

1986

The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part 2]

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Source Publication:

International Review of Industrial Property and Copyright Law (now International Review of Industrial Property and Competition Law). Volume 17 (1986), p. 715.

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Recommended Citation

Vaver, David. "The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part 2]." *International Review of Industrial Property and Copyright Law (now International Review of Industrial Property and Competition Law)* 17 (1986): 715.

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Bureau headed by the Director General. This also has the advantage for the Berne Union that a large efficient office is available to carry out its resolutions and tasks. The Union as such is maintained. I would like to close with the wish that in the future, in a world in which technology plays a paramount role and countries belong to different groups depending on their social and political structure, the Berne Union still adheres to its tradition and remains a uniting force for the protection of works of literature and art.

J.K.

David Vaver*

The National Treatment Requirements of the Berne and Universal Copyright Conventions Part Two**

4. RBC Rome 1928, Art. 19: an Exception to National Treatment?

The discussion up till now has not mentioned a possible problem for states bound by RBC Berlin 1908 or Rome 1928. Under Art. 19 of those texts: "The provisions of the present convention shall not prevent a claim being made for the application of any wider provisions which may be made by the legislation of a country of the Union in favour of foreigners in general." This confusing Article, first introduced in RBC Berlin 1908, was eventually amended at Brussels 1948 by removing the final words, "in favour of foreigners in general", after an attempt to do so at Rome in 1928 failed.⁹⁸

Read literally, Art. 19 suggests that RBC members can claim rights greater than the RBC *minima* only when the other RBC forum extends such protection to "foreigners in general".⁹⁹ If the legislation simply grants greater rights

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** Part One of this article was published in 17 IIC 577 (1986).

⁹⁸ RAESTAD, *supra* note 30, at 229; LADAS, *supra* note 3, at 190 *et seq.* Some minor inconsequential drafting changes were made to Art. 19 at Stockholm 1967, principally the substitution of "greater" for "wider" before "protection".

⁹⁹ "Documents", *supra* note 45, at pp. 105, 379.

to its own nationals, Art. 19 arguably would not apply. This would then undercut the fundamental principle of BC 1886 that a BC author should be able to claim national treatment if the national legislation confers larger rights on nationals alone.

Fears that Art. 19 in its original form had this effect seem in hindsight unwarranted. Before 1908, some Belgian courts had held that RBC members could claim only the minimum rights guaranteed by the RBC even though Belgian law conferred greater rights and made them available to foreigners generally, without condition of reciprocity. Under this theory, the RBC prevented its members obtaining protection an RBC state purported to extend to all foreigners. Disagreeing with this interpretation, the Belgium delegation at Berlin, with Italy's support, proposed an amendment to overturn these views which it feared might gain currency in other RBC states. Moreover, non-RBC states might be deterred from joining the Union if they thought that their authors would lose existing protection.

The amendment Belgium proposed accurately reflected its intention by confirming that RBC protection was only a minimum and was without prejudice to more liberal national laws.¹⁰⁰ Unfortunately, although Belgium's reasoning appears to have been adopted,¹⁰¹ the language of its proposed amendment was not. The proposal was redrafted and passed in the delphic form set out in Art. 19.

The apparent inconsistency between Arts. 4 and 19 of RBC (Berlin and Rome) justifies recourse to the Berlin *travaux préparatoires*. These indicate that Art. 19 was inserted out of abundant caution. It did not intend to cut down the basic principle of national treatment in Art. 4 of RBC Berlin and Rome; nor did it intend to expand the concept of author's rights. Rather, it intended to deal with the special case of a domestic law that was drafted to cover both nationals and all foreigners: RBC nations could claim the benefit of such a law. Article 19 did not intend that they could claim wider protection *only* in such a case: this would be inconsistent with Art. 4(1). The Brussels 1948 amendment, in eliminating the last six words of Art. 19, returned to a form of wording that eliminated the possibility of any argument and reinforced the intent of Art. 4(1).

RBC (Berlin and Rome) Art. 19 therefore does not affect the basic principle of national treatment set out in Art. 4 of those Conventions. Nor does Article 19, as it has appeared in its current form since RBC (Brussels 1948), in any way affect the above analysis of the national treatment provisions in the 1948 and later texts.

100 "Procès-Verbaux", *supra* note 61, at pp. 94-96.

101 *Id.*, 148-149.

5. What Rights Are Subject to National Treatment under the RBC?

What "rights" fall within the national treatment requirement of RBC (Paris 1971) Art. 5(1)? The provision itself includes three classes:

- (a) rights which a country's laws presently grant to nationals;
- (b) rights which a country's laws later grant to nationals;
- (c) rights specially granted by the Convention.¹⁰²

Ladas argues that "rights" should be broadly interpreted; any other view would be a "dangerous theory".¹⁰³ But what is meant here by "rights"? As is common in legal matters, the black and white ends of the spectrum are clear enough; it is the grey shading in the middle that causes difficulty.

At an abstract level, the owner of a right must possess it against some person(s); the right relates to some act or omission of that person and must be enforceable by law.¹⁰⁴ As used in the RBC, an author's right tracks the primary meaning common to most national copyright laws: an author has in relation to his/her work the right to exclude others from reproducing or using the work in some way. The RBC extends this primary meaning to include a right to receive remuneration from the user of the work, even where the author is unable to prevent the use.¹⁰⁵ Again, the right must be understood in the sense contemplated by the RBC and not merely a state's domestic law.

