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PART VIII

NON-DISCRIMINATION ISSUES

33. Remuneration rights and national treatment

Bernt Hugenholtz

1. INTRODUCTION

On 28 April 2022, following Uganda's accession to the Berne Convention, membership of the Berne Union amounted to 181 countries[1] – just 12 short of the number of states composing the United Nations.[2] Whereas near-universal adherence to Berne makes national treatment in standard international copyright cases almost a given, the application of national treatment at the outskirts of the Convention remains controversial. The exercise of rights or subject matter situated at the margins of the traditional copyright domain, where national laws tend to diverge, has challenged the robustness of the Convention's core principle. Indeed, Berne itself provides for various exceptions to national treatment: in respect works of applied art,[3] term of protection,[4] and *droit de suite* (artist's resale right).[5]

Rights of remuneration are especially problematic. While the Convention refers to rights of remuneration in just three provisions,[6] remuneration rights of various kinds have become important instruments to protect the pecuniary interests of authors in many Berne Union states. Since statutory rights of remuneration are spread unevenly over the globe – with jurisdictions of the *author's right* tradition more receptive to this legal construct than *copyright* states – disputes about the application of national treatment to remuneration rights that have no solid basis in the Berne Convention, have regularly arisen.[7]

1 Berne Convention.

2 https://www.un.org/en/about-us accessed 3 December 2022.

3 Berne Convention (n 1) art 2(7).

4 Ibid., art 7(8).

5 Ibid. art 14*ter*(2).

6 Ibid., art 11*bis*(2) {(re)broadcasting}, art 13(1) {recording of musical works} and art 14*ter* {artist's resale right}.

7 E. Steup, 'The rule of national treatment for foreigners and its application to new benefits for authors' (1978) 25(4) Bulletin of the Copyright Society of the U.S.A. 279, 280.

While the application of national treatment to remuneration rights based on exceptions to exclusive rights, such as levies for private copying, no longer seems contentious, the emergence of new, more complex 'residual' remuneration rights in various EU countries[8] raises new and difficult questions. For example, from August 2022 Belgian law accords a non-transferable and non-waivable, collectively managed right of equitable remuneration to the authors of an audiovisual work contingent upon the transfer of the right of communication to the public to a film producer, which can be exercised against audiovisual streaming services, such as Netflix or Disney Plus.[9] A draft bill proposing a similar right is under discussion in the Netherlands.[10] Whereas proponents extol the virtues of residual rights as an effective means of compensating authors in asymmetric bargaining positions,[11] opponents fear that most of the new revenue will not benefit local authors but will instead line the pockets of American film makers, since most content on popular streaming services originates in the United States (US).

Another reason for (re)visiting national treatment in respect of remuneration rights, is the EU Court of Justice's decision in the RAAP case.[12] According to the CJEU, EU Member States may not require reciprocity, as permitted under the Rome Convention and the WPPT,[13] and deny national treatment to non-EU performing artists claiming remuneration for secondary uses of sound recordings, unless EU law expressly allows this.[14] As a consequence, the European Commission is currently reassessing its portfolio of IP directives and regulations in the light of national treatment provisions in international treaties.

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[8] 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market', 11 (2020) JIPITEC 132.

[9] Act of 19 June 2022 implementing Directive (EU) 2019/790 art 62, Belgisch Staatsblad/Moniteur Belge 1 August 2022, no. 189.

[10] See https://www.internetconsultatie.nl/auteurscontractenrecht/details accessed 4 December 2022. The proposed bill is based on a study conducted for the Dutch Ministry of Justice: S. van Gompel a.o., 'Evaluatie Wet Auteurscontractenrecht Eindrapport' (2020).

[11] Raquel Xalabarder, 'The equitable remuneration of audiovisual authors: a proposal of unwaivable remuneration rights under collective management' (2018) 255 RIDA 5ff.

[12] Case C265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others* ECLI:EU:C:2020:677.

[13] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention); WIPO Performances and Phonograms Treaty (WPPT).

[14] See Ole-Andreas Rognstad, 'Performing artists' right to remuneration – on the junction of external treaty competence, national treatment, material reciprocity and fundamental rights: RAAP' (2021) 58(5) CMLR 1523–1546.

This chapter examines the extent of national treatment obligations to rights of remuneration found in national copyright law.

