a congress in Rome in 1882 the Association decided to opt in favor of a conference proposed by the German Publishers' Association to form an international copyright union instead of the universal copyright law agenda that had been the objective before. Over three days in Berne, Switzerland in September 1883, that conference was conducted and the result was a treaty consisting of ten articles; a year later another conference was convened by the Swiss government on the proposed treaty and after that conference, along with two more, all in September, a final draft was produced of the Convention for the Protection of Literary and Artistic Works. On December 5 1887, the treaty was signed by 10 countries; Germany, Belgium, Spain, France, the United Kingdom, Haiti, Italy, Liberia, Switzerland and Tunisia. With the permanence and universality of the texts of the Berne Act it was intended to signal departures from the bilateral agreements that had preceded it. That was achieved by capturing the attributes in the treaties' creation of a "Union for the protection of the rights of authors over their literary and artistic works."[43] The aim of the structure of the union was to exist separately and apart from particular acts of the treaty; as a result revision of the treaty could be made to meet any changing conditions over time. Adherence to the new act was, however, not conditional for members in order for them to retain their place at the conference table for future revisions and simply by adhering to the most recent act of the Convention any new country could join the Union at any time.[44]

A number of revisions have been made to the text of the Berne Act, such as in 1886 for the purpose of applying a rule of comparison of terms and to determine compliance with formalities, a work's country of origin was made important. Published works had their country of origin where they were first published but in the case of unpublished works the author's nationality was also his work's country of origin. With the Berlin Act from 1908 several new important changes were made, prohibition of formalities being a condition so

[42] Ricketson, Sam and Ginsburg, Jane C., *International Copyright and Neighboring Rights: The Berne Convention and Beyond.* p. 50-51.

[43] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 20.

[44] Ibid, p. 19-21.

authors could acquire, exercise or enjoy copyright protection. It was also decided that the minimum term of protection for works would be fifty years from the death of the author.[45]

The Berne Additional Protocol, formed in 1914, introduced a reprisal clause that is now embodied in Article 6 (I) of the Paris Act from 1971. Following that moral rights of attribution and integrity were added to the Conventions minimum rights by the Rome Act in 1928. Minimum copyright terms for works of joint authors should be measured from the death of the last surviving author. In 1948 several minimum rights were strengthened by the Brussels Act, some of them were moral rights, adaption rights and translation rights; also, television was included to broadcast rights. When the Berne Convention was signed, nations like France, Germany and the United Kingdom committed their colonies to the obligations of the Convention. In the 1950s those colonies started to gain independence and they were annoyed because of the copyright treaty standards that had been imposed upon them by a foreign country and in an effort to address these demands the countries of the Berne Convention decided to meet in Stockholm in 1967 to form a Protocol Regarding Developing Countries.[46]

That protocol made accommodations to the demands of the developing countries but the developed countries had made them grudgingly because they were afraid that the developing countries would withdraw from the Conference and it became clear that the developed countries were not prepared to be bound by the Protocol. This led to a dispute between the members of the developed countries and the members of the developing countries, in the years between 1967 and 1971, that almost led to the collapse of the Berne system. Some provisions of the Protocol in favor of the developing countries were destined never to come into force and were factors that lead to further revision of the Convention by the 1971 Paris Act.[47]

For the entire first century of the Berne Convention the single and commercially most important country to remain outside the Convention was the United States and they actually made no copyright relations with foreign countries until their first bilateral copyright

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[45] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 21.

[46] Ibid p. 21-22.

[47] Ricketson, Sam and Ginsburg, Jane C., *International Copyright and Neighboring Rights: The Berne Convention and Beyond.* p. 129-130.

agreement in 1892. In 1955 they took a bigger step when they adhered to the Universal Copyright Convention. One of the reasons why the United States decided not to join the Berne Convention was because they wanted to retain formalities such as the domestic manufacture clause that had been prohibited by the Berne Convention since 1908 by the Berlin Act. The fact that American publishers had a so-called "back door to Berne" is another reason why they remained outside the Convention. This back door to Berne was available to the American publishers by simultaneously publishing a work in the United States and in a Berne Union country; by doing so they were able to secure the protection of the Berne Convention. The United Kingdom did not like this back door so they proposed a protocol that would allow for reprisal in such cases. That protocol was adopted in 1914 and is embodied in article 6 (I) of the Paris Act of 1971. Finally in 1989, on March 1, the United States adhered to the Berne Convention.[48]