One can envisage a state compensating authors for uses made of their works, in ways that fall outside this concept of rights. Thus, a state might choose to protect a work's ideas rather than its expression. It would then depart from the RBC understanding of authors' rights and, for that matter, copyright; such a right would be outside the RBC. More specifically, if home taping of copyright works was thought detrimental to authors, a scheme could be established whereby home taping was made legal. To compensate authors for such uses, the government could then distribute monies from a fund set up from general taxation or even from taxation specially levied on manufactur-

¹⁰² The provision in essentially this form dates back to RBC Berlin 1908, Art. 4. Indeed, apart from the rights mentioned under (c), it dates even further back to the original BC 1886, Art. 2.

¹⁰³ LADAS, *supra* note 3, at 268. See too *Gribble v. Man. Free Press Co. Ltd.*, *supra* note 19, at 573.

¹⁰⁴ FITZGERALD (ed.), "Salmond on Jurisprudence" (12th ed., 1966, Sweet & Maxwell, London), 221-222.

¹⁰⁵ As in RBC (Paris 1971) Art. 11^{bis}(2) where the author's right to authorize public radiodiffusion of his/her works may be regulated by the state, but not so as to prejudice the author's moral right or the author's right to receive an "equitable remuneration".

ers of home taping hardware or software. The author would have a "right" against the fund but it would not be in respect of a particular use by a particular user, any more than paying the proceeds of a tax levied on the manufacturers of handguns to the victims of gun crimes would be considered a victim's right against gun manufacturers. This sort of "right" may well be beyond the concept of "rights" contemplated by Art. 5(1); if so, it would not be subject to the principle of national treatment.¹⁰⁶

Article 5(2) does not affect this conclusion.¹⁰⁷ It refers in its first sentence to the "enjoyment and exercise of *these* rights", *i.e.*, the rights just mentioned under Art. 5(1). In its second sentence, it refers to "the author" and "his rights". Article 5(2) therefore intends to elaborate the consequences of the principle of assimilation but does not intend to enlarge the basic concept of "author's rights".¹⁰⁸

This view concedes a state's power to deal with a perceived inequity by means other than granting an individual a legal cause of action against a wrongdoer. Nothing in the RBC requires a state to benefit authors by providing solutions within a copyright framework if it considers another scheme to be politically, economically or socially more expedient. Thus, *domaine public payant* (royalties from public domain works paid into a fund to support living authors), social security payments, and tax reductions or subsidies given to authors in respect of the publication of their works are not "rights" subject to Art. 5(1).¹⁰⁹

The sort of rights that are subject to Art. 5(1) seem to be rights expressly enumerated in the RBC, either as rights states are obliged or entitled to grant, or rights *in pari materia*. Thus, as suggested above, a state could grant the author of a computer program in source or object code the right to convert it into machine code. Special mention however should be made of the *droit de suite* and the public lending right.

106 STEWART, "International Copyright in the 1980s" 28 Bull. Cop. Soc. 351, at 368-369 (1981) (STEWART III); *cf.* STEUP, *supra* note 41, at 287. A state acting thus might be in breach of RBC (Paris 1971) Art. 9(1) by not sufficiently providing for the author's right to authorize reproduction of his/her work or going beyond the exceptions to that right permitted in Art. 9(2), but that is another matter.

107 The provision appears *supra*, in text following note 22.

108 Commentators who concentrate on Art. 5(2) to claim that any scheme benefiting authors must be granted national treatment thus miss the point: *see, e.g.*, SEEMAN, "A Look at the Public Lending Right" 30 ASCAP Cop. Law Symp. 71, at 94-96 (1980).

109 STEUP, *supra* note 41, at 284.

(a) Droit de Suite

Prior to the RBC 1928, firm BC adherents such as France and Belgium introduced a *droit de suite* in 1920 and 1921, entitling artists and their heirs to a share in the increased value of their copyright works when publicly sold, but extended its application to foreigners only on the basis of reciprocity. No country commented adversely on this limitation at Rome in 1928 where a *voeu* requesting states to consider adopting a *droit de suite* was adopted. Nor did they in 1948 at Brussels when the right almost failed to be introduced after the British, Dutch and Nordic delegations felt unable to accept it as a conventional obligation. The Dutch delegation specifically denied that the right could be considered an "author's right". A compromise was reached: the *droit de suite* was introduced as Art. 14^{bis} of the RBC but no member was obliged to enact it. Moreover, the right was subjected to material reciprocity rather than national treatment.¹¹⁰

Up to 1948, therefore, a general consensus existed excluding the *droit de suite* from the "rights" covered by Art. 5(1). It is now excluded from the national treatment provision because of the express provision in RBC (Brussels) Art. 14^{bis} (now RBC (Paris 1971) Art. 14^{ter}) subjecting it to material reciprocity. It would thus be paradoxical if a state bound to the RBC prior to Brussels 1948 were obliged to extend national treatment if it enacted a *droit de suite*, but a state bound at the level of Brussels 1948 or later had to grant material reciprocity only. Especially in light of the historical trend to increase levels of protection with each successive revision of the BC, this paradox cannot represent the legal position.

In truth, the *droit de suite* is exceptional in a scheme either of copyright or author's right: it does not relate to the use of the work, but rather to the obtaining of a share of the profits on resale. Nor is it a right to exclude or to receive compensation on use.¹¹¹ As an exceptional non-obligatory right exempt even under the latest RBC text from the fundamental principle of

110 "Documents", *supra* note 45, at 362-368. Cf. RAESTAD, *supra* note 30, at 73 *et seq.*

111 *Accord*: KATZENBERGER, "The 'Droit de Suite' in Copyright Law" 4 IIC 361, 378-379 (1973); ULMER, *supra* note 41; "WIPO Guide", *supra* note 3, at 92 (semble); RECHT, "Has the 'Droit de Suite' a Place in Copyright?" 3 UNESCO Cop. Bull. 51 (1950).

