

The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles

Sam Ricketson*

Introduction.....	342
I. The International Framework	342
II. The Basic System Principles – What Are they?	343
III. Constraints Imposed on National Action by the International Framework	348
A. Increased Numbers.....	349
B. The Divide Between Developed and Developing Countries ..	350
C. International Copyright Reform in the Wider Context	352
D. Concluding Reflection: The Daunting Task of Effecting Changes in the Berne Text.....	352
IV. Special Agreements	353
A. Agreements Outside the Scope of Berne	355
B. Agreements Codifying State practice.....	355
C. Agreements on Matters Already Dealt with in Berne	356
V. Gaps in the Berne/WCT Umbrella: Immovable Obstacles and Bendable Boundaries	356
A. Bendable Boundaries	357
1. Works to be Protected and Issues of Originality.....	357
a. Fixation Requirements.....	358
b. Derivative Works.....	358
c. Official Texts.....	358
d. Collections.....	358
e. Applied Art.....	358
f. Facts.....	358
g. Speeches	358
2. Exclusive Rights	360
a. Exclusive Reproduction Rights	360
b. The Meaning of “Public” and “to the Public”	360
c. Intermediary Liability	361
3. Exceptions and Limitations.....	361
a. Compulsory Licenses	361
b. Quotations.....	362
c. Teaching Uses.....	362

342	COLUMBIA JOURNAL OF LAW & THE ARTS	[41:3
	d. Press Usage.....	363
	e. The Three-Step Test	363
	f. Implied Exceptions	364
	B. Immovable Obstacles.....	364
	1. Terms of Protection.....	364
	2. The “No-Formalities Rule”	365
VI.	Concluding Comments: Thoughts for The Future.....	366

INTRODUCTION

This Article is concerned with the international framework within which authors’ rights in their works are protected and exploited. It is not about brave new worlds that might exist outside or beyond this framework where rights and usages are reconceived and restructured on some totally new basis, but instead with what that framework presently allows and facilitates.¹ The Article is therefore pragmatic in its approach, simultaneously seeking to expose the potential flexibilities and gaps within the international framework that may enable the realization of some, at least, of the objectives of those who would seek to reform and reformulate copyright laws. Indeed, it may be that there is a brave new world for the protection of authors’ rights that is embedded within the interstices of the present international framework just waiting to be uncovered and realized.

I. THE INTERNATIONAL FRAMEWORK

For the purposes of this Article, I will limit the multilateral instruments dealing with authors’ rights to the following: (1) the Berne Convention for the Protection of Literary and Artistic Works of 1883 (last revised Paris, 1971) (“Berne Convention” or “Berne 1971”), which now has 176 contracting states (or “Berne Union members”); (2) the World Intellectual Property Organization (“WIPO”) Copyright Treaty of 1996 (“WCT”), which now has ninety-six contracting states; and (3) the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 2013

* Professor of Law, University of Melbourne; visiting professor, Columbia Law School, October 2017.

1. See, e.g., WHAT IF WE COULD REIMAGINE COPYRIGHT? (Rebecca Giblin & Kimberlee Weatherall eds., 2017); DAVID J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT (Elgar Monographs *in* INTELL. PROP. L. ed., 2017).

(“Marrakesh Treaty”), now in force with forty-one contracting states.² I will leave aside instruments touching on neighboring or related rights, such as the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, the WIPO Performances and Phonograms Treaty of 1996, and the Beijing Treaty on Audiovisual Performances of 2012, and will touch only lightly on the provisions of the World Trade Organization Agreement on Trade-Related Intellectual Property Rights (“TRIPS Agreement”).

II. THE BASIC SYSTEM PRINCIPLES – WHAT ARE THEY?

Berne initiated the modern system for international protection of authors’ rights. It was by no means the first international treaty on this subject matter, but it was the most significant because it was fully multilateral in character, open to all states, without restriction, and was based on the principle of national treatment.³ It is the last of these – national treatment – which is the most significant for present purposes. As adopted in article 3, first para, of the original Berne Act 1886, it was provided that:

Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may here-after grant to natives.

With one notable addition—the words “rights specially granted”—this remains in essentially the same form in article 5(1) of the latest (1971) Act of the Convention:

“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

National treatment and “rights specially granted” therefore enshrine the content of the protection that each Berne Union member must accord to the works of authors whose country of origin is another Berne member. To say this is an obligation assumed with respect to foreigners, while broadly correct, is something of a simplification, as there are detailed rules for determining the country of origin of a work.⁴ For example, national treatment extends to works first published in a Berne

2. The different texts of these conventions and current lists of contracting states are to be found on the website of the World Intellectual Property Organization (“WIPO”). WIPO, WIPO-ADMINISTERED TREATIES, <https://perma.cc/EFP2-T976> (last visited Aug. 16, 2018).

3. The first and second of these matters are worth celebrating as significant milestones in the general development of public international law. See Sam Ricketson, *The Emergence and Development of the International Intellectual Property System*, in *THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW* (Rochelle Dreyfuss & Justine Pila eds., 2017).

4. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, and *as amended* Sept. 28, 1979, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne 1971], at art. 5(4).

country, even if the author is not a national of that country or another Berne Convention member nation.⁵ On the other hand, nothing in the Berne Convention affects the protection that each country of origin gives to its own authors and those first publishing there. This is confirmed by article 5(3) which provides:

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

While there may be debates about the scope and content of national treatment,⁶ as a starting point for achieving protection it represents the opposite of doing so on the basis of substantive or material reciprocity, that is, where countries A and B undertake to grant an equal level of protection to each other's authors. Under national treatment, a foreign author receives as much or as little protection as native authors do, or may hereafter receive, under their own authors' rights law. National treatment, therefore, provides authors who are nationals or residents of one Berne Union member, or who have first published their work in a member country, with unfettered access to the legal systems of all other Berne Union members. This access is rendered more seamless by the "no formalities" rule, which allows for automatic protection once the connecting factors of nationality/residence or first publication in a Berne Union member are satisfied.⁷ Because national treatment alone would be an incomplete and uneven means of providing protection for non-country of origin claimants to rely upon, "rights specially granted" have become important. This list of exclusive rights has been steadily augmented, modified, and refined over successive revisions of the Berne Convention: (1) translation and public representation/public performance rights (1886); (2) adaptation and other rights of transformation, cinematographic reproduction and adaptation rights, and

5. *Id.* at art.5(4)(a) and (b). To avoid confusion for readers, it should be noted that, in the text which follows, the expressions "foreign" and "non-country of origin" are used interchangeably, but are to be understood as meaning the same thing. The expressions "domestic" or "local authors" and "country of origin authors" are also used interchangeably.

