




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

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Starting point – the international framework: what is it?

- ▶ Berne Convention for the protection of Literary and Artistic Works 1886, last revised 1971, Paris –now has 176 member states
- ▶ WIPO Copyright Treaty 1996 – 95 contracting states
- ▶ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled 2013 – 31 contracting states
- ▶ Also WTO Agreement on Trade-Related Intellectual Property Rights 1996
- ▶ But not treaties on neighboring or related rights, ie Rome convention, WPPT, Beijing Treaty...



Starting points – object of protection

- ▶ Objects of treaties:
 - ▶ Berne, article 1: establishes a 'Union for the protection of the rights of authors in their literary and artistic works' – authors at the center here, but also in:
 - ▶ WCT, preamble, first para ('desiring to develop and maintain protection...')
 - ▶ **CF** Marrakesh preamble, where this is down the list of other important social and policy objectives
- ▶ Who is to be protected?
 - ▶ Authors: Berne, article 3
 - ▶ Nationals and residents of any Union country for published and unpublished works
 - ▶ Non-Union nationals for works first published in Union country
 - ▶ WCT, TRIPS and Marrakesh proceed on same bases of eligibility
- ▶ Works protected:
 - ▶ Berne, articles 2 and 2bis – inclusive list
 - ▶ WCT and TRIPS supplement this

Some “system” principles

- ▶ National treatment **plus** “rights “specially granted” - Berne Convention, article 5(1):
 - ▶ (1) 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**.
 - ▶ May give greater protection as well: article 19
 - ▶ **Country of origin (“CO”)** defined in article 5(4) – must be Berne member and either country of nationality or residence or country of first publication
- ▶ Obligations under WCT to apply Berne plus further obligations, likewise for TRIPS
- ▶ Marrakesh purports to be consistent with Berne but adds obligations re exceptions



The Berne model in more detail...

- ▶ National treatment – a principle of integration of “foreigners” to “locals” (more correctly CO works and non-CO works)
 - ▶ Applies prospectively as well as in the present
 - ▶ Provides immediate access to all Berne countries other than CO, cf a system based on substantive or material reciprocity
 - ▶ Supplemented by no formalities rule and fixed terms of protection, and various permissible limitations and exceptions on protection to be given

PLUS

- ▶ Rights “specially granted”
 - ▶ Gradually increased over successive revisions:
 - ▶ translation and public representation/public performance rights (1886), adaptation and other rights of transformation, cinematographic reproduction and adaptation rights, and public performance rights (1908), broadcasting and some wired diffusion rights and moral rights (1928), public recitation rights (1948), reproduction rights (1967)
 - ▶ Now supplemented by WCT: rental and distribution rights, communication to the public
 - ▶ Permissible limitations and exceptions also apply here- boundaries to protection to be given



“System principles” – some general observations

- ▶ Obligations only apply to treatment of works with CO other than the country where protection is sought (crudely, the works of “foreigners” or non-nationals, but not always)
 - ▶ Marrakesh may be an exception here – directed at national copyright laws
- ▶ Works of CO are not covered, ie the published or unpublished works of nationals/residents or works first published there
 - ▶ **Berne, Article 5(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.
- ▶ Leaves freedom for CO to treat these categories of authors and works differently (these may include foreigners if first published in CO)



System principles – general observations (cont)

- **NONETHELESS** Berne members will usually seek to align protection of non-CO works (both under national treatment and “rights specially granted”) with that granted under domestic law
 - The international obligations therefore pull the national law along with them – a symbiotic relationship or continuous feedback loop

UNLESS

- There is a good case for differential treatment of CO works
- This therefore underlines the importance of the process of treaty interpretation in determining scope and content of the international obligations
- Berne – multilateral in operation while respecting of CO autonomy



Questions arising for copyright reform...

- ▶ How easy is it to modify or change international obligations?
 - ▶ **AND**
- ▶ If this can't be done, what space or leeway do these obligations allow national laws to differ with respect to treatment of non-domestic, ie foreign, works and authors?
 - ▶ Bendable boundaries or immovable obstacles



Change at the international level

- ▶ Starting assumption is that this is unrealistic and/or unattainable
 - ▶ Revision needs unanimity of votes cast at Dip Con: article 27(3), Berne
 - ▶ Hence, move on to the next question

BUT

- ▶ History of Berne may suggest otherwise – a story of steady, incremental change and additions up to 1967
- ▶ Realistic assessment, however, is that revision becomes more difficult as membership increases – only 12 states negotiating in 1886, today there are 176
- ▶ Developed/developing country divide nearly brought Convention to its knees in Stockholm 1967 and this divide continues today **AND**
- ▶ Copyright reform issues, national and international, arise in much wider social, cultural and economic context today – industry groups, civil society groups, human rights and consumer protection concerns




Is change at the international level really impossible?