2. TAXONOMY OF REMUNERATION RIGHTS

Statutory remuneration rights exist in great variety. For the purpose of our analysis, four categories are to be distinguished: remunerated exceptions; rights to remuneration per se; rights to fair remuneration in exploitation contracts; and residual rights.[15]

2.1 Remunerated Exceptions

The first category concerns rights that compensate authors for losses from statutory limitations and exceptions. A well-known example is the right to remuneration for private copying that obliges manufacturers and importers of recordable media or recording equipment to remunerate authors by way of levy schemes that currently exist in more than 70 countries.[16] Other examples are rights to remuneration that many laws provide for educational copying, library copying, or photocopying ('reprography').[17] Remuneration rights of this kind directly relate to the exclusive rights that the statutory exception restricts. Where no use within scope of the exclusive right occurs, no right to remuneration arises.

The policy rationales of these statutory rights are diverse, and include the right to privacy[18] (e.g., private copying), the general public interest (e.g., educational copying) and the impracticability of individual licensing (e.g., reprography).

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[15] This taxonomy is in line with the classification developed by M. Ficsor, 'Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU "Acquis"' in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (3rd edn, Kluwer, 2016) 52–53; see also Thomas Riis, 'Remuneration Rights in EU Copyright Law' (2020) 51(4) IIC 446–467.

[16] https://www.cisac.org/sites/main/files/files/2020-11/Private%2BCopying-EN-web.pdf accessed 4 December 2022.

[17] Lucie Guibault, 'The Reprography Levies across the European Union' 2003 Institute for Information Law.

[18] Natali Helberger and P. Bernt Hugenholtz, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' (2007) 22(3) BTLJ 1061–1098.

2.2 Remuneration Rights Per Se

The second category of remuneration rights comprises statutory rights to compensation that go *beyond* the catalogue of exclusive rights found in most copyright laws. Typically, these rights are intended to reward authors for uses that are outside the scope of copyright protection, but nevertheless may cause financial harm.

The best-known example of a remuneration right per se is the artist's resale right (*droit de suite*), which is optional under the Berne Convention[19] and exists in over 70 countries.[20] The right secures artists a percentage of the proceeds of each public resale of an original work of visual art. It thus goes beyond the scope of the right of distribution, which is exhausted following the authorised first sale of a copy of a work.

Another example is the public lending right that compensates authors for public libraries lending books and other published media. Public lending rights exist throughout Europe[21] and in a handful of other countries.[22] Like the artist's resale right, it remunerates authors for a use that is outside the scope of the right of distribution.

A third example is the neighbouring right of performing artists and phonogram producers to equitable remuneration for 'secondary uses', which was at the centre of the RAAP case.[23] Rights of this kind exist in all 111 countries that have ratified the WPPT.[24]

The main rationale for this type of remuneration right is to allow authors or other right holders to financially benefit from certain uses of their work, without burdening the market with an exclusive right.

2.3 Right to Fair Remuneration in Exploitation Contracts

The third category encompasses statutory rights to 'equitable', 'appropriate', 'proportionate' or 'fair' remuneration in exploitation contracts. These are non-overridable rights that purport to guarantee that authors are properly

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[19] Art 14ter(2).

[20] https://www.adagp.fr/en/indicative-list-countries-whose-legislation-provides-resale-right accessed 4 December 2022.

[21] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

[22] https://en.wikipedia.org/wiki/Public_Lending_Right accessed 4 December 2022.

[23] Rome Convention, art 12; WPPT, art 15.

[24] https://www.wipo.int/treaties/en/ip/wppt/ accessed 4 December 2022.

remunerated in cases where contracts provide for the assignment or exclusive license of some or all of the author's copyright prerogatives.

Rights of this kind are commonly found in jurisdictions of the author's rights tradition, such as France, Germany, Italy, Spain and Latin-American countries.[25] With the adoption in 2019 of the Copyright in the Digital Single Market (DSM) Directive, all EU Member States are obliged to 'ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration'.[26] Also, additional remuneration is due 'when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works […]'.[27]

The right to receive fair remuneration under an author's contract is predicated upon a general principle of fairness and equity. Similar in purpose to consumer protection or some tenancy laws, the right seeks to redress the structurally weaker bargaining position of individual creators vis-à-vis the copyright industry. In contrast to the other categories, however, rights of this kind can be invoked only against the author's contractual counterparts (possibly including successors in title) – not against third parties.