6. Compare here the more specific direction that is provided in the TRIPS Agreement by way of a footnote (footnote 3) to articles 3 and 4 which deal respectively with protection by way of national treatment and most favored nation treatment:

3. For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

7. Berne 1971, art. 5(2). This may be contrasted with registered industrial property rights protected under the Paris Convention, where access is underpinned by a period of priority that will allow filing in another Paris country with a fixed period of first filing in a country of origin (six months for trademarks and designs and twelve months for patents). See generally Paris Convention for the Protection of Industrial Property Act, Mar. 20, 1883, last revised Lisbon 1958 [hereinafter Paris Convention], arts. 4A-I.

public performance rights (1908); (3) broadcasting and some wired diffusion rights and moral rights (1928); (4) public recitation rights (1948); and (5) full reproduction rights (1967). The Berne Convention does not obligate members to extend “rights especially granted” to their own authors or to do so in the terms stipulated by Berne (although it seems unlikely that a member would agree to accord a higher level of protection for foreign claimants than its own authors). Nonetheless, “rights specially granted” represent the minimum level of extra protection that must be given to authors whose countries of origin are other Berne members. Indeed, Article 19 provides for a “top up” of protection for foreign claimants in the event that the domestic level of protection exceeds what they might otherwise receive by virtue of “rights specially granted.” This extension, however, appears to be within the discretion of the protecting country: “The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”⁸

National treatment and “rights specially granted” are then further qualified by requirements as to the duration of the protection to be granted to foreigners—essentially for the author’s life plus fifty years—and as to the limitations on, and exceptions to, protection that may be made (with the one mandatory obligation to provide a quotation exception.⁹) Allowance is also made here for the imposition of compulsory licenses in certain circumstances: in the cases of broadcasting and related uses (Article 11*bis*(2)), mechanical reproduction of musical and literary works (Article 13(1)) and reproduction and translation of works in developing countries (Appendix).¹⁰ In keeping with a tradition in national laws that may be traced back to the Statute of Anne in the U.K. in 1709, protection under the Berne Convention extends to successors in title, that is, to heirs and other grantees.¹¹

The WCT, although not an amendment or revision of the Berne Convention,¹² proceeds on the basis that all contracting parties will be bound by the Convention’s national treatment and “rights specially granted” provisions.¹³ To this are added obligations that are to be applied to works entitled to claim protection under Berne: (1) computer programs¹⁴ and compilations of data¹⁵; (2) the grant of exclusive distribution, rental and communication to the public rights¹⁶; (3) extension of the term of protection for photographic works¹⁷; (4) collateral protections with respect to technological measures¹⁸; (5) rights management information¹⁹; (6) and, more

8. Berne 1971, art. 19.

9. *Id.* at art. 10(1).

10. *Id.* at arts. 11(2) and 13(1).

11. *Id.* at art. 2(6).

12. It is declared to be a “special agreement” within article 20 of Berne. WCT, art. 1(1).

13. WCT, art. 1(4).

14. *Id.* at art. 3.

15. *Id.* at arts. 4 and 5.

16. *Id.* at art. 6-8.

17. *Id.* at art. 9.

18. *Id.* at art. 11.

19. *Id.* at art. 12.

generally, with respect to the enforcement of rights²⁰. This is accompanied by a more general template for permissible exceptions that embodies the three-step test derived from the Berne Convention.²¹

Finally, the Marrakesh Treaty mandates a series of exceptions for making or providing accessible format versions of works for blind and visually impaired persons. Apart from the fact that these exceptions are mandatory in character (unlike the great majority of those in Berne and the WCT), Marrakesh requires them to be provided for in “national copyright laws,” which indicates the exceptions should apply to domestic as well as foreign claimants.²²

Some general propositions emerge from the above birds’ eye view of the international framework for the protection of authors’ rights. The first, and most fundamental, proposition is that these obligations apply only to the treatment of foreigners, that is, to non-country of origin authors, although the Marrakesh Treaty may now represent a small departure from this time honored approach (see further below).

Second, as a corollary to this first proposition, national laws remain free to deal with the rights of their own (country of origin) authors in whatever way they wish and to reflect in those laws the specific social, cultural or economic policy goals that policy makers and legislators desire to adopt. The pragmatic view, of course, is that no country will readily depart from Berne or WCT norms if this means that local authors will be treated worse than foreigners; thus, international obligations have a direct and immediate influence on the content of national laws although this is not the legal effect of a country becoming bound by them. In practice, prospective Berne and WCT members will therefore carefully consider the advisability of adopting Berne or WCT standards as part of their domestic laws before ratifying or acceding to the treaty text in question and this will be so, whether or not they are countries where treaty obligations are capable of direct implementation at the national level.²³ Accordingly, alignment of the protection of national authors with that required under the international framework for non-country of origin authors will occur in the vast majority of cases. On the other hand, alignment is not mandated, and scope remains for any country prior to ratification or accession to depart from a Berne standard in the case of locals, or even to introduce such departures after ratification or accession, where it believes this to be justified. It may be supposed that national policy makers will usually be inclined to benevolence towards their own authors and their successors in title

20. *Id.* at art. 14.

21. *Id.* at arts. 10(1) and (2). The three-step test, as contained in art. 9(2) of Berne 1971, provides: “(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such 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.”

22. Marrakesh Treaty, arts. 4–6.

23. This may be a more vital question for a country where international obligations are capable of direct implementation, as evidenced by the United States with respect to moral rights. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) § 3.

rather than malevolence, meaning that any Berne departures will be pro-author in effect and will, in any event, be extended to non-country of origin authors as a consequence of national treatment. But such departures would not necessarily have to be pro-author in their purpose if they are inconsistent with a “right specially granted” to non-country of origin authors, so long as confined to domestic authors. Thus, other policy objectives could be served, as in the case of registration requirements as a condition for enforcement (as in the United States), which might assist in the process of case management and in providing useful notice to third parties.²⁴ There may also be departures that, while strictly prejudicial to the author’s interests, serve worthy social, cultural or economic goals which a country wishes to promote, for example, uses for educational or archival purposes that might go beyond what is permitted in the case of Berne-protected works or shorter terms of protection for certain categories of domestic works, such as computer programs or compilations of data. Such departures will be perfectly justifiable so far as the Berne Convention or the WCT are concerned, but, in doing so, the country adopting such measures will need to be open in acknowledging that it is discriminating against its own authors, or at least that it is according them differential treatment. Circumstances differ from country to country, and what may be acceptable in the social-political-cultural context of country A may not be so in B.²⁵ For present purposes, all we need to note is that nothing in the Berne Convention or the WCT precludes such an approach.

Third, the only departure from this strict foreign-domestic dichotomy appears to be in the Marrakesh Treaty, which only came into force in late 2016.²⁶ Marrakesh applies to forty-one countries, most of which are developing, and, as noted above, requires the adoption of its exceptions into national copyright laws to apply to both domestic and foreign authors.²⁷ This is made subject to the three-step test template embodied in Berne, WCT and TRIPS, presumably with the intention of aligning the exceptions for both categories of authors. Whether the “Marrakesh Model” or

24. Even in the case of Berne works, such requirements may still be Berne-compliant. See Jane C. Ginsburg, *“With Untired Spirits and Formal Constancy”: Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title- Searching*, 28 BERKELEY TECH. L.J. 1583 (2014).

25. The size of the country concerned will also be relevant here in determining whether such author-limiting provisions at the domestic level would, in fact, promote some other desired social or economic goal. For example, what might work in a copyright-sufficient country such as the United States, where a large proportion of works consumed will be locally sourced may have the contrary effect in a smaller country such as Australia, where the larger proportion will be foreign-sourced works, meaning that there will be a detriment to local authors without a corresponding public benefit, such as increased educational or library usages because the protection of foreign-sourced works will still need to be in compliance with the higher Berne requirements. I am indebted to Jane Ginsburg for this observation.

26. This occurred on 30 September 2016, three months after the 20th ratification or accession. Marrakesh, art. 18.

27. Exceptions are Canada and Australia, but other significant developed countries have not yet acceded, including the USA, Japan and the countries of the EU. *WIPO-Administered Treaties: Contracting Parties > Marrakesh VIP Treaty*, WIPO, <https://perma.cc/49AC-K4NC> (last visited Aug. 18, 2018).

“Marrakesh Deviation” provides a model for further international agreements on exceptions in other areas, such as libraries and educational institutions, remains to be seen.