2.4 The Paris Act of the Berne Convention from 1971

The current text of the Berne Convention is the Paris Act of 1971 and it entered into force on October 10, 1974. For a work to be entitled to protection in a union country, other than its country of origin, the Paris Act prescribes two principal points of attachment. The first one is that if the author is a national or domiciled in the particular country, the work will be protected, and the second one applies if the work is published first or simultaneously in a member state. The requirement, introduced in Berlin in 1908, that enjoyment and exercise of copyright shall not be subject to formalities, carries the bedrock requirement of national treatment that has been in every Act from the beginning. In Article 19 it is stated that the "Conventions 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." Member states have some leeway in determining conditions for protection under the Paris Act, for example if works have not been fixed in some material form it should be a matter for legislation of the member country to what category, general or specified, the work shall be protected under, if any. Furthermore local legislation should determine to what extent applied art, designs and models, official texts, political speeches and speeches given in legal proceedings should be protected. A special rule was also established by the Paris Act, the rule about what should not be

[48] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 23.

protected: "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[49]

It should be up to national legislation to decide who can qualify as author and initial owner or a literary or artistic work protected by copyright as the Paris Act rules; however, there seems to be a common widespread belief that only flesh and blood authors can qualify as is reflected by copyright laws of civil law countries. If a national law is absent regarding clarification of who is the work's author, Article 15 (I) of the Paris Act perceives that the name that appears on the work in the "usual" manner is the author of the work, given that fact and law does not prove otherwise. The minimum term of protection is fifty years from the death of the author or the death of the last surviving author in cases of joint authorship, however that is only a minimum term and Article 7 (8) provides 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 of the work."[50]

Minimum standards of moral and economic rights are established by the Paris Act and, for example, Article 6bis was added to the Act with the intention of dealing solely with moral rights. It provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[51] The article also provides for a minimum term of protection of rights that coexist with the economic rights of the work and subject's the means that these rights are to be safeguarded by the law of the country where the protection is claimed.[52]

Economic rights are also safeguarded by the Paris Act, for example that literary or artistic work can be reproduced in any manner or form, adaptions or arrangements can be made of the work, to distribute and publicly perform cinematographic adaption's and reproductions, translations, broadcasts, public recitations and public performance of dramatic-musical and musical works. Article 9 (2) says: that it "shall be a matter for legislation in the countries of

[49] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 23-25.

[50] Ibid, p. 25-26.

[51] Ibid, p. 26.

[52] Ibid, p. 26.

the Union to permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not unreasonably prejudice the legitimate interests of the author."[53]

Most exemptions are left for national legislation to decide upon, such as limitations for educational and press purposes; however, exemption of quotation from a work that has been made available to the public lawfully is mandatory according to Article 10 (I). Residual power among Union members is recognized by Article 17 of the Paris Act. The article gives the competent authority the right to permit, control or prohibit by legislation or regulation any circulation, presentation or exhibition of any work or production. The sovereign monopoly of censorship power that predated the first copyright law is effectively validated by this provision as far as copyright is concerned. Public censorship measures usually do not contradict the private right against unauthorized appropriations of literary or artistic works which is the overall intention of the Berne Convention. If the government, however, obstructed the creative freedom of an author - for example, even the freedom of exploitation of work in the marketplace - under Article 17 the government would prevail in order to preserve public order.[54]

New countries that want to become a Union member cannot adhere to any other text than of the Paris Act. The legal relations that a new country has with Union members that have adhered to earlier texts of the Convention are mentioned in special provisions of the Paris Act regulating those relations. Special agreements among union members are entitled in Article 20 but they have to grant more rights than the Convention provides or other provisions that do not contradict the Berne Convention. Settlement of disputes about interpretation or application of the Convention is handled by the International Court of Justice as is provided for by the Paris Act; however, that route is unused because dispute settlement by the TRIPS Agreement has proved to be a more effective procedure.[55]

2.5 Universal Copyright Convention

Following the adoption of the Berne Convention it was hoped that the United States would join but there were some factors that prevented that. One of them was that in the United States

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[53] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 26.

[54] Ibid, p. 26-27.