Contra: LADAS, *supra* note 3, at para. 123; NORDEMANN, "The 'Droit de Suite' in Article 14^{ter} of the Berne Convention and in the Copyright Law of the Federal Republic of Germany", Copyright (1977), 337 at 340 (as from 1948); "The Charter", *supra* note 5, at 29 (no reasoning is offered to support the conclusion); SCHULDER, "Art Proceeds Act: A Study of the 'Droit de Suite' and a Proposed Enactment for the United States" 61 Nw. U.L.R. 19, 42-43 (1966) (but the reasoning appears vitiated by the wrong assumption at n. 91 that France has always considered the *droit de suite* as an author's right and available to all RBC states without condition of material reciprocity).

national treatment, it does not support an argument that the fundamental concept of authors' rights has somehow changed since 1948.

(b) Public Lending Right

A number of countries have introduced a public lending right for books but have not extended it to foreigners.¹¹² If the scheme takes the form of giving the author a right to receive remuneration from an entity such as a library each time it authorizes a person to borrow his/her book, a good argument exists for treating the right as an "author's right" under Art. 5(1). It is a right to receive remuneration on use of the work, a sort of right of distribution or renting right. Whether or not a state includes the scheme in its copyright legislation is irrelevant to the obligation to provide national treatment.¹¹³

Many states compensating authors for public lending have not proceeded in this way. They have reached an equivalent result by setting up a fund established from general revenue or by specific taxation on lending facilities, and distributing it in some predetermined manner to authors. Such a scheme is more a form of welfare legislation directed towards a particular class than a form of "author's right" against any user or lending facility in respect of a particular use of the author's work: it may well be outside Art. 5(1).¹¹⁴

D. Universal Copyright Convention

As is well known, the purpose of the UCC was to allow countries – principally the United States, but also other Pan-American and Asian countries – whose copyright principles and requirements prevented them joining the RBC to adhere to an international copyright treaty that included RBC members, and thus to minimize "back-door" reliance on the RBC. It was recog-

112 For a summary of countries, see BROPHY, "A Guide to Public Lending Right" (1983, England), para. 1.10.

113 ULMER, *supra* note 41, at 22–23; STEUP, *supra* note 41, at 281–282. See also 1931 H.C. Debates (Canada), at p. 2432: "If something in the Copyright Act is in contravention of the Rome convention, we have no right to put it somewhere else" (Mr. Rinfret).

114 STEWART III, *supra* note 106; STEUP, *supra* note 41, at 288. Contrary views (a) simply assert that every right flowing from authorship is subject to national treatment, without analyzing the concept of a "right" (e.g., NORDEMANN, "Public Lending Rights in Federal Germany" 90 R.I.D.A. 61, at 82–83 (1976)); or (b) wrongly focus on Art. 5(2) without appreciating that provision does not enlarge the concept of "rights" under Art. 5(1) (see, e.g., SEEMAN, *supra* note 108).

Of course, whether or not the scheme appears in a state's copyright law is irrelevant: the accident of location does not turn a "non-right" into a "right", and vice versa.

nized from the start that the UCC would be practically worthless unless the United States joined and that the achievement of this goal would require a less comprehensive and coercive treaty than the RBC. Obtaining political approval to the UCC in the United States would be difficult enough without expecting the U.S. to make major legislative changes to the works and rights requiring protection. Just as was the case with the BC 1886, a modest treaty would, in Judge Wyzanski's metaphor, be a stairway which states would slowly mount, step by step, perhaps ultimately reaching the landing of a unified RBC/UCC.

It is thus not surprising that the UCC, as eventually drafted in 1952 and even as revised in 1971, covers fewer works and gives states greater discretion and flexibility in the nature and degree of protection for those works than does the RBC.

1. What Works Fall under the UCC?

Article I of the UCC reads: "Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture."

Articles II.1 and II.2 reject the principle of material reciprocity and endorse the principle of assimilation: UCC nationals "shall enjoy the same protection" for their published and unpublished "works" in another UCC state as nationals of the latter. Apart from a requirement to protection certain minimum rights first introduced in the 1971 text of the UCC,¹¹⁵ the provisions of Arts. I and II in the 1952 and 1971 texts of the UCC are identical.

In its ordinary meaning, the language of Art. I imposes two obligations. First, states must "provide for adequate and effective protection" of authors' rights. This gives them greater flexibility than RBC states over what rights should be accorded to works and how the rights should be qualified. Secondly, like the RBC, the rights must be those of "authors . . . in literary, scientific and artistic works".

All these terms must have a Convention meaning, not whatever meaning states choose to give them. States must therefore ensure that all works qualifying as literary, scientific or artistic are included in their copyright laws, except to the extent that *travaux préparatoires* reveal a contrary intent. As

115 See UCC 1971, Art. II.1, II.2, IV^{bis}.

will be discussed below, the *travaux* do indeed permit states a certain limited discretion to depart from the well-established meaning of the phrase in certain cases but, significantly, do not indicate that states are entirely free to interpret these words as they think fit. Article I could have been drafted: "each state undertakes to protect the rights of authors *in such works as each state in its own unfettered discretion decides to be* literary, scientific and artistic works". But it was not, nor was any suggestion of this kind made at the Conference, nor is there any reason to interpret Art. I as if those words were there. Otherwise, a state could comply with Art. I by including only the specific examples in Art. I and adding books, logarithm tables and paintings. It could say in all good faith that, after due deliberation, it has decided to return to 18th century notions of copyright and recognize only the latter additions as literary, scientific and artistic works. The UCC framers certainly did not contemplate this result. Yet the result would follow if the term "literary, scientific and artistic works" were not given a meaning fixed by the Convention as including all present and future works falling fairly within that phrase.