Finally, if alignment of international and national standards remains the norm for national policy makers and legislators, the matter of treaty interpretation becomes critical: what exactly do the international standards require for the purposes of compliance? It will be argued below that the space for maneuver here is quite extensive, although there are some specific constraints that may limit national initiatives. It will be further argued that this quest for “interpretative space” becomes the more pressing when it is appreciated that remedial action at the international level, while not impossible, is far from easily attained.

We need, then, to consider these specific constraints on action before exploring the spaces for maneuver. Before doing so, we must, as a first step, deal with the matter of effecting change at the international level.

III. CONSTRAINTS IMPOSED ON NATIONAL ACTION BY THE INTERNATIONAL FRAMEWORK

National discussions of copyright law reforms often seem blocked by the following objection: “Oh, you can’t do that, it will be contrary to the Berne Convention...” The force of this objection requires further consideration, although it will be suggested below that, even on strict interpretations of their provisions, both the Berne Convention and the WCT allow considerable flexibility in their implementation. However, the truth remains that change at the international level appears unlikely, given the self-denying provision in Article 27(3) of Berne that, with the exception of the administrative and financial clauses in Articles 22-26 to which special procedures apply, “any revision.... .including the Appendix, shall require the unanimity of the votes cast.”²⁸ The requirement of unanimity has been part of Berne since its inception, although the formulation of that first instrument may have been even stricter: “It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it.”²⁹ But the notion of revision was also embedded from the outset: Berne was envisaged as a dynamic document subject to periodic revisions “for the purpose of introducing therein amendments intended to perfect the system of the Union.”³⁰ This remains the same today, except that current text more modestly refers to amendments “designed to improve the system of the Union.”³¹ Regular revision and addition of substantive obligations were striking features of the first eighty years of the life of the Berne Union: 1896 (Paris), 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris). As noted

28. Berne 1971, art. 27(3).

29. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986) [hereinafter Berne 1886] art. 17, para. 3.

30. Berne 1886, art 17, para. 1.

31. Berne 1971, art. 27(1).

above, each of these revisions significantly added to the substantive obligations contained in the Convention (“rights specially granted”) and, in this respect, Berne stands in sharp relief to its slightly older sister, the 1883 Paris Convention for the Protection for Industrial Property, which, although likewise subject to regular revision, provides little by way of substantive obligations in addition to national treatment and its system of priorities.³² The fact that Berne has remained unrevised since 1971 (and the Paris Convention, indeed, since 1958) can be attributed to several factors which are only compounded by the unanimity requirement (which does not actually apply in the case of the Paris Convention). These are: the increased numbers involved today in any multilateral negotiation; the continuing and significant division between developed and developing countries; and the changing technological, social and economic environments in which matters relating to the protection of authors’ rights now arise. Each of these factors, while interlinked, deserves further comment.

A. INCREASED NUMBERS

The more countries that participate in the making of a multilateral treaty, the more difficult it is for agreement or even consensus (in the sense of no objection) to be reached. This may appear to be a statement of the obvious, but, in the case of the Berne Convention, it was some time before increasing numbers began to make further revision too cumbersome to undertake. There were only twelve nations represented at the final conference of 1886 that adopted the initial Berne Convention, fifteen member states and twenty-one non-member observer states at the critical conference of Berlin in 1908, thirty-five member states and twenty-one non-member state observers at Rome in 1928, and thirty-five member states and eighteen non-member observer states at Brussels in 1948.³³ Agreement became more difficult at each conference, but substantive progress was nonetheless made. The reason for this was that most, though not all, were states at similar stages of development and most, though not all, were European nations or former colonial offshoots such as Australia, Canada, and New Zealand. Differences therefore may have been more of a legal kind—civil versus common law traditions—rather than those of a social and cultural kind that were to emerge at the next revision conference of Stockholm in 1967.

32. The revision conferences of 1900 (Brussels), 1911 (Washington), 1925 (The Hague), 1934 (London), and 1958 (Lisbon) resulted in final texts that were subsequently adopted, but there were several notable “failed” conferences: 1886 (Rome), 1989 (Madrid) and 1980–84 (three held in Geneva and one in Nairobi). *See generally* RICKETSON, *THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY* (2015) [hereinafter “RICKETSON”].

33. RICKETSON & GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 84-179 (2d ed. 2006) [“RICKETSON & GINSBURG”].

B. THE DIVIDE BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

By the time of the Stockholm Revision Conference (“SRC”), the logistical difficulties of dealing with greater numbers of participants were compounded by the processes of decolonization and the coming into independence of former colonial territories, particularly those of France, Belgium and the United Kingdom. A number of these had signalled their intention to continue as members of treaties such as Berne and Paris that had previously been applied to their territories by their former metropolitan powers, while others specifically opted to join one or both of these conventions.³⁴ For the first time in the Berne Union, there was now a bloc of what we might call “developing countries” as well as another identifiable group of “socialist countries” (for the most part from Eastern Europe³⁵). The Stockholm Revision Conference, which extended to revisions of the Paris Convention (very limited) and its associated agreements (Madrid, Nice, Hague and Lisbon) as well as the adoption of a new convention establishing the World Intellectual Property Convention, provided a forum in which the different interests of these groups of countries came into open collision for the first time. While the Stockholm revision achieved some success in rationalising and extending the substantive provisions of the Berne Convention, including the adoption of the exclusive reproduction right and the three-step test (to say nothing of the recast administrative, financial and other provisions), the real controversy at the Conference was in relation to proposals for allowing reduced terms of protection and the granting of compulsory licences for translation, reproduction and broadcasting in favour of developing countries. These proposals were included in a Protocol annexed to the Stockholm Act, which was accepted with no apparent opposition by other Berne members. In the immediate post-revision period, however, it became clear that a number of developed countries (mainly in Europe and largely prompted, perhaps, by major publishing interests) were not prepared to sign up to this package. This opposition led to a rapid revision of the terms of the Protocol and the adoption of a considerably modified Appendix in a special revision conference that was held only four years later in Paris, in tandem with corresponding changes to the Universal

34. For example, Benin which gave notice of continued adherence after independence from France in August 1960, Cameroon after independence from France in January 1960, Cyprus from August 1960 following independence from the United Kingdom, Democratic Republic of the Congo from June 1960 following independence from Belgium, Congo from August 1960 following independence from France, Mali from March 1962 following independence from France, and Sri Lanka from February 1948 following independence from the United Kingdom (this notice was not given until 1959 and related to the continued application of the Rome Act). For these and other examples of notifications or declarations of continued adherence post-independence, see WIPO, *BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS CONTRACTING PARTIES* (Jan. 15, 2018), <http://perma.cc/Z4CT-7CT7>. By contrast, Israel ratified the Rome Act in December 1949 following the end of the British League of Nations mandate, Pakistan acceded to the Rome Act in June 1948 following independence from the United Kingdom, and Cote d’Ivoire acceded to the Brussels Act in July 1961 following independence from France. *Id.* (listing Berne membership).