[55] Ibid, p. 26.

there was a law that required published copies to have certain notices affixed to them and the maximum protection of works under U.S. law was 56 years. In the Berne Convention however, the formalities like registration and notices were not allowed as a condition for protection of copyright; also the rule that the life of the author plus 50 years was the minimum term of protection deterred the United States from adhering to the Berne Convention. Then, under the initiative of UNESCO following the Second World War, an international convention was promoted that would ensure effective protection of an author's works by the contracting states. Countries with systems of protection different from the Berne Convention were not required to accept rules that would deter them from joining the new instrument.[56]

The United States was not the only country the promoters of the Convention had in mind with this, but also other countries, such as developing countries, that granted little copyright protection and were not able to join the Berne Convention because of that. This led to the signing of the Universal Copyright Convention (UCC) in Geneva in 1952 and this was later revised in Paris in 1971 where the obligation to grant protection by the contracting states was increased. Contracting states under the Convention are obliged to "provide for the adequate and effective protection of the rights of authors and other copyright proprietors" and nationals of other contracting states should be granted national treatment. Certain form of notice affixed to published copies of works was added to cover the position of the United States with regard to formalities. The term of protection was to be ruled by the law of the contracting states but no less than 25 years after the death of the author; however, states that had systems of a fixed term were allowed to maintain their system given the term was no less than 25 years from first publication.[57]

The UCC had considerable success in membership, with countries like the United States joining in 1955 and the USSR joining in 1973, both not members of the Berne Convention then; also many other countries joined that were parties to the Berne Convention and countries that had no copyright relations with other countries. Almost 100 states are members of the UCC today but it is unlikely that the Convention will be developed further because of the coming of the TRIPS Agreement and efforts of the WIPO Treaties to deal with copyright protection problems stemming from modern technological aspects mean that the attempt of

[56] Sterling, J.A.L., *World Copyright Law.* p. 633-4.

[57] Ibid, p. 634.

international copyright to bring together countries on the most basic ground has brought about a global increase in the standard of copyright protection. The success of the UCC in bringing the United States and the USSR into the international copyright tradition has proved to be vital in the development of international copyright.[58] The text of the UCC also had a so called Berne Safeguard Clause that was aimed to deter countries to withdraw from the Berne Convention and join the UCC because of the more relaxed terms the UCC has. This clause provided that countries that withdrew from the Berne Convention would not be protected by the UCC in Berne Convention countries. The UCC remains independent from the Berne Convention apart from the Berne Safeguard Clause but however if there is a conflict on the terms between the two Conventions the relevant text of the Berne Convention will govern.[59]

Adequate and effective protection of the right of authors and other proprietors of copyright in literary, scientific and artistic works is provided for by the UCC and its contracting states and just like the Berne Convention the UCC may be self-executing or it may be by specific legislation that the necessary protection is introduced or maintained. The principle of national treatment is established by the UCC just like the Berne Convention and with that principle the obligation of contracting states to provide for adequate and effective protection of the rights of authors and other proprietors of copyright is linked to the granting of rights.[60]

2.6 The WIPO Copyright Treaty

In 1996, in a Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, representatives from 120 countries adopted the WIPO Copyright Treaty (WCT) and in this Conference questions that had not been addressed since the 1971 revision of the Berne Convention along with new questions about copyright protection for digital electronic uses were addressed. Also protectibility of computer programs as literary works was confirmed to be within the terms of the Berne Convention as was the new reality that had been introduced with the TRIPS Agreement.[61] Authors of literary and artistic works are the beneficiaries under the WCT are guaranteed additional special distribution rights. National treatment, rental rights, extended rights of communication to the public and compliance with the Berne

[58] Sterling, J.A.L., *World Copyright Law.* p. 634.

[59] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 29.

[60] Sterling, J.A.L., *World Copyright Law.* p. 635.

[61] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 32.