- ▶ Not a requirement of complete unanimity of members (as in 1886 Berne Text)
 - ▶ Only an unanimity of votes cast required, leaving therefore...
 - ▶ a place for the uninvolved or unaffected non-voters... **BUT**
 - ▶ Also plenty of leeway for the disaffected dissident
 - ▶ Change at the international level in multilateral meetings of any kind always requires consensus on new norms – authors' rights are not special in this regard and history of Berne Convention demonstrates this, eg adoption of no formalities rule and mechanical reproduction licence in 1908, broadcasting right and moral rights in 1928, even the WCT itself in 1996
 - ▶ Goodwill and commitment can go a long way and processes of WIPO are adapted for this purpose

AND

- ▶ Berne members do have an obligation to revise “to improve the system of the Union”: article 18(1)



Nonetheless being realistic...avenues for limited change...

- ▶ Special agreements between Berne members under article 20:
 - ▶ 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 **contain other provisions not contrary to this Convention**. The provisions of existing agreements which satisfy these conditions shall remain applicable
- ▶ Grand parents pre-Berne bilateral and plurilateral agreements
- ▶ Also applies prospectively, eg agreements on extending term of protection because of war losses
- ▶ More recent WIPO-sponsored agreements: WCT a “special agreement”, likewise Marrakesh (though not declared to be so)

Possible uses of article 20 agreements

- To extend protection already given to each other country's authors, eg in relation to communication rights (WCT), matters of duration, subject matter, etc –
- To deal with something not already covered by Berne, eg WCT and rental/distribution rights
- To embody codifications of emerging state practice on particular matters, eg computer programs, databases – WCT again (also TRIPS)
- To deal more prescriptively with matters already covered by Berne or WCT, eg Marrakesh providing mandatory exceptions consistent with here step test,
- **NB** implication of art 20 agreements: requirement to extend national treatment to authors from non-special agreement countries (except agreements on duration & resale royalty rights)



Assuming no change at the international level, what then?

- ▶ The wiggle room left for national policy makers and legislators through appropriate treaty interpretation then needs to be considered, ie:
 - ▶ “Bendable boundaries” and
 - ▶ “Immovable obstacles”
- ▶ What do these mean in practice?



Bendable boundaries...

- ▶ Works to be protected – productions listed and non-listed under art 2(1) and flexibilities in arts 2(2)-(8) and *2bis*
- ▶ Originality requirements – no indication as to this other than it be a work of authorship
- ▶ Determining who is an author and what is authorial contribution – co-authorship, human authorship issues
- ▶ Exclusive rights, in particular reproduction and public dissemination rights (performance, broadcasting, communication...)
 - ▶ Substantiality/quantum requirements
 - ▶ Non-literal versions
 - ▶ Strict liability or knowledge requirements
 - ▶ Public-private dichotomy
 - ▶ Intermediate liability issues
- ▶ Limitations and exceptions, including three step test
- ▶ Matters not addressed or only indirectly, notably ownership and transfer issues – an open frontier rather than a boundary



Immovable obstacles...

- ▶ Terms of protection – perhaps the most rigid
 - ▶ No convincing rationale for long terms to be found in convention records and history
 - ▶ Only modifications allowed in cases of applied art and photographic works (now closed by WCT), cinematographic works)
- ▶ No formalities rule – perhaps more permeable
 - ▶ Does not affect domestic systems
 - ▶ Could be optional for foreign works with added benefits or inducements (US example)
 - ▶ Could be mandatory perhaps where declaratory as to such matters as ownership, and not a restriction on “enjoyment” or “exercise” of rights – see here the arguments of Jane Ginsburg and Rebecca Giblin



Concluding remarks

- ▶ Change at the international (multilateral) level very difficult though not impossible – “You’re dreaming!”
 - ▶ Special agreements may be an option in some areas
- ▶ Considerable latitude (“interpretative space”) at the national level for both regulation of CO and non-CO works within the international framework, though with some immovable obstacles, such as duration obligations
 - ▶ Allows for country-specific responses sensitive to legal, cultural, social and economic traditions

BUT

- ▶ May lead to greater lack of uniformity and harmonization and away from multilateralism
- ▶ Some change therefore possible with goodwill, commitment and creative thinking