35. For example, Hungary, then Czechoslovakia, Poland, then Yugoslavia, Bulgaria and Rumania.

Copyright Convention (“UCC”). Notably, the USA, not then a Berne member but a leading member of the UCC, played an important role in resolving this “crisis” in the international copyright system.³⁶ In “system” terms, this collision between the interests of developing and developed countries did not lead to a diminution in Berne membership: no country was sufficiently aggrieved to denounce and exit Berne and, indeed, membership slowly increased as various newly independent and developing countries were persuaded to join as part of a wider program of proselytization carried out by the newly constituted WIPO.³⁷ But the developing-developed country split inclined many to think that further treaty revision, after such a near death experience, was inadvisable and should not be attempted again. Failure to revise the Paris Convention over four successive revision conferences between 1980 and 1984 simply served to underscore the necessity of letting sleeping dogs lie.³⁸

Nothing, of course, ever remains the same, and, with the coming of the TRIPS negotiations as part of the Uruguay Round and the accession of the USA to the Berne Convention in 1989, followed soon thereafter by China (1992) and the Russian Federation (1995), state membership of Berne began to come close to being universal rather than only partly so. A modest attempt at Berne revision therefore began in 1991 under the auspices of WIPO, perhaps as a response to what was happening in the context of the GATT with TRIPS.³⁹ This initiative, however, did not aim at a full revision of the treaty text, but rather at the formulation of a protocol dealing with a miscellany of topics from computer programs to artificial intelligence and extended terms of protection that could be signed up to at the discretion of Berne members. As we all know, this Berne protocol process morphed into a more integrated set of treaty proposals that focussed on “digital agenda” issues, but this was in the form of a freestanding treaty (the WCT). So far as numerical and temporal measures are concerned, the WCT must be termed a success: within two decades, it has attracted a membership just over half that of the much older Berne Convention. Nonetheless, it goes without saying that tensions between developed and developing countries continue within the membership of Berne and the WCT⁴⁰, as evidenced in the proceedings of the WIPO Standing

36. See generally RICKETSON & GINSBURG, at Chapter 14.

37. The WIPO Convention was signed at the Stockholm Revision Conference on 14 July 1967 and entered into force in 1970: see further *Convention Establishing the World Intellectual Property*, WIPO, <https://perma.cc/HHJ3-VR9H> (last visited Feb. 18, 2018).

38. See RICKETSON, at ¶ 5.02.

39. See RICKETSON & GINSBURG, at 141–43.

40. Developing and least developed countries remain the majority of WCT adherents. Although drawing the line between developed, developing, and least developed can be a difficult and shifting exercise (WIPO seeks to follow general United Nations practice in this regard), a perusal of the list of WCT member states reveals that about a third would be regarded as “developed”. These include the present twenty-seven states of the European Union (several, such as Bulgaria, Romania and the Baltic states appear on WIPO developing country lists) and Australia, Canada, Japan, Republic of Korea, and the United States. Arguably, the “developed” list could include China and the Russian Federation as well. On the face of it, therefore, it is difficult to maintain that the WCT is dominated by the interests of

Committee on Copyright and Related Rights, as well as in the other forums of WIPO⁴¹ and the WTO.

C. INTERNATIONAL COPYRIGHT REFORM IN THE WIDER CONTEXT

Debates about international copyright law reform now take place within a far different environment than existed at the time of the SRC. There is a much greater engagement with these issues by industry and civil society groups representing a vast range of interests and concerns, with a much greater emphasis on broader human rights and consumer protection issues. In the immediate context of WIPO, this is reflected in the large numbers of observer groups that each have a right to contribute to the deliberations of its Standing Committees and other bodies. It is obviously beneficial that such groups have a voice in these discussions; on the other hand, it can reduce progress to a snail's pace as meetings can become protracted, policy discussions tend to be more rhetorical than substantive in character, and outcomes much harder to achieve. Reaching consensus between member states becomes even more difficult when all these other inputs enter into the mix, to say nothing of the changed environment that has occurred with the advent of digital technology and networked communications.

D. CONCLUDING REFLECTION: THE DAUNTING TASK OF EFFECTING CHANGES IN THE BERNE TEXT

The simple point emerging from the above is that effecting change in the foundational document, the Berne Convention, is a daunting task, but is it an impossible one? In legal terms, obviously not, as it is specifically provided for in Article 27, but proposals for change can be readily scuppered if any single member—which could be Lichtenstein, the United States or the Democratic Peoples' Republic of Korea, to give three extreme examples—votes against. On the other hand, it should be noted that Article 27(3) speaks only of an “unanimity of votes cast”, rather than unanimous consent (as in the original Berne text of 1886). The possibility therefore remains for a group of members to abstain from voting, but not vote against, an amendment.⁴² No meaningful diplomatic conference on any topic occurs unless there is some measure of consensus on what is to be achieved and absence of opposition, and this is usually an iterative process pursued through preparatory meetings and consultations. Berne itself provides some examples of this, such as the preliminary meetings of experts before Stockholm that crafted the three-step formulation, and, at an earlier time, the

developed countries, but the political reality may, of course, be quite different, particularly when regard is had to the economic importance of the United States, China, Russian Federation, and states of the European Union. For the current WCT membership, see CONTRACTING PARTIES.

41. See also 45 *Adopted Recommendations under the WIPO Development Agenda*, WIPO (2007), <https://perma.cc/43LB-Y9AE>.

42. Berne 1971, art. 27.

adoption of moral rights at the Rome Revision of 1928. The same can be said of the WCT itself, which seemingly sprang almost fully formed from a series of preparatory meetings over a period of less than two years prior to the diplomatic conference of December 1996.

Accordingly, it is not inconceivable that if there were sufficient goodwill and determination among Berne members, consensus could be reached on some basic changes or modifications to the existing text as part of a full revision of that text, for example, in relation to such matters as the scope of the no formalities rule, terms of protection, and so on. For this to happen, there would need to be an initial acceptance at national levels that such changes would be a “good thing”, but there are instances in the history of the Berne Convention where such acknowledgements at the national level have been readily enough, and often quite rapidly, translated into international norms within the next revised text: mechanical reproduction rights at the time of the Berlin Revision are one example, and the adoption of broadcasting rights in Rome in 1928 is another. Hence, it would be foolish to dismiss the possibility of a Berne revision at some future time, bearing in mind that the exhortation to revise the Convention “with a view to the introduction of amendments designed to improve the system of the Union” is an obligation that each member country that has ratified or acceded to the Paris Act of 1971 has undertaken. It should also be said that this is an obligation cast on members, not on the administering agency, WIPO.⁴³

Having said all this, it may be accepted that revision of the Berne text presently remains highly unlikely—to quote a leading character in an iconic Australian film, “You’re dreaming!”⁴⁴ Other options, however, remain and it is to these I now turn.

IV. SPECIAL AGREEMENTS

Quite separately from its obligation to revise, Berne has always contained the possibility of an intermediate step whereby some members may enter into an agreement among themselves for extending the protection of authors as between themselves:

The 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

43. It is therefore noteworthy that one distinguished commentator with considerable experience in international organizations such as the WIPO has proposed a possible restructuring of Berne, proceeding on the basis that this is not an entirely unrealistic project and pointing to areas of possible agreement between member states. DANIEL J. GERVAIS, (RE)STRUCTURING COPYRIGHT: A COMPREHENSIVE PATH TO INTERNATIONAL COPYRIGHT REFORM 299–313 (2017).