Convention are the basic principles. Obligations concerning technical measures and protection of management information rights along with provisions on the enforcement of rights are also provided for in the WCT.[62]

In the Berne Convention it is provided that Union countries can make special agreements among themselves as long as they offer greater protection for authors and do not contradict the Convention. It is also stated in the WCT that it is a special agreement within the Berne Convention and is not to have any other relations nor prejudice any rights and obligations of other treaties. The treaty provides that contracting states shall comply with Article 1 -21 of the Berne Convention as well as its Appendix and that is of great importance to the Treaty. This includes Article 6bis of the Berne Convention that talks about moral rights and was added with the Paris Act. This is where the WCT differs from the TRIPS Agreement that also has a corresponding obligation to the Berne Convention, however with the exception of Article 6bis. The treaty offers considerable advancement to the task of finding solutions to the problem regarding copyright and rights related to developments in technology but it is only the beginning of the law updating process in that field.[63]

2.7 The TRIPS Agreement

The perception of the importance of international protection of intellectual property, copyright and related rights in particular, was affected greatly in the 1970s mainly by two developments. International dissemination of protected materials had been greatly developed because of new technological means like satellite transmissions and computer technology like internationally linked computer databases. Also there had been much growth of piracy of sound recording, films and books that had evolved to industries that spread internationally copies of products created unlawfully that were protected by copyright or related rights. Because of this, owners of the right were rightly concerned about this development and wanted to ensure that exploitation of their rights was effectively acknowledged and that piracy would be eradicated or at least contained and reduced.[64]

In the existing international Conventions, contracting states were required to provide certain rights but they did, however, not contain any provisions allowing members to introduce some

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[62] Sterling, J.A.L., *World Copyright Law.* p. 707.

[63] Ibid, p. 707-8.

[64] Ibid, p. 681.

kind of enforcement measures that could help when disputes arose about the application of provisions of the Conventions. Also, new technical developments in the making and uses of computer programs, databases and satellite transmissions were not dealt with in any specific way by the Conventions. Major supplying countries of copyrighted and other rights related material were concerned that the new development could prejudice their interests in trading relationships since these rights represented an important part of the gross domestic production in many of these countries and were therefore important in relation to exports.[65]

In 1986 a revision of the GATT Agreement began in Uruguay and in those negotiations the subject of protection of intellectual property was introduced. After long and detailed negotiations the World Trade Organization Agreement (WTO Agreement) was made in April of 1994 and with it was adopted the Agreement on Trade Related Aspects of Intellectual Property Rights or the TRIPS Agreement. The WTO Agreement established the World Trade Organization and all countries that are members of it are also members of the TRIPS Agreement and therefore bound by it. Standards in the scope and application of intellectual property rights are established by the Agreement and obligations about copyright and related rights, trademarks, geographical indications, industrial designs, patents, semiconductor topographies and confidential information are introduced by the agreement also. Obligations concerning enforcement of intellectual property rights are imposed as well as dispute prevention and settlement procedures are introduced. [66]

As has already been said members of the Agreement shall comply with Articles 1 – 21 of the Berne Convention along with its Appendix - however with the exception of Article 6bis because of strong objections from the United States about including the moral rights obligations of the Berne Convention in the Agreement.[67] The other Articles are the substantive provisions of the Convention that gives authors their rights and they also set out the rules of protection, limitations and exceptions. Because of this all members of the WTO must abide by these provisions of the Berne Convention no matter if they are members or not. Concerning facilities for the developing countries members of the Agreement must also follow the provisions of the Appendix to the Convention and in addition the Agreement also imposes obligations on members to grant certain rights that are more than those of the Berne

[65] Sterling, J.A.L., *World Copyright Law.* p. 681-2.

[66] Ibid, p. 682.

[67] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 55.

Convention. That protection is to be granted to the author by copyright or author's right is never specifically mentioned in the Agreement but that is not necessary because that comes from the application of the Berne Convention.[68]

[68] Sterling, J.A.L., *World Copyright Law.* p. 683.

Chapter 3 Moral and Economic Rights

3.1 Moral Rights

Moral rights as well as economic rights of authors over their works have to be examined with regard to the question of whether international copyright exists. Since morality and economics are such a big part of our lives those elements cannot be overlooked. Rights relating to the personality of authors and the integrity of their works are called moral rights and they should be distinguished from economic rights that concern control over commercial or industrial exploitation of the works as well as reproduction and representation of them that do not by themselves necessarily prejudice the integrity of the work or the reputation of the author. Since the fifteenth century economic rights have been recognized in some form; however, moral rights only began to be recognized in the early nineteenth century and the developments generally began in France and Germany. The right of the author to prevent publishers from publishing unauthorized amendments of their texts was recognized by a French court in 1814. Analyses put forward by Immanuel Kant and in the writings of learned authors influenced the theoretical development of moral right.[69]