2.4 Residual Rights of Remuneration

The fourth, and most recent variant of remuneration right is the residual right, 'a right to remuneration (usually of authors and performers) that survives the transfer of certain exclusive rights'.[28] These are statutory rights awarded to authors and performers in situations where (broad) transfers of rights have become the norm, such as film production or recording contracts. The best-known example is the unwaivable right to remuneration for acts of commercial rental accorded to authors and performers under the European Rental and Lending Rights Directive.[29] The remuneration right for audiovisual authors mentioned in the introduction of this contribution, is a more recent

[25] See Lucie Guibault and P.Bernt Hugenholtz, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union' (2002) European Commission Report, https://www.ivir.nl/publicaties/download/final-report2002.pdf accessed 4 December 2022.

[26] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (DSM Directive), art 18(1).

[27] DSM Directive, art 20(1).

[28] Ficsor (n 15) 52–53.

[29] Directive 2006/115/EC (n 21).

example.[30] While statutory residual rights are gaining in popularity among national lawmakers, rights of this kind presently exist in only a few countries. Unsurprisingly, they are not mentioned in the Berne Convention or other treaties.

Residual rights are contingent upon an exclusive right (e.g., the right of commercial rental or the right of making available on video on demand (VOD) services) being granted to the author's contractual counterpart. Absent a transfer, the author has no remuneration right for he still enjoys the full scope of the exclusive right.[31] Nevertheless, the right to remuneration is not directed solely, or even primarily, against the author's counterpart. Following the transfer, the right can be exercised against any person or entity engaging in the acts circumscribed by the statutory provision, e.g., each company broadcasting or streaming the audiovisual work under a license from the transferee (e.g., the film producer).

The purpose of these residual rights, therefore, is to ensure that authors receive proper remuneration for economically significant uses of their works that they no longer control, having transferred their rights to a producer. Like the right to fair remuneration in exploitation contracts, these rights are intended to compensate creators for underpayment arising from the asymmetric bargaining positions that commonly exist in the film and music industries.

3. REMUNERATION RIGHTS AND NATIONAL TREATMENT

The principle of national treatment is enshrined in Article 5(1) of the Berne 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.

The TRIPS Agreement more broadly mandates national treatment in respect of the entire catalogue of intellectual property rights within the scope of the agreement,[32] while the WIPO Copyright Treaty incorporates the Berne Convention national treatment rule by reference.[33]

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[30] See generally Xalabarder (n 11) 5ff

[31] Ibid., 50.

[32] TRIPS Agreement, art 3(1).

[33] WIPO Copyright Treaty, 2186 UNTS 121 (signed 20 December 1996, entered into force 6 March 2002), art 3.

The principle of national treatment enshrined in Article 5 is, first and foremost, a rule of non-discrimination that prohibits Berne Union states from discriminating against foreign right holders based on nationality. Whether national treatment also infers a rule of applicable law (conflicts law), obliging Union states to apply the law of the protecting country (*lex protectionis*), is a matter of academic debate that exceeds the scope of this contribution.

It is clear from the Berne text that the rule of national treatment applies not only to rights that existed at the national level at the time of the creation of the Convention (most recently the Paris Act 1971) or are enumerated as minimum rights, but also to new rights not mentioned in Berne.[34] Whether a statutory remuneration right is subject to national treatment, therefore, ultimately depends on whether the right is to be qualified as a copyright 'right' within the meaning of Article 5(1). This calls for an autonomous interpretation of the treaty.[35] Whether or not a right is characterised as copyright under national law, is not decisive.[36]

Apart from the exclusive rights expressly enumerated in the treaty, the Berne Convention does not define or describe conventional 'rights' within the meaning of Article 5(1). Logically, the notion also encompasses other exclusive rights similar to the Convention rights that national law grants to authors with respect to uses of their works.[37] It is equally obvious that 'rights' do not extend to government grants and other subsidies to authors, such as tax benefits or cultural funding schemes.[38]

What, then, elevates a statutory remuneration claim to a 'right'? Apart from a few incidental references to remuneration, the Berne Convention text offers few clues. In response to the emergence of remuneration rights in the second half of the twentieth century, several commentators have come up with definitions or criteria. According to Elisabeth Steup, a right qualifies as a copyright right if it is 'granted to (1) a person in his capacity as author (2) of a determined work, and, (3) the right being related to the utilization of that work'.[39]

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[34] See Peter Burger, 'The New Photocopy Remuneration Provisions in the Federal Republic of Germany and their Application to Foreign Authors under International Copyright Law' [1988] IIC 490.

[35] Steup (n 7) 284.