44. Darryl Kerrigan in *THE CASTLE* (Village Roadshow 1997).

contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.⁴⁵

The reference to “existing agreements” is probably now of historic interest only, as a reference to those bilateral agreements that preceded the adoption of the Berne Act in 1886 and continued in force after this time.⁴⁶ So far as post-1886 special agreements are concerned, however, there appears to be only one that exists at the multilateral level, or at least only one that is expressly proclaimed to be such: the WCT.⁴⁷ Notwithstanding the lack of a similar express reference, the Marrakesh Treaty must also be regarded as an Article 20 agreement in that it is declared that nothing in the 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.”⁴⁸

In so far as any proposed changes in international copyright norms might lead to a reduction in the protection of the rights of authors, Article 20 provides no assistance to Berne members wishing to adopt such measures as between themselves. For example, if Berne member countries A, B, C, through to Z, who are also members of the WCT, decide among themselves that the term of protection for certain categories of works, such as computer programs and databases, is too great and that each will apply a term of twenty-five years from making to programs and databases whose country of origin is one of the other countries of this group, this will clearly be contrary to Berne Article 7(1) and hence outside Article 20. On the other hand, an agreement between the same countries to extend the term of protection for each other’s works of poetry to the life of the author plus one hundred years would clearly be within the scope of Article 20 as this affords more extensive protection, while Article 7(8) (the “comparison of terms” rule) will provide a permissible limit on the application of national treatment in the case of works originating from Berne member countries outside this group. Another instance would be a special agreement on the implementation of an artists’ resale royalty right scheme within the scope of Berne Article 14ter, which could likewise be kept away from national treatment requirements by virtue of Article 14ter(2). Other possible permutations of the Article 20 facility are as follows.

45. Berne 1971, art. 20. The first sentence is almost exactly in the same form as the original. Berne 1886, art. 15. The second sentence referring to existing agreements was added in the Berlin Act of 1908, art. 20.

46. RICKETSON & GINSBURG, at 346.

47. WCT, art. 1(1).

48. Marrakesh Treaty, art. 1. This must also be the case with the TRIPS Agreement, in so far as it requires compliance, under art 9(1), with arts 1-21 of Berne 1971 and the Appendix thereto. *See* RICKETSON & GINSBURG, at 348, 354– 5; *but see* H. G. RUSE-KHAN, *THE PROTECTION OF INTELLECTUAL PROTECTION IN INTERNATIONAL LAW* 78-80 (Oxford Univ. Press ed. 2016). Free trade agreements between Berne members likewise may qualify in this regard.

A. AGREEMENTS OUTSIDE THE SCOPE OF BERNE

If the agreement deals with something that is not otherwise dealt with in the Berne Convention, this should satisfy the conditions of Article 20. This might, indeed, be the case with the WCT, which adds two rights—distribution and rental—not mentioned in Berne and, in the case of distribution rights, specifically rejected at the SRC (although a number of members at that time included them within the general scope of reproduction rights).⁴⁹ The WCT “communication to the public” right was not a new right, as it subsumed and extended existing broadcasting and communication protection rights required under various articles of Berne.⁵⁰ However, there are other matters (such as ownership) not touched upon in Berne. It might be possible here to contemplate a special agreement that provides for author-protective mechanisms, such as the terms of publishing agreements or the reversion of rights to the author. Such an agreement would give authors further rights and would not be contrary to the provisions of the Berne Convention. Furthermore, unlike agreements with respect to duration, such extensions of protection will probably be the subject of national treatment in the case of authors from Berne member countries not party to the special agreement.⁵¹ If the aim of the special agreement is the protection of authors, such an outcome may be a desirable one as it will provide an incentive for non-special agreement members to adopt these measures in their own laws and become members of the special agreement.

B. AGREEMENTS CODIFYING STATE PRACTICE

It will be argued in the next section that Berne still leaves considerable room for individual interpretation and application by member countries. If this is so, could member countries take the next step of extending their individual interpretations on a bilateral or multilateral basis through the use of an Article 20 agreement between likeminded members? Examples might be agreements as to the level of originality required for protection of literary and artistic works, the treatment of specific categories of works such as photographs and works of applied art, and the scope of particular limitations or exceptions to protection (so long as within the three-step test). Such agreements could be viewed as a means of regularizing individual state practice and bringing about an increased level of uniformity amongst members. There appears to be no ostensible breach of Article 20 here, and this could be an effective means of codifying state practice.

49. RICKETSON & GINSBURG, at 660 (noting that a limited right over distribution is accorded in the case of cinematographic works under the Brussels Act of the Berne Convention, art. 14(1)(i)).

50. *See, e.g.*, Berne 1971, arts. 11(1)(ii), 11bis(1)(i)–(ii), 11ter(1)(ii), 14(1).

51. *Id.* at art. 19.

C. AGREEMENTS ON MATTERS ALREADY DEALT WITH IN BERNE

More controversially, Article 20 agreements may also be used to regulate matters that are already dealt with in Berne. The Marrakesh Treaty is a good example of this, as are other initiatives presently under consideration within WIPO regarding exceptions for libraries and archives. Apart from its intrusion into domestic legislation, the “Marrakesh Model” adopts the approach of mandating its exceptions within the framework of the three-step test. On its face, this does not seem contrary to either of the limbs of Article 20 (as is no doubt intended), but it does run the risk of limiting the freedom of contracting states to determine for themselves: (1) whether to have any exceptions in the first place; and (2) how these exceptions should be framed. The scope that is presently provided under Articles 9(2), 10, and 10bis of Berne and Article 10 of the WCT is now limited to the specific model mandated under the Marrakesh Treaty. In practical terms, this may not matter very much, as few will disagree with the worthy goals of the Marrakesh Treaty and the need to have meaningful exceptions in this area, while there is probably enough flexibility within the Marrakesh Treaty provisions in any event to allow member countries to adopt the provisions that best suit their needs. As a harbinger of things to come, however, mandatory exceptions in other areas clearly reduce national policy making autonomy and may undermine one of the virtues of the existing Berne/WCT system, which allows for creative legislative responses that reflect local cultural and social traditions. The possibility therefore arises that the use of Article 20 agreements to further this kind of agenda, though formally within the limits set by that article, may ultimately be less author-protective than they first appear.

Apart from the WCT and Marrakesh Treaty, special agreements under Article 20 have (perhaps regrettably) not yet been utilized by Berne members to pursue a progressive agenda in relation to authors’ rights. Countries have understandably preferred to seek solutions at the national level, where, as will be demonstrated *infra*, there is considerable flexibility.

V. GAPS IN THE BERNE/WCT UMBRELLA: IMMOVABLE OBSTACLES AND BENDABLE BOUNDARIES

The point to be made here is one that has not been lost on national policymakers and legislators, although often it may not be spelled out explicitly. It is this: in protecting foreigners—and considering whether to align these protections with those accorded to locals—countries have significant room for maneuver without having to step outside the Berne/WCT framework. While some restrictions remain—these might be called the “immovable barriers”—those remaining are relatively malleable or stretchy and might be called the “bendable boundaries”. The scope of these barriers and boundaries is ultimately a matter of treaty interpretation for each Berne member—and it must at once be said that a great deal of flexibility is already inherent in this process, as the rules of interpretation

embodied in the *Vienna Convention on the Law of Treaties* demonstrate.⁵² Let us begin by considering these bendable boundaries.

A. BENDABLE BOUNDARIES

It is not to be assumed that these are all “good” in themselves by reason of the fact that they represent an unregulated gap in Berne/WCT coverage: as the outline below will illustrate, some may be the very opposite in that they may lead to lack of uniformity and complications where authors come to exploit their works internationally. On the other hand, these flexible or bendable boundaries do exist and should be noted.

1. Works to be Protected and Issues of Originality

Berne Article 2(1) contains an extensive but inclusive list of literary and artistic works protected in member countries.⁵³ Inclusion in this list has sometimes been hard fought (photographic works and works of applied art), while other new media have been added relatively easily (cinematographic works and choreographic works). The majority, however, have been there from the original Berne Act 1886 and reiterate the language of pre-1886 national laws and bilateral treaties, reflecting late nineteenth century culture and aesthetics, for example, books, pamphlets and other writings, lectures, addresses, works of drawing, painting, architecture, sculpture, and so on. The list is indicative and exhortatory, with the starting point being that it includes “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as . . .” but much is still left to national laws by way of precise definition and the content to be given to the various productions then listed. It is also clear that certain productions are not included (sound recordings, phonograms and broadcasts), while subsequent paragraphs in Articles 2 and 2bis deal with what might be thought to be marginal cases, combining a series of mandatory (or inflexible) and permissive (flexible) obligations for Berne Convention members.

52. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, arts. 31–32.

53. “The expression ‘literary and artistic works’ 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.” Berne 1971, art. 2(1).

a. Fixation Requirements

Fixation requirements may be imposed as a condition of protection, either generally or with respect to specified categories of works—or not at all.⁵⁴

b. Derivative Works

Translations, adaptations, arrangements of music and other alterations of literary and artistic works are to be protected as original works, without prejudice to the copyright in the original work.⁵⁵

c. Official Texts

Members are to determine the protection (or lack thereof) to be given to texts of a legislative, administrative and legal nature, and official translations of such texts.⁵⁶

d. Collections

Collections of literary and artistic works, such as encyclopedias and anthologies which, by reason of the election and arrangement of their contents, constitute intellectual creations, are to be protected as such, without prejudice to the copyright in each of the works forming part of such collections.⁵⁷

e. Applied Art

Works of applied art and industrial designs and models may be protected to the extent determined by the law of the member country, with further provisions as to what happens where this is done solely by designs and model laws.⁵⁸

f. Facts

No protection is to be given under the Convention to “news of the day or to miscellaneous facts having the character of mere items of press information”.⁵⁹

g. Speeches

Certain limitations may be applied with respect to political speeches, speeches delivered in the course of legal proceedings, lectures, addresses and the like.⁶⁰

54. *Id.* at art. 2(2).

55. *Id.* at art. 2(3).

56. *Id.* at art. 2(4).

57. *Id.* at art. 2(5).

58. *Id.* at art. 2(7).

59. *Id.* at art. 2(8).

Within the interstices of these provisions, there is room for legislative fish to swim and play by way of definition and application at the national level, notably in such areas as applied art and fixation requirements. Outside the list, claims for protection under Berne remain a matter for national determination and members are free to extend the benefit of their laws' protection to foreigners as generously as they wish. Equally, they may decide that a particular non-listed production lacks the necessary attributes of a literary or artistic production and deny protection accordingly. For a period, this may have been the case with computer programs and compilations of nonliterary or artistic items, but collateral obligations under both the WCT and TRIPS Agreement now require their protection as literary and artistic works under Berne.⁶¹

The real flexibility, however, with respect to works to be protected lies in the determination of what is meant by the requirement that these be the works of "authors." Who is an author for this purpose and what level of original contribution or intellectual creation is required? Berne carefully steps around this issue, apart from its indication that, in the case of compilations of literary or artistic works, intellectual creation is required of the elements of selection and arrangement. More generally, the determination of who is an author, what constitutes authorial contribution, and what is encompassed by the notion of co-authorship, are matters that are left to each Berne member to determine for itself, with the consequence that the authors in some countries such as Australia, where the bar is set relatively low, may be unable to claim national treatment and rights specially granted in other countries where the bar is set higher.⁶² This lack of uniformity may be regretted, but it provides a principled basis on which a Berne Convention member country may refuse protection to productions that it regards of a less authorial or more "industrial kind" (sound recordings are a good historical instance of this, unoriginal databases are another, as are works "of small change" or insubstantial works such as words and short phrases). National laws will vary on their approach to such matters but may do so consistently within the parameters provided by the Berne Convention and the WCT.

60. *Id.* at art. 2bis.

61. WCT, arts. 4–5; TRIPS, arts. 9(1)–(2).

62. Arguably, Berne at least implicitly requires that an author should be a human being. See Ricketson, *People or Machines: The Berne Convention and the Changing Concept of Authorship*, 16 COLUM. J.L. & ARTS 1, 37 (1991). Further, art. 2(5) may set a ground floor requirement of some kind of "intellectual creation", thereby excluding tests based on "sweat of the brow" only. See Gervais, *The Compatibility of the "Skill and Labour" Originality Standard with the Berne Convention and the TRIPS Agreement*, 26 EUR. INTEL. PROP. REV. 75 (2004).

2. Exclusive Rights

There is also considerable flexibility permitted in the way the various exclusive rights provided for in Berne and the WCT are interpreted and applied by the member states. The following examples may serve to illustrate this general point.

a. Exclusive Reproduction Rights

At first sight, Article 9(1) appears comprehensive in its terms, namely “the exclusive right of authorizing the reproduction of these works [i.e., the works of authors protected under the Convention], in any manner or form,” coupled with a deeming provision in Article 9(3) that includes sound or visual recordings.⁶³ But closer inquiry reveals a number of questions left unanswered. Does reproduction mean only literal copies and, if not, how close must the reproduction be to the original?⁶⁴ Must it be of the whole of the work or will only part suffice, and, if so, how much? And must the reproduction be of a permanent kind, or does it include transient or temporary copies made in the course of other activities which may be lawful? Does infringement of this exclusive right require knowledge or intention on the part of the infringer or is liability strict? The first of these questions has received partial resolution through collateral obligations contained in the WCT and TRIPS with respect to the non-protection of ideas, procedures, methods of operation or mathematical concepts “as such,”⁶⁵ but the issues of quantum of taking and state of mind of the infringer are left unanswered,⁶⁶ while an attempt to clarify the issue of temporary reproductions was left unresolved by the 1996 Diplomatic Conference that adopted the WCT.⁶⁷

b. The Meaning of “Public” and “to the Public”

The scope of these terms, as related to the exclusive rights under Berne Articles 11, 11bis, 11ter and 14, and WCT Article 8, is left entirely to national legislators and courts to determine.⁶⁸ Recent litigation in the EU has shown that this gap may

63. Berne 1971, art. 9.

64. One early pre-Berne bilateral treaty provision addressed the issue of reproduction in more specific terms. Copyright Convention, Aus.-Sardinia, May 22, 1840, *translated in* BRITISH AND FOREIGN STATE PAPERS (1858). Austria and Sardinia. The scope of “piracy” is interpreted as follows: “[Piracy] takes place not only when there is a perfect resemblance between the original work and that which is reproduced, but also when under the same or a different title, an identity of object exists in the 2 works, and the same order of ideas, and the same distribution of parts are found in it. The work posterior in time is, in this case, considered as a piracy, even although it should have been considerably diminished or increased.” *Id.* at 1117.

65. WCT, art. 2; TRIPS, art. 9(2).

66. But an argument for strict liability would be easier to sustain if one interprets Berne to implicitly characterize the exclusive rights to be granted as property rights.