The jurisprudence and learned writings in most civil law countries argued that the reputation and integrity of the author and his works should be protected by specific rights. There was, however, no such development in common law countries. When it was proposed, for example, that moral rights would be incorporated in the Berne Convention in 1928 that proposal was met with support from the civil law countries while the common law countries protested. Even so, Article 6bis was added to the Convention where it was recognized that the author had moral rights in relation to his work, or the paternity right, and the right that the integrity of the work would be preserved against acts that could prejudice his honor or reputation, or the integrity right. In the following years a statutory recognition of moral rights of paternity and integrity was formed in the civil law countries while the common law countries claimed that such statutory recognition was unnecessary because they were covered under by headings like contract and defamation.[70]

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[69] Sterling, J.A.L., *World Copyright Law.* p. 337-8.

[70] Ibid, p. 338.

The reluctance of common law countries to give statutory recognition to moral rights deterred the United States, for instance, from adhering to the Berne convention for a long time and, as has been claimed, the exclusion of Article 6bis from the TRIPS Agreement reflects the position of the common law countries. However, the position of the common law countries has changed in the last few decades to a more positive position with the United Kingdom introducing moral rights of paternity and integrity with an Act in 1988. Moral rights for certain works of visual arts have been introduced by the United States as well and many other common law countries have considered or are considering introducing some special statutory protection of the moral rights.[71] These visual arts that are protected as moral rights in the United States include paintings, drawings, prints, sculptures or photographs that exist in 200 signed and numbered copies or less. Authors can also decide not to exercise their moral rights or to waive them but that must be done in writing. This is not the case in European countries, where all copyright protected work of authors is given moral rights and those rights cannot be waived. Canada compromises between those two and offers moral rights to authors of all copyright protected work and also offers the option to authors to waive them.[72]

Unlike the TRIPS Agreement, the WIPO Copyright Treaty from 1996 does not exclude the Article 6bis of the Berne Convention from the obligation of its members to comply with the substantive provisions of the Convention and because of that all members of the Treaty must recognize moral rights of paternity and integrity of the author. The scope of moral right differs in many different jurisdictions but especially in civil law jurisdictions some features are fairly common, such as the fact that they are almost always treated separately from economic rights in national legislation. Also, generally the same term of protection is for moral rights and economic rights, but sometimes moral rights have an even longer term. Even though moral rights may descend to heirs and successors in title, they cannot be assigned. The protection criteria for moral and economic rights is also different between a number of countries; sometimes moral rights are granted to all authors no matter what nationality the author is or where the work was published. When moral and economic rights come into conflict the moral right will in most instances be more likely to prevail, at least in civil law

[71] Sterling, J.A.L., *World Copyright Law.* p. 338-9.

[72] Harris, Lesley E., *How International Copyright Works, 2005,* p. 43.

jurisdictions. The traditional thinking has been that moral rights can only arise or be granted to human beings because of its root.[73]

3.2 Economic Rights

Economic rights divide into products conferred by either copyright or author's right or by neighboring rights. The lines dividing them are not universal and a recorded performance may be treated as a literary work that has a claim to copyright while another country may exclude them from authorial works and protect them under neighboring rights. Countries attach rights on literary and artistic works differently. No restrictions are placed on library lending of literary works in most countries. In those countries proscribing a public lending right it is treated as a neighboring right, except Germany, which treats it as an author's right. These differences raise the question of whether a country that treats a right as copyright is obligated to give the same treatment to works coming from another country, which treats the same work as a neighboring right and would do the same to works coming from another country.[74] Economic rights can be classified as reproduction, adaptation, distribution and communication; these are the main types but in some countries other rights are also recognized such as the right to display artistic works and the artist's resale rights.[75]

[73] Sterling, J.A.L., *World Copyright Law.* p. 339.

[74] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 247-8.

[75] Sterling, J.A.L., *World Copyright Law.* p. 366.