For the reasons already elaborated in connection with the RBC,¹¹⁶ "works" in Art. II, and indeed in the many other Articles in which that word appears, must mean those works covered by Art. I: any other conclusion would mean that this key word has some fluctuating meaning varying from one provision to another. Therefore, a work that is not "literary, scientific and artistic" or that is not specifically enumerated in Art. I is not protected by the UCC.¹¹⁷

Two objections may be made to this view. The first appeals to state practice. Both RBC and UCC states frequently extend the protection of the whole of their copyright laws to all other Unionist states, without limiting the categories of works to those falling under Art. I. Thus, the United States extended the protection of its Copyright Act 1976 generally to all published UCC works as "work" is defined in secs. 102 and 103 of that Act.¹¹⁸ But state practice such as this is ambiguous and thus legally irrelevant. A state may

116 Text *supra* accompanying notes 34 *et seq.*

117 *Accord*: BOGSCH, "The Law of Copyright under the Universal Copyright Convention" (3rd rev. ed., 1968), at pp. 11, 7; DE SANCTIS, "The International Copyright Conventions", Copyright (1978) 254, at 256-257; STEWART I, *supra* note 39, at para. 6.05; KARNELL, *supra* note 78; ESCARRA, "La Convention universelle du droit d'auteur du 6 septembre 1952" 6 Rev. Trim. de Dr. Comm. 65, at 67-68 (1953). The *travaux préparatoires* support this conclusion: UNESCO, "Records of the Intergovernmental Copyright Conference, Geneva, 18 August - 6 September 1952" (1955, Switzerland), at pp. 74 ("Rapporteur-Général's Report" on Art. I), 130-137, *passim* (Main Commission Minutes).

118 17 U.S.C. s. 104(b). But note that semiconductor chips, at one time mooted for ordinary copyright protection, were eventually subjected to material reciprocity rather than national treatment: *see* note 4, *supra*.

conclude that the costs of discriminating between states depending upon what works they protect or of including material reciprocity provisions outweigh the benefits that the simplicity of national treatment involves. Alternatively, the extension may have been because of other bilateral or multilateral obligations binding the state, or may have been voluntary for broader strategic reasons such as those suggested at the beginning of this study.¹¹⁹

Secondly, Ulmer appears to take a different view on this point from the one he correctly took on the similar point under the RBC.¹²⁰ His premise is that a "work" can fall under Art. II even though it is excluded from the obligation of Art. I. So architecture, which Ulmer excludes from the obligation of Art. I, can fall under Art. II. However records, also outside Art. I, do not according to Ulmer fall under Art. II: they are not "works" in the UCC sense because they fall under neighbouring rights, not copyrights.¹²¹ Relying on the same premise as Ulmer, Dawid reaches the opposite conclusion: records are "works" under Art. II.¹²²

That two commentators can reach a diametrically opposite result while starting from the same premise suggests that the premise is wrong. Ulmer is right in saying that records do not fall under the UCC, but this is not simply because they are not "works": it is because they are neither *literary, scientific or artistic works* nor the works of an *author*. They do not fall under Art. I; therefore, they do not fall under Art. II. Ulmer's architecture example is similarly right for the wrong reason. Ulmer correctly seems to accept that architecture is under Art. I an artistic work of an author, but one that, according to the UCC *travaux*,¹²³ states are free in their discretion to exclude from protection. He fails to note that architecture is subject to national treatment under Art. II not merely because it is a "work" but because it is an *artistic work*, albeit subject to optional protection.

The interpretation we have suggested ensures that the relationship between RBC (Paris 1971) Arts. 2(1) and 5(1) (and corresponding provisions in previous texts) and UCC Arts. I and II is symmetrical. Apart from this logical neatness, the result was no doubt intended both by the RBC adherents to the

119 See text accompanying note 6, *supra*. Indeed, in the case of the U.S. Copyright Act of 1976, only the extension of protection to U.N. or O.A.S. publications was claimed to be "a treaty obligation of the United States" (House Report No. 94-1476 (94th Cong., 2d Sess., 1976), at p. 58); the silence on other treaty obligations may imply that the U.S. was surpassing them in some respects.

120 *Supra* note 41, and accompanying text.

121 *Supra* note 41, at p. 21.

122 *Supra* note 31, at 7.

123 Text *infra* accompanying note 125 and notes 145-146.

UCC familiar with the RBC structure and by the non-RBC states that looked on the UCC as a bridge towards future adherence to the RBC. A contrary interpretation unnecessarily forces the word "work" in Art. II to carry some undeterminable and unbounded meaning that it has hitherto not had: anything a state in its own discretion chooses to call copyrightable subject-matter.

States nevertheless have some discretion in defining the concept of "work". Just as for the RBC,¹²⁴ they may require a degree of intellectual creativity as a condition of protection. Further, although "work" will normally imply fixation in material form, this may not be a necessary element. True, the RBC provision, dating back from Rome 1928, that a work includes "every production . . . , whatever may be the mode or form of its expression", a phrase that arguably makes fixation optional, was deliberately not included in the UCC. Moreover, an attempt specifically to include oral works in Art. I was unsuccessful when the United States pointed out its constitutional inability to protect non-"writings". However, the significance of these events was not to exclude oral works from the ambit of the UCC; rather, it was "to allow each country to follow its own general doctrine on the basis of the good faith without which no international instrument could be effective".¹²⁵ Thus, states remain free in their discretion to include oral works within Art. I.