67. This matter is not dealt with in the agreed statement to WCT, art. 1(4).

68. Berne 1971, arts. 11, 11bis, 11ter, 14; WCT, art 8.

lead to highly unpredictable outcomes.⁶⁹ On the other hand, this ambiguity affords Berne countries considerable flexibility in determining the dividing line between the public and private spheres and between liability and non-liability. As in the case of reproduction rights, no indication is given in the Convention texts as to matters of quantum or the state of mind of putative infringers.

c. Intermediary Liability

Other than indirectly, none of the convention provisions with respect to exclusive rights deals with the issue of secondary or intermediary liability, leaving this as a matter for national laws to determine in accordance with their own legal doctrines and traditions.⁷⁰

3. Exceptions and Limitations

Much current debate is taken up with discussions of exceptions and limitations, often with the underlying assumption that Berne and the WCT provide unreasonable restrictions on what can be done. This frustration can be readily understood, but there is nonetheless a degree of flexibility in the miscellany of exceptions and limitations provided for under Berne and the WCT, although some of them may now appear tied to older times and technologies.

a. Compulsory Licenses

The possibility of compulsory licenses is specifically provided for in three situations: (1) the mechanical reproduction of musical and literary works (an

69. The starting point in this confusing situation is *Svensson v Retriever Sverige AB*, and subsequent decisions at national and European Union Court levels have added further glosses to the initial insistence of the CJEU on the need for a “new public”. Case C-466/12, E.C.R. 2014. These decisions are admirably reviewed in a series of reports and opinions published by the International Literary and Artistic Association (“ALAI”). See ALAI, Report and Opinion on a Berne-Compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet (2015), <https://perma.cc/AX8X-3LCX>; ALAI, Opinion on the Criterion “New Public”, developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public (2014), <https://perma.cc/ZF88-KG92>; ALAI, Report and Opinion on the Making Available and Communication to the Public in the Internet Environment—Focus on Linking Techniques on the Internet (2013), <https://perma.cc/K5EM-WQVL>.

70. The verb “authorizing” is used in the various provisions on exclusive rights in Berne, but its meaning is various. *E.g.* “the exclusive right of authorizing the reproduction of...” Berne 1971, art. 9(1). In some jurisdictions, such as Australia and the United Kingdom, where the rights of the author are framed in terms of “doing” and “authorising the doing” of acts falling within these exclusive rights the notion of “authorization” has been extended beyond what might be regarded as acts of primary or direct liability to include acts that, in other systems, would be dealt with under doctrines of vicarious or contributory liability. Copyright Act 1968 s 36(1)–(1)(a) (Austl.); Copyright, Patents and Designs Act, 1988, c. 48 § 16 (Eng.). It is unclear whether the use of “authorizing” in Berne was ever intended to have this wider operation, and certainly the various revision conferences do not indicate that delegates were ever thinking of wider issues of intermediate, rather than direct, liability here.

instance of what was originally perceived to be one of market failure); (2) the broadcasting and certain other communications of literary and artistic works (an instance of a public interest intervention at the time of the introduction of a new technology); and (3) the reproduction and translation of works in developing countries for education and training purposes.⁷¹ These licenses are subject to various conditions, including the payment of equitable remuneration and respect of moral rights.

b. Quotations

Quoting from works made lawfully available to the public is permissible provided the act is “compatible with fair practice, and their extent does not exceed that justified by the purpose, . . .” with a requirement of identification of the source and the name of the author if this appears on the work.⁷² Unlike other exceptions under the Berne Convention and WCT, this is couched in mandatory terms (“It shall be permissible to make quotations. . .”), and the meaning and scope of what is meant by “quotation” is left open to interpretation, as is the purpose for which the quotation is made. This leaves considerable latitude to national legislators to shape a quotation exception in accordance with their own social and cultural traditions: all that Berne requires is that they should have one and that it meets the conditions of fairness, appropriateness for the purpose, and identification of source and author. It may be that the potential of this provision has not been fully appreciated by many at the national level; for example, in Australia, the only relevant provision is concerned with criticism or review and does not go beyond.⁷³

c. Teaching Uses

Use by way of illustration in publications, broadcasts, or sound or visual recordings for teaching purposes is also allowed, provided this is compatible with fair practice and the source and author are identified. Unlike article 10(1), there is no onus on Berne Convention members to have such an exception (“It shall be a matter for legislation in the countries of the union . . . to permit. . .”), and no particular limits are placed on the interpretation of the requirement of “fair practice” by national laws.⁷⁴ It is also contemplated that countries may conclude special agreements between themselves on such exceptions (presumably consistently with Article 20).

71. Berne 1971, arts. 13(1), 11bis(2).

72. *Id.* at art 10(1).

73. Copyright Act 1968 s 42 (Austl.). For a challenging argument that art.10(1) provides the basis for a wider mandatory fair use exception, see Tanya Aplin & Lionel A.F. Bently, *Displacing the Dominance of the Three-step Test: The Role of Global, Mandatory Fair Use*, in *COMPARATIVE ASPECTS OF LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW* (Wee Loon Ng et al. eds., forthcoming), <https://perma.cc/YJ8Y-643K>.

74. Berne 1971, arts. 10(2), 20.

d. Press Usage

Berne allows for various uses by the press of articles published in newspapers or periodicals on current economic, political or religious topics in cases where such uses have not been expressly reserved.⁷⁵ This is not subject to a fair practice condition, although there is a requirement that the source be indicated. Potentially, it provides for free use of many newspaper and periodical articles, but may, of course, be easily negated by the making of an express reservation by the author which, presumably, is a form of formality that is permissible, notwithstanding Article 5(2).⁷⁶

e. The Three-Step Test

Under Berne, the three-step test applies only to reproduction rights, but it is applied to distribution, rental and communication rights under article 10 of the WCT, and, even more expansively, to all exclusive rights under article 13 of the TRIPS Agreement.⁷⁷ Much scholarly and some legislative effort has been expended in sketching out the limits of this test: on one side are those who believe each of the three steps must be satisfied in turn before a limitation or exception is allowed⁷⁸, and on the other, those who favor a more generous overall assessment (for example, with the three steps collapsed into one).⁷⁹

Even with a narrower interpretation, the three-step test has certain features that allow national policy makers and legislators considerable flexibility. The test is neutral as to the purpose of the excepted use, although normative considerations may well be relevant in applying the second step. As a corollary, there is no limitation on the number of exceptions that may be brought within the test: each will stand or fall on its own merits. Member states are free to adopt such exceptions as they wish, or not at all. Quite apart from its prospective operation—a matter expressly addressed in the agreed statements to WCT Article 8—the three-step test has a retrospective application in that it was intended to include all previous exceptions existing under national laws.⁸⁰ It may also justify the

75. *Id.* at art. 10bis(1).

76. *Id.* at art. 2.

77. *Id.* at 9(2); WCT, art. 10; TRIPS, art 13.

78. *See, e.g.*, 17 U.S.C. § 110(5); Status Report of the United States, Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute United States – Section 110(5) of the US Copyright Act, WT/DS160 (Feb. 16, 2018), <https://perma.cc/V6ZZ-QZ9X>.

79. Christophe Geiger et al., *Declaration: A Balanced Interpretation of the “Three-Step Test” in Copyright Law*, 39 INT’L REV. INTELL. PROP. & COMPETITION L. 707 (2008) (arguing that the three-step test “should be interpreted so as to ensure a proper and balanced application of limitations and exceptions”); Wittem Group, European Copyright Code, art. 5.5, IVIR, <https://perma.cc/DK7T-XKW3> (proposing an alternate approach allowing exceptions “provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties”); Martin Senftleben, *Copyright, Limitations and the Three-Step Test*, 1 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 67, 69, 75 (2010).

80. WCT, art. 8.

imposition of compulsory licenses as a means of meeting the requirements of the third step (no “unreasonable prejudice to the author”), although it is possible that the scope for such licenses will be larger under the more generous interpretation referred to above.

f. Implied Exceptions

There is a series of implied exceptions that are applicable in the cases of performing, recitation and broadcasting rights (the “minor reservations” doctrine), and translations of works where these may be lawfully used in the case of the originals under the various exceptions discussed above.

Overall, there is considerable latitude allowed under these provisions for creative solutions at the national level that are still consistent with the Berne/WCT requirements.