Chapter 4 National Treatment

Since national treatment of rights relating to copyright is such a big issue in the international conventions, treaties and agreements it has to examined more closely to find the answer to the question of this dissertation: whether international copyright exists. National treatment is embodied in the main copyright and neighboring rights conventions and it is a rule about nondiscrimination. It promises foreign authors that they will get the same protection and treatment of their works in that country as it gives to its own nationals. In his book *International Copyright* (2001), Paul Goldstein says about national treatment: "Stephen Ladas's characterization of national treatment under the Berne Convention applies to the other conventions as well: 'the complete assimilation of foreigners to nationals, without condition of reciprocity.'"[76] The formulation of the terms of national treatment rules under the copyright and neighboring rights treaties can vary but the underlying requirement remains substantially the same. Paul Goldstein again says: "Article 5(I) of the Berne Convention provides that authors shall enjoy in protecting countries 'the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.'"[77] Inevitably, when new classes of creative work as well as new means to exploit them appear, the question is whether it falls under the works and rights of the national treatment obligation presented in Article 5(I) of the Berne Convention or protection of intellectual property in the TRIPS Agreement. Paul Goldstein notes:

> "Commentators generally agree that convention law, not national law, governs the question whether a class of subject matter or a means of exploitation falls within the convention's scope so that it is subject to the national treatment requirement. As Professor Ulmer observed, '[t]he nature and content of the legal provisions may certainly be important, But the terminology used and the classification given by the national law remains irrelevant.' Convention rules governing existing works and media, as well as the underlying trade economics of national treatment,

[76] Goldstein, Paul, *International Copyright: Principles, Law and Practice*. p. 72.

[77] Ibid, p. 73.

> can help to shed light on the question whether new classes of creative work and new means of exploitation will in any case be entitled to national treatment."[78]

When creative production admittedly falls outside the minimum terms of a convention, but the country decides nonetheless to protect it under its copyright legislation, that poses a separate but related question for national treatment. This happened in the United States when the U.S. Copyright Act included sound recordings as an object to protect; however, that was not a subject matter of the Berne Convention. The question that arises is if the country, the United States in this example, should have to extend this protection to other members of the convention. Could not they just have included this protection in another statute that was separate from copyright and avoided this result? Paul Goldstein says:

> "A persuasive argument can be made that the protecting country, having decided to treat the subject matter as belonging to copyright for its own nationals, should be required to give the same treatment to works originating on the territory of its treaty partners, at least if, as in the United States, the legislation does not expressly provide to the contrary."[79]

The United States would not be required to extend the rights to sound recordings because in this case it is a matter of national treatment but not of minimum standards. Economic line-drawing around rights and subject matter within the national treatment obligation is one reason for that. Another reason is respect for national autonomy and the consequent motives of the legislature to choose to place a copyright label on something, when they could have called by a different name and therefore got a lesser international expense.[80]

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[78] Goldstein, Paul, *International Copyright: Principles, Law and Practice.* p. 74.

[79] Ibid, p. 74.

[80] Ibid, p. 74-75.

Conclusion

International copyright definitely exists; maybe it is not an absolute right that automatically protects all work everywhere in the world and that everyone must obey but there is obviously a common understanding and measures available in most countries in the world that ensure that copyright is being protected internationally. The fact that many conventions, treaties and agreements about the protection of copyright exist on the international level and most of the countries of the world adhere to at least one of them shows that there is a universal understanding about copyright protection. The provisions of these international instruments do bind its members to offer at least a minimum protection for all other members; however, there is no instrument that makes sure that the member countries do incorporate the rules in their domestic legislation as is expected. Countries are given much freedom as regards how they choose to apply the protection and they can offer more protection than is required if they want.

Domestic law is the law that protects copyright in the countries of the world and these laws are very different. But they all derive from the international conventions like the Berne Convention that set the minimum standard of protection. Even though some countries stick to the minimum and other countries offer considerably more rights, they have in common the fact that they derive from this international set of rules that the countries decided to adhere to. Arpad Bogsch puts it well in the preamble to his book *The Law of Copyright under the Universal Convention* (1968):

> "It has become traditional to differentiate between the European and American philosophy of copyright by alleging that Europeans think that copyright is an inherent or natural right of the individual author, and that Americans think that copyright is a monopoly granted in order to stimulate artistic creation…..This difference in approach, if it exists, does not seem to have significant practical consequences, since the laws of Europe and the United States yield protections which, in their results, are rather similar to each other."[81]

[81] Bogsch, Arpad, *The Law of Copyright under the Universal Convention.* p. 3-4.

This is probably the best possible assessment of whether international copyright exists or not; countries differ in interpretation of where copyright derives from but they all agree that it exists and should be protected. Also, the laws that they have for protection are rather similar and that derives from the international instruments. The special nature of copyright offers the possibility of different interpretations but it is an international right nonetheless.

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