II

The protection of Art. I extends to "the rights of authors" in "literary, scientific and artistic works." Both phrases¹²⁶ were obviously deliberately chosen from the RBC and must have been intended to have the same open-textured meaning as in that text.¹²⁷ Thus, to the extent that computer programs are included within the RBC,¹²⁸ they should equally fall under the UCC.

124 Text *supra*, accompanying notes 51-52.

125 UNESCO, *supra* note 117, at pp. 132, 135 (statement of Mr. Farmer, U.S. delegation); see also p. 131 (Mr. Lokur, Indian delegation).

126 The addition of the category of "scientific" works is immaterial for present purposes. This was included to ensure that such things as logarithm tables and works on nuclear physics would be covered: UNESCO, *supra* note 117, at 74 ("Rapporteur-Général's Report"). Such works are expressly included within the definition of literary and artistic works of RBC (Paris 1971), Art. 2(1) and prior texts; see also *Cuisenaire v. South West Imports Ltd*, *supra* note 57, at 510 ff.

127 "(Prima facie) where no deviation was intended, the UCC is to be interpreted in the same manner as the Berne Convention": STEUP, *supra* note 41, at 283.

128 Text *supra* accompanying notes 78 *et seq.*

On the other hand, proposals to incorporate the RBC (Brussels 1948) Art. 2(1) definition of literary and artistic works into the UCC failed at the 1952 Conference, and thus many of the examples of literary and artistic works included in the RBC are omitted from the UCC. This omission was said to occur for two reasons: enumeration of many examples would be "dangerous" because literary, scientific and artistic works "might be read limitatively"¹²⁹ and because the inclusion of certain works would make it difficult for certain countries to join the Convention".¹³⁰

Logically, however, there may be two alternative results of excluding particular works from the mutual undertaking contained in Art. I. First, states may have a discretion to treat such works as literary, artistic or scientific under Art. I. If they do so treat them, those works would fall under Art. II. Alternatively, the excluded works would be impliedly removed from the coverage of the treaty. A state that chose to protect them would do so voluntarily outside the UCC. The former seems the more plausible alternative in the light of the *travaux*.¹³¹

(a) Performers, Recordings, Editions and Broadcasts

Performers' rights, sound recordings,¹³² published editions and broadcasts are not covered by the UCC. They are not "literary and artistic works" under the RBC nor are they produced by an "author". The same reasons for

129 (E.g., if "dog" is defined as including "doberman pinscher and great Dane", a *noscitur a sociis* interpretation might read "dog" as applying only to large short-haired canines, thereby excluding chihuahuas and English shepherds.)

130 UNESCO, *supra* note 117, at 74 ("Rapporteur-Général's Report").

131 *Supra* note 125 and accompanying text; TANNENBAUM, "The Principle of 'National Treatment' and Works Protected: Articles I and II", in KUPFERMAN & FONER (eds.), "Universal Copyright Convention Analyzed" (1955, N.Y.), p. 13 at 16.

132 *Accord*: NIMMER, *supra* note 69; "Ilsley Report", *supra* note 68; "Dalglish Report", *supra* note 67, paras. 73 and 233 (sound recordings excluded from UCC); *see also* text accompanying notes 120 *et seq.*, *supra*.

Some opinions issued after the signing of the UCC claimed that the sound portion of a movie would be protected under the UCC either as part of a "cinematograph work" (a specifically enumerated category of work under Art. I) or as a separate work, thereby suggesting that sound recordings themselves might qualify under Art. I: KUPFERMAN & FONER, *supra* note 131, at pp. 17 TANNENBAUM); 436n. (interim Inter-Governmental Copyright Committee). But these opinions were issued in order to expedite the enactment of U.S. legislation implementing the UCC; they are not authoritative expositions of the UCC's meaning; and, in any event, that part of a work may be protected within the framework of a larger work does not mean that the part has separate copyright under a different category.

excluding them from the RBC apply equally to the UCC. Two additional comments are perhaps pertinent.

First, the notion of an "author" was well known to the participants, including the United States whose delegation included two members (Messrs. Fisher and Schulman) who had also been observers at the RBC Brussels 1948 Conference. True, the UCC's preamble does refer to "copyright protection of literary, scientific and artistic works", but then it also refers to respecting the "rights of the individual" and disseminating "works of the human mind". More importantly, Art. I includes the phrase "rights of . . . other copyright proprietors" in addition to "the rights of authors". This language, as well as other references to "copyright" throughout the text, was included to accommodate the U.S., a "copyright" rather than "authors' right" country. But the additional language in Art. I is too slim an indication of any intent to extend the notion of authorship, something that had been rejected so recently at RBC Brussels 1948.¹³³ A Nordic proposal to excise the phrase from Art. I on grounds of tautology was withdrawn after the U.S. delegation explained that the words were necessary to deal with a peculiarity of U.S. law whereby the author of a "work for hire" is the worker's employer, not the worker himself.¹³⁴ The phrase also ensured that the author's assignees or heirs were entitled to UCC protection,¹³⁵ thus paralleling RBC (Brussels) Art. 2(4) and its successors. Little else can be made of the addition.

Secondly, the many proposals made at the 1952 UCC Conference to add to the list of enumerated objects in Art. I never went beyond items such as those appearing in the RBC. Specifically, no mention was made of broad-

133 *Supra* note 45. Indeed, at the time Clause 1 of Protocol 2 protecting U.N. and O.A.S. publications was agreed to, the Director of the Berne Bureau (Mr. Mentha) read a statement, in response to queries by some delegates, that the provision "in no wise conflicts with the rule that only natural persons can create intellectual works and, in that capacity, have their copyright as original authors recognized"; he reaffirmed "a principle which is in conformity with human laws and with a sound interpretation of the notion of copyright": UNESCO, *supra* note 117, at 169.