B. IMMOVABLE OBSTACLES

Two here require particular mention: terms of protection and the no formalities rule. Both pose significant obstacles to reform initiatives, and ways around them are not easy to discern, although the second may be less immovable – more permeable, perhaps? - than might at first appear.

1. Terms of Protection

One seeks in vain for clear explanations as to why particular terms of protection have become enshrined in the Berne Convention, apart from generalized statements about the need to protect authors and their descendants and the desirability of having uniform terms (ever upward) when works are exploited across borders. Economic and social analysis of the kind that we often see at the national level has not been a feature of the various revision conferences of Berne, notably that of Berlin in 1908, when the present term of life plus fifty years was adopted. Some shorter terms, however, do exist in the “marginal cases” of applied art, photographic works, and cinematographic works.⁸¹ Leaving aside categories of works where it might well be argued that the term of author’s life plus fifty years is hardly justified in terms of the incentive provided and the economic life of the work (computer programs are a good example), there is the problem that, after a time, a greater proportion of all works fall into a kind of empty space where they remain in protection but are unused and/or inaccessible, as well as possibly being impossible to track down because authors and successors are unknown (the vexed problem of orphan works). This cultural, social and economic dead loss is

81. Berne 1971, art. 7(2)–(4); *cf.* WCT, art. 9.

facilitated by long minimum terms: while it would be possible for country A to prescribe that the works of its own authors fall into the public domain after a given time—a fixed period, on the death of the author, or a shorter terms of years after death—to apply this to non-country of origin works claiming protection under Berne would be clearly contrary to Article 7(1).⁸² One possible way around this problem may be to provide for reversion of rights that have been transferred by the author back to him or her or their successors after a given period of time so as to encourage continued exploitation and availability of the work, but: (1) this may not solve the problem of orphaning where the work that has not been transferred in the first place, and (2) there may be a problem with the no-formalities rule in Article 5(2) if some notice or recordation requirement is imposed in order to facilitate the reversion and to provide notice to third parties.⁸³ There may be some creative solutions that can be adopted here, as Dr. Gilbin has suggested⁸⁴, but the fact remains that shortening the Berne terms is not one of them. The conclusion therefore must be that this is an immovable barrier to any project of copyright reform that affects the protection of authors and works from other Berne Convention countries.

2. The “No-Formalities Rule”

Along with long terms of protection, the “no-formalities rule” has long appeared to be a major inhibiting factor in the operation of the international copyright system, and one that can only be modified or changed through the ungainly process of revising Berne. On closer scrutiny, however, there may be less immovability with the rule than first appears. Its terms are worth revisiting: “The enjoyment and exercise of these rights [the rights accorded under national treatment and rights specially granted] shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.”⁸⁵ In general terms, “enjoyment” can be equated with subsistence, while “exercise” can be equated with exploitation and enforcement. While Article 5(2) does not touch upon national decisions to impose registration, notice or similar requirements on domestic works, it does not exclude the possibility of making these requirements optional in the case of works claiming protection under Berne and even providing incentives to do so in the form of additional remedies or other procedural advantages that do not otherwise prevent the enforcement of rights.⁸⁶

82. Berne 1971, art. 7(1).

83. This might not be a problem if such requirements are seen as applying to questions of ownership and entitlement rather than the existence and enforcement of rights. See Jane C. Ginsburg, *With Untired Spirits and Formal Constancy: “Berne-Compatibility of Formal Declaratory Measures to Enhance Copyright Title-Searching*, 28 BERKELEY TECH. L.J. 1583, 1584–86 (2014).

84. Rebecca Gilbin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 COLUM. J.L. & ARTS 369 (2018).

85. Berne 1971, art. 5(2).

86. But for an argument to the contrary in relation to additional or “Berne plus” remedies, see Ginsburg, at 1597–1601.

Several Convention provisions also allow for what might be called formalities in other circumstances—making protection dependent upon fixation in material form is one and the possibility of reservations with respect to the exercise of certain user rights under Article 10*bis* is another.⁸⁷ Furthermore, the prohibition on formalities in Article 5(2) does not extend to formalities affecting the transfer and licensing of rights, such as the need for these to be in writing and signed by the grantor or grantee: they do not constitute formalities on the exercise and enjoyment of the rights protected by Berne as they deal with the persons entitled to those rights and do not impact subsistence or enforcement. The scope for permissible formalities may even go beyond this to include what Professor Ginsburg has labelled “declaratory measures” to enhance title searching, for example, notification requirements in relation to rights reversions.⁸⁸ Hence, there is a degree of flexibility within Article 5(2) for national legislators to adopt formality requirements that will still be Berne-compliant, while avoiding the need for revision of the provision itself.⁸⁹

VI. CONCLUDING COMMENTS: THOUGHTS FOR THE FUTURE

More than two decades before the adoption of the Berne Convention (in 1858), a group of distinguished authors, publishers and academics met at a Congress on Literary and Artistic Property in Brussels to propose, for the first time, the creation of a universal law for the protection of authors’ rights in their literary and artistic works.⁹⁰ This idealistic goal has never been realized, and, indeed, is unlikely to be so in the foreseeable future, other than, perhaps, in limited regional arrangements between likeminded states. The present system, which has existed since the late nineteenth century, is concerned only with protection to be given to non-country of origin works in each contracting country. But this Article has also demonstrated that this system has several mechanisms that operate towards an overall harmonization of protection of authors at both the national and international levels. Thus, as a starting point, countries will usually seek to align whatever protection must be given to domestic authors with the obligations they have assumed to foreign authors with respect to rights specially granted. On the other hand, countries are also aware that changes to their laws affecting authors will usually then be applicable to foreign authors as an incidence of the requirement of national

87. Berne 1971, arts. 2(2), 10*bis*(1).

88. Ginsburg, at 1593.

89. An argument may nonetheless be made here that formalities, even if Berne-compatible and desirable so far as authors and rights owners in developed countries are concerned, may bear unnecessarily harshly on authors in developing countries where the technological infrastructures required for registration and searching systems may not be so easy to access. I am grateful to Dr. Rebecca Giblin for this observation.

90. See further RICKETSON & GINSBURG, at 9, 44–49. For a summary of the proceedings of the Congress, see *ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE, ARTISTIQUE ET LITTÉRAIRE* (1858), 401–63. For the full proceedings and records, see E. ROMBERG, *COMPTE RENDU DES TRAVAUX DU CONGRÈS DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* (1859).

treatment. There is a kind of symbiotic relationship in operation here, with international and national obligations operating in a continuous loop.

Furthermore, it should not be thought that the international framework is as rigid as might first appear. At the international level, changes to the Berne Convention itself seem highly unlikely, notwithstanding its built-in mechanism for revision and its past history of successive but incremental revisions. However, if overall revision is a remote possibility, the option remains for a special agreement that would meet the requirements of Article 20 and, in all probability, provide a vehicle for incremental advances as between groups of likeminded states. Leaving aside changes at the international level, this Article also argues that the international framework itself is not as inflexible as it might first appear when it comes to the things that national policy makers and legislators may do. Many of its boundaries are bendable, in that they provide space for the making of national decisions that will still comply with Berne, but which will allow contracting countries to achieve many of their own goals and objectives. And although there are some immovable barriers, such as term and formality requirements, in the case of the latter, there are various options that may be adopted without contravening international obligations. A nuanced and careful approach is required, and perfection in outcome may never be possible, bearing in mind the aphorism that the perfect should not become the enemy of the good. Nonetheless, much may still be achieved within the existing framework that promotes the objectives both of author protection and the wider public interest.