[36] Eugen Ulmer, 'The "Droit de Suite" in International Copyright Law' (1975) 6 IIC 12, 22.

[37] Burger (n 34) 500.

[38] Steup (n 7) 284.

[39] Ibid., 284.

Building on Steup's definition, Peter Burger proposes a somewhat more refined test:

> [A] copyright right is comprised of at least (1) a right (2) granted to an individual author (3) to authorize a use of his/her work, or for remuneration in connection with a use of the work if the legislature statutorily limits the exclusivity of the right. If the right does not contain the three elements necessary to be a copyright right, national treatment will not apply, and foreign authors will not benefit.[40]

Referring to Burger, Professor Goldstein formulates three more abstract requirements:

> Characterized at the highest useful level of abstraction, an economic right subject to national treatment under the 1971 Berne Paris Act consists of three elements: it is effective against the world at large; it enables the author to control, or benefit from, the use of a literary or artistic work; and it values the use of the work, however roughly, proportionately to the work's success or prospective success in the marketplace. The presence in a domestic compensation system of any one of these attributes will indicate that national treatment may be required; the presence of all three will indicate that it must be extended.[41]

These definitions have in common that the Berne Convention 'right' extends beyond traditional exclusive rights and allows some room for statutory rights to remuneration. Considering the criteria developed by Steup, Burger and Goldstein, I will now attempt to qualify the four remuneration rights previously distinguished.

3.1 Remunerated Exceptions

The first category, remunerated exceptions, is the least problematic. These are remuneration rights that directly correspond to the exclusive rights the exceptions curtail. Since the exclusive rights, such as the right of reproduction, squarely fall within Article 5(1), this is a powerful argument for according rights status to the corresponding remuneration rights. The rights are granted to individual authors or other right holders and can be invoked against the world. The fact that some rights of this kind, such as private copying levies, can only be exercised collectively, does not alter their status as individual rights.

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[40] Burger (n 34) 501.

[41] Paul Goldstein and P. Bernt Hugenholtz, *International Copyright* (4th edn, OUP 2019) 100.

Nevertheless, some commentators have questioned the rights status of levy schemes because authors receive payment from a fund rather than directly from users of their works. According to Professor Vaver

> [t]he 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 Article 5 (1); if so, it would not be subject to the principle of national treatment.[42]

However, applying Burger's and Goldstein's criteria, even such levy-based rights probably qualify as Article 5(1) rights, because levies are usually distributed proportionately to estimated usage or to the work's success in the marketplace.[43]

3.2 Rights to Remuneration Per Se

Rights to remuneration per se, such as *droit de suite* and public lending rights, are more difficult to qualify. These are not remuneration claims originating in exclusive rights, but independent statutory claims in respect of uses of works that justify compensation.

In the past, the place of both *droit de suite* and public lending right in the Berne Convention has been debated – with different outcomes. Whereas Article 14ter(1) embraces *droit de suite* as 'the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work', Article 14ter(2) subjects the right to material reciprocity, not national treatment. By contrast, despite discussions in the years preceding the WIPO Copyright Convention, public lending rights have not received international convention status, and there is no international consensus on whether such rights are covered by national treatment under the Berne Convention.[44]

Applying the tests developed by Burger and Goldstein to this type of remuneration right leads to dissimilar results. Whereas remuneration rights per se fall short of Burger's definition, because the rights are not derived from an exclusive right, Goldstein's more abstract criteria do allow qualification of this type of remuneration right as a right subject to national treatment.

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[42] David Vaver, 'The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part Two]' [1986] IIC 715, 717–718.

[43] Goldstein and Hugenholtz (n 41) 100.

[44] Silke von Lewinski, *International Copyright and Policy* (OUP 2008) para 7.29.

3.3 Right to Fair Remuneration in Exploitation Contracts

By contrast, rights to remuneration prescribed by author's contract law, do not qualify as Berne rights as they are not rights that can be invoked against the world, but solely against the authors' contractual counterparts or perhaps their successors in title.[45]

Moreover, as Hilty and Peukert point out, applying national treatment to statutory rules regarding author's contracts might be difficult to reconcile with conflicts rules regarding international contracts. Hence, they conclude 'it does not seem possible or desirable to incorporate copyright contract law into the existing conventions'.[46] Instead, contract conflicts law will determine the application of national author's contract rules to international author's contracts, most likely by applying either the law of the author that has executed the transfer or the law of the transferee to the contract at issue.[47] Consequently, many authors residing in countries where author's contract rules do not exist will not have a statutory claim to fair remuneration in foreign countries where such rights subsist.[48]

4. RESIDUAL RIGHTS

Residual rights of remuneration are the most difficult to qualify. In contrast to the rights of the first and second category, these rights are contingent upon the transfer of copyright from an author to a producer or other exploiter. The remuneration claim therefore originates in the contract and transfer between author and exploiter, while its purpose is to ensure the author is fairly compensated for transferring the right to the producer in addition to the payment the producer makes directly.