134 UNESCO, *supra* note 117, at 135 (Mr. Farmer, U.S. delegate). As to the Nordic proposal, see *id.*, 132-133, 136; cf. text *supra* accompanying notes 47-49. Since the proprietor may be a juristic person, the problem of who is the author of a cinematographic work may be more easily overcome under the UCC than under the RBC: DESBOIS, FRANÇON & KEREVER, "Les conventions internationales du droit d'auteur et des droits voisins" (1976, Dalloz), at 73-74; STEWART I, *supra* note 39, para. 6.07. Equally, states may treat corporations as "nationals": UNESCO, *supra* note 117, at 76 ("Rapporteur-Général's Report"); cf. under the RBC, *supra* note 45.

135 BOGSCH, *supra* note 117, at p. 7; BOGUSLAVSKY, "The U.S.S.R. and International Copyright Protection" (Moscow, 1979), at 150; NEWCITY, "Copyright Law in the Soviet Union" (Praeger, N.Y., 1978), at 64-65.

casts, sound recordings, published editions or performers' rights.¹³⁶ Having regard to the history of the RBC Brussels Conference just four years previously, this diplomatic silence is eloquent.

(b) Specific Examples in Article I

The specific examples in Art. I, "writings, musical, dramatic and cinematographic works, and paintings, engravings and sculptures" present, with one possible exception noted below, few problems of interpretation. All appear in RBC (Brussels 1948 and Paris 1971) Art. 2(1); indeed, apart from cinematographic works, all date back to the original 1886 BC. These examples will no doubt be given an interpretation similar to that given their counterparts in the RBC.¹³⁷

A broad interpretation of some of the UCC examples may also include some of the RBC examples omitted from the UCC. Thus, a dramatico-musical work could qualify under either UCC "dramatic" or "musical" work.¹³⁸ Choreography and mime can qualify as an UCC "dramatic" work. Books and pamphlets can qualify as UCC "writings". Lectures, addresses, and sermons, can qualify as UCC "writings", if fixed; if unfixed, they may qualify simply as "literary works". Lithography may qualify as an UCC "engraving". Plastic works relative to geography, topography, architecture or science may qualify as UCC "sculpture".

Cinematographic works present a possible difficulty. Quite apart from the pressure exerted by the motion picture industry to have this category specified in the UCC, its inclusion was presumably thought necessary because it had only recently been promoted to the category of literary and artistic works in RBC (Brussels 1948).¹³⁹ The omission of a phrase such as

¹³⁶ UNESCO, *supra* note 117, at 131-137. The suggestion that phonograms might qualify as a "writing" (STEWART I, *supra* note 39, at para. 604) cannot be supported in the light of the *travaux*. Nor does any reason appear why "writing" in the UCC should bear a different meaning from the RBC, where it decidedly does not include phonograms: cf. BOGSCH, *supra* note 117, at 8-9; DE SANCTIS, "The Paris Revisions (July 1971) of the Universal Copyright Convention and the Berne Convention", Copyright (1972) 241, at 248 (n.18). That phonograms may be "writings" within the U.S. Constitution provision on copyright is irrelevant, just as would be the fact that another country does not under its national law treat them as "writings".

¹³⁷ Cf. BOGSCH, *supra* note 117, at pp. 8-9.

¹³⁸ *Accord*: STEWART I, *supra* note 39, at para. 6.04.

¹³⁹ See text *supra* accompanying notes 59 *et seq.* Apparently, the fuller enumeration of categories in RBC (Brussels) was one reason why only 13 states had ratified it by 1952: UNESCO, *supra* note 117, at 135 (Brazil delegate).

"including works produced/expressed by a process analogous to cinematography", dating back to RBC (Berlin 1908), might suggest that telefilm and videograms, to the extent they fall under this extended definition rather than simply "cinematographic works", are excluded. Bogsch thinks otherwise; he equates cinematographic works with "silent or sound motion pictures" and claims that genre, mode of realization and technical processes are irrelevant to the question of what constitutes a cinematographic work.¹⁴⁰ This seems a reasonable view: it focuses on the similarity of the creative processes and type of medium involved, and proceeds on the premise that the RBC phrase was omitted for reasons of brevity rather than to exclude its subject-matter.¹⁴¹ Television broadcasts are however probably excluded for the same reasons as are radio broadcasts.¹⁴²

(c) RBC Examples Omitted from the UCC

A number of the examples in RBC (Paris 1971) Art. 2(1) that are omitted from the UCC and that do not easily fall within other UCC examples may nonetheless fall within the general term "literary, scientific or artistic work". Illustrations, geographical charts, plans and sketches should qualify as "literary, scientific or artistic works". So, no doubt, will derivative works (*e.g.*, translations and adaptations) and collective works (encyclopaedias and anthologies).

Works of applied art also fall under "artistic works", but the reference in Art. IV.3 to "works of applied art in so far as they are protected as artistic works" demonstrates an intent to allow states to exclude this category from protection under Art. I. If they do include it in their domestic law, they are bound to afford national treatment under Art. II.¹⁴³

Similarly, photographic works are not specifically mentioned in Art. I but Art. IV.3 refers to them, thereby indicating that they are included under Art. I as "artistic works". The reference in Art. IV.3 to states "which protect photographic works" however indicates that protection is optional; if afforded, it is subject to national treatment under Art. II.¹⁴⁴

140 *Supra* note 117, at p. 9. *Accord*: DUBIN, *supra* note 60.

141 *See* text *supra* accompanying notes 60-71.

142 Text *supra* accompanying note 132 *et seq.*; *cf.* GRIFFIN, "The Universal Copyright Convention and the Problem of Community Antenna Television Systems" 3 Ohio No. U.L.R. 535, at 546 (1975).

143 *Accord*: BOGSCH, *supra* note 117, at p. 10; ROYAL COMMISSION ON PATENTS, COPYRIGHTS, TRADE MARKS AND INDUSTRIAL DESIGNS, "Report on Industrial Designs" (Ottawa, 1958), p. 6.

144 *Id.*; ULMER, *supra* note 41, at 22.

Works of architecture were not listed among the examples in the original BC 1886, but gained admission to the RBC at Berlin 1908. They may thus be considered "artistic works" within the meaning of the UCC. However, architecture was deliberately excluded as an example from Art. I, principally because the U.S. asserted its constitutional inability to protect this subject-matter.¹⁴⁵ This does not mean that architecture is excluded from Art. I. Rather, just as for works of photography and applied art, states have a discretion whether to include it; if they do, then it falls subject to Art. II.¹⁴⁶

(d) Bogsch's Views

Bogsch takes a somewhat different approach from that outlined here. He apparently accepts that the words in Art. I cannot be interpreted by each state as it thinks fit. However, pointing out that the phrase "literary, scientific and artistic works" contains overlapping categories (*e.g.*, is a film on nuclear physics literary, artistic or scientific?), Bogsch argues that the phrase must have the ambulatory meaning of "works susceptible of copyright protection". From this, he deduces that when categories of works, other than those specifically enumerated in Art. I, "are recognized as works by the custom of the civilized countries", they may fall within the ambit of Art. I.¹⁴⁷

This view is open to a number of objections. First, it lacks logic. Just because an object may qualify as either A, B or C does not mean either that A, B and C are meaningless or that they have some more abstract meaning or that they should be discarded as categories. Rather, in an international treaty, the inference may be drawn that states have some discretion to categorize the object as either A, B or C according to their domestic cultural and legal concepts.

Secondly, if the states participating at the UCC conferences had intended to be bound by Bogsch's paraphrase, they would have used it instead of the well-known and internationally long-accepted phrase they deliberately did choose. They would not have bothered to agonize over what examples should or should not be included in Art. I and over such questions as whether the word "scientific" should or should not be omitted from the phrase "literary, scientific and artistic".

145 UNESCO, *supra* note 117, at pp. 132, 135 (Mr. Farmer, U.S. delegation).

146 But see ULMER, *supra* note 41, at 21, and text accompanying notes 120 *et seq. supra*.

147 BOGSCH, *supra* note 117, at 9; see also "WIPO Guide", *supra* note 3, at 13. Cf. SCHULMAN, "International Copyright in the United States: A Critical Analysis" 19 *Law & Contemp. Probs.* 141, at 151 (1954).

Thirdly, Bogsch's view is too vague to be workable.¹⁴⁸ When will a work be sufficiently recognized and by how many countries for it to qualify? Which countries will qualify as "civilized"?¹⁴⁹ What if some countries protect works such as broadcasts, performances and sound recordings as "neighbouring rights" rather than traditional "author's works": will they be counted amongst the "civilized countries" who include such works within their chapter on traditional works? Since most countries apart from the United States protect utilitarian works of architecture, does this make the U.S. permanently "uncivilized" in this respect, permanently in breach of the UCC, or never in breach since, without U.S. participation, a civilized custom cannot arise?

In sum, the objections are similar to those suggested above in relation to the RBC. It is one thing to say that the phrase "literary etc." works is an open-ended one, and that it is designed to embrace new forms of authors' intellectual endeavours resulting in works that fall within the classically accepted definition of "literary, etc." (as amplified by the examples in Art. I).¹⁵⁰ It is another to say that a tree planted by a gardener will ever be a literary, scientific or artistic work, however many countries choose to call it that and whatever their degree of "civilization" may be.¹⁵¹

The most that can be said is that interpretations of the UCC should march in step with those of the RBC wherever possible; otherwise the many states bound by both Conventions may be in a position of perpetual confusion. But even this view must be cautiously and selectively applied. Thus, as has been seen, the obligatory RBC meaning of "literary and artistic works" may be tempered by the UCC *travaux*, allowing states a limited discretion to exclude from protection certain items that would otherwise fall within those categories.

148 BOGSCH himself recognizes the difficulties of a test based on "some transcendent standards of civilized countries" when discussing what "adequate and effective protection" means under Art. I: *supra* note 117, at 6-7. Indeed, at one point he calls this standard "logical though not overly helpful": *id.*, at 5. The same comments apply to the test if used in relation to works.

149 Surely, those countries joining the UCC that favoured a circumscribed view of works eligible for copyright would not become bound to a meaning of copyright works that more "developed" countries, typically net exporters of copyright material, chose to adopt. Yet who is to say that the former countries are less "civilized" than the latter?

150 DESBOIS, FRANÇON & KEREVER, *supra* note 134, at 73. Cf. STEWART I, *supra* note 39, at para. 6.04: "The description of works as 'literary, scientific and artistic' must not be taken in a literal sense"; nor, one might add, in a sense that ignores the history and intent of the text.