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[45] See e.g., DSM Directive, art 20.1.

[46] Reto M. Hilty and Alexander Peukert, '"Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?' (2004) 22(2) CAELJ 401, 443.

[47] Goldstein and Hugenholtz (n 41) 135–136. Note that contract conflicts law is generally national law, except for regional unifications such as Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) [2008] OJ L177/6.

[48] Publishers and other exploiters will be tempted to avoid the application of the right to fair remuneration, by way of contractual choice-of-law clauses pointing to less author-friendly jurisdictions. However, the EU DSM Directive in conjunction with the Rome I Regulation does not allow such circumvention. DSM Directive, art 23(1) and Recital 81; Rome I Regulation, art 3(4).

Absent a contract entailing a transfer, residual rights do not exist. Rights of these kind are not based on statutory limitations and exceptions,[49] since they leave the exclusive right that is transferred intact. Nor does their scope exceed any existing economic rights. This gives the residual right a character fundamentally different from remuneration rights of the first and second kind.

However, the residual right differs from contractual rights of the third category in that the right can be invoked against third parties that are not party to the author's contract. For example, the residual right under discussion in the Netherlands gives authors a right remuneration against VOD providers that are licensed by the film producers but have no direct contractual ties to the authors of the film.

Is this a right that can be exercised 'against the world at large'? While the right can be invoked against some third parties, it does not have the *erga omnes* force of an exclusive right or of the remuneration rights of the first and second kind, which can be exercised against *any* user of the work. The residual right can only be invoked against third parties that are licensed by the transferee following the initial rights transfer by the author. The obligation to fairly compensate the author for the transfer of the right is, as it were, partially shifted to the licensee.

All this makes the residual right a hybrid legal construct that eludes straightforward qualification. Although the right's aim is to bring about fair compensation for authors that have transferred their rights, it can be invoked against qualified third parties. Moreover, the amount of remuneration is proportionate to its actual use. With that said, the residual right does not meet the Burger test, but the more abstract criteria developed by Goldstein might still leave room for national treatment under Article 5(1).

Leaving these criteria aside, a normative analysis points us further away from national treatment. As explained above, residual and contractual rights to remuneration share the same public policy rationale. Both are justified by the desire to compensate creators for underpayment due to the asymmetric bargaining positions that, unfortunately, are common to many sectors of the copyright industry. But this justification does not warrant indiscriminate application. In respect of author's contracts governed by the law of countries where other mechanisms of securing proper income for authors are firmly in place, claiming a residual right in a foreign country would lead to unjustified payment. This may well be the case, for example, for authors of films produced

[49] For an opposing view, see Roma Leuyerink, 'Het beginsel van nationale behandeling en de VOD-vergoeding' (2022) 2 Auteursrecht 85, 95, arguing that the residual right for VOD services proposed in the Netherlands compensates film authors for a statutory limitation of their exclusive rights, because of the presumption of transfer rule enshrined in Dutch law.

in the US, where the Guild Agreements secure proportionate remuneration to screen writers and directors, for uses both in the US and elsewhere.

Since the residual right shares its rationale and some of its characteristics with the right to fair remuneration in exploitation contracts, there are compelling reasons not to apply national treatment to this type of right. Moreover, even if national treatment were accorded, the residual right's direct connection to the underlying author's contract and initial transfer, would justify application of the law governing the underlying contract or transfer rather than *lex protectionis*. Otherwise, application of the law of the protecting country to the residual right might lead to inconsistent outcomes, for example, where a contract or transfer is deemed invalid under the governing law, but the statutory residual right remains intact.

5. CONCLUSION

In conclusion, not all remuneration rights should be treated the same. While remunerated exceptions and remunerations rights per se merit national treatment, statutory claims arising from author's contracts, such as the right to fair remuneration in exploitation contracts and statutory residual rights, are not 'rights' contemplated by the Berne Convention subject to *lex protectionis*. Instead, remuneration rights like these are to be governed by the law of the contract or transfer that gave rise to the claim.