151 Text *supra*, following note 55.

2. What Rights Are Subject to National Treatment under the UCC?

So far as what rights must be accorded to protected works, UCC Art. II uses slightly different language from that in RBC Art. 5(1).¹⁵² But no intention to achieve a different result appears. The right in question must be an author's right.¹⁵³

Article IV^{bis} of the 1971 text states that the rights under Art. I "shall include the basic rights ensuring the author's economic interests", leaving it open to states to include basic rights ensuring authors' non-economic interests. True, a proposal to include moral rights specifically within Art. I was defeated principally because the United States claimed that, although its law recognized similar principles under libel or unfair competition theories, moral rights could not be constitutionally provided for under American copyright law.¹⁵⁴ The *travaux* reveal no intent to remove moral rights from the concept of author's rights. Rather, they emphasize that the "adequate and effective protection" states undertook to provide did not necessarily include moral rights. If a state did voluntarily extend moral rights protection to authors, the obligation under Art. II to provide the "same protection" to foreign works would apply to moral rights.¹⁵⁵ Further support for the proposition that moral rights are rights contemplated by the UCC is gained from the fact that the translation right, the sole minimum right prescribed by the 1952 text, contains in Art. V.2 provisions in effect requiring states that permit compulsory translation licences to acknowledge the original author's moral rights of paternity and integrity.

Domaine public payant, made the subject of a *voeu* at the UCC 1952 in terms similar to the *voeu* at RBC Brussels 1948,¹⁵⁶ and other forms of author subsidies are clearly excluded. Whether or not public lending rights are

¹⁵² See text *supra* preceding note 116.

¹⁵³ Spain's proposal to list a number of rights was rejected because, according to the Rapporteur-Général, "these rights should include those given to authors by civilized countries but . . . an enumeration was dangerous, because it might read limitatively": UNESCO, *supra* note 117, at 74. No intention to change the nature of authors' rights as understood under the RBC appears.

¹⁵⁴ UNESCO, *supra* note 117, at 132, 135 (Mr. Farmer, U.S. delegate). A similar move to include moral rights within Art. IV^{bis} at UCC 1971 failed: UNESCO, "Records of the Conference for Revision of the Universal Copyright Convention" (Paris, 1973), at 110-111; 65-66 ("General Rapporteur's Report"). Significantly, the U.S. did not claim that moral rights should be excluded from the concept of "author's right".

¹⁵⁵ WELLS, "The Universal Copyright Convention and the United States: A Study of Conflict & Compromise" 8 ASCAP Cop. Law Symp. 69, at 96 (1957); KURY, "Protection for Creators in the United States and Abroad" 13 ASCAP Cop. Law Symp. 1, at 22 (1964).

¹⁵⁶ UNESCO, *supra* note 117, at 98.

included depends, as for the RBC, on the nature of the scheme established.¹⁵⁷

As for the *droit de suite*, even a commentator such as Bogisch, who favours a broad interpretation of the UCC, mentions the reciprocal nature of the *droit* in Belgium and Germany without adverse comment.¹⁵⁸ Presumably, Bogisch accepts that this is not an "author's right" under the UCC and therefore is not subject to national treatment.¹⁵⁹ A state bound by both the RBC and UCC is entitled to condition the *droit de suite* by reciprocity,¹⁶⁰ to require a state bound only by the UCC to extend national treatment would be anomalous, especially given the lower level of obligation generally imposed by the UCC.

E. Conclusion

There has been a noticeable tendency amongst some commentators and states to assume or accept with perfunctory analysis that the interpretation to be placed on what works and rights fall under the RBC and the UCC national treatment requirements should be an expansive one. Occasionally, this seems to have been the result of wishful thinking, or of a natural and, perhaps, commendable desire to create greater international copyright uniformity and levels of protection without forcing states to resort to fresh treaties to cover emerging or unforeseen problems. A natural reluctance of states to seek authoritative guidance from the International Court of Justice, the ultimate arbiter of disputes under the RBC and UCC, has also contributed to doctrinal uncertainty and confusion.

This study has concluded that any interpretation of the Conventions must consider the texts in the light of their history and purposes. Due regard must

157 See text *supra* accompanying notes 112 *et seq.* *Contra*: NORDEMANN, *supra* note 114, at pp. 83, 85.

158 BOGISCH, *supra* note 117, at pp. 235, 343.

159 Text *supra* accompanying notes 109–111. *Accord*: Ulmer, *supra* note 41, at 18–19, 24; STEUP, *supra* note 41, at 288; KATZENBERGER, *supra* note 111. *Contra*: NORDEMANN, *supra* note 111, at 340–342, while noting that a pre-Conference proposal to make the *droit de suite* the subject of national treatment under the UCC was defeated; HAUSER, "The French *Droit de Suite*: The Problem of Protection for the Underprivileged Artist under the Copyright Law" 6 Bull. Copr. Soc. 94, at 110 (1958); NIMMER, *supra* note 69, at para. 17.04[B], n. 6 (public lending right and tax on equipment should also qualify as rights "equivalent" to copyright; but are they *in fact* authors' rights?).

160 Text *supra* accompanying notes 110 *et seq.* UCC Article XVII and its Appendix Declaration contain the "Berne safeguard" clause: this ensures that the UCC does not affect the RBC, which continues to govern relations between RBC states who are also UCC members.

be paid to the fact that the Conventions carry the indelible imprint of Continental notions of authors' rights in literary and artistic works, only smudged diplomatically by Anglo-American notions of copyright. Once this is appreciated, many of the apparent difficulties in the texts disappear and a coherent, though not necessarily ideal, interpretation consistent with the basic intent of the framers can emerge.

The RBC and UCC were both drafted to ensure that many new developments may fairly fall within their coverage. But lines inevitably have to be drawn in texts designed to be dynamic yet bounded. The sometimes unpalatable conclusion may have to be reached that a newly emergent problem or solution cannot, upon a good faith purposive interpretation of the treaties, be included within their coverage. Rather than engaging in semantic gymnastics to fit the unfittable into the ambit of the Conventions, one may have to conclude that persuading recalcitrant states to adhere to and ratify the latest texts of existing Conventions or arranging new treaties may be the only means available to cope with the problems of developing technology and lack of international uniformity.