Choice of law in copyright and related rights: alternatives to the lex protectionis

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Chapter 3

Foreigners in International Copyright and Related Rights

3.1 Introduction

To resolve choice-of-law issues in the area of copyright and related rights, one invariably turns to the multilateral intellectual property treaties as a starting point for answers. The question is whether copyright and related rights treaties actually contain choice-of-law rules. Some legal scholars think they do; others do not, but argue that certain conflict rules logically follow from the international intellectual property system as enshrined in those treaties. As we shall see in Chapter 4, caselaw in the Netherlands and elsewhere is not very clear on the issue, but appears to have generally followed the latter approach. The exact choice-of-law calibre of the conventions will be discussed in the next Chapter. The current Chapter is designed to provide the necessary backdrop for that analysis.

The most significant instrument in international copyright law—and therefore the primary focus of this Chapter—is the 1886 Berne Convention for the protection of literary and artistic works. As of October 2002, 149 states were party to the Convention. It may safely be said that this “Grande dame” of international copyright has profoundly influenced the intellectual property treaties that came after it. These include the 1952 Universal Copyright Convention, the 1961 Rome Convention for the Protection of Performing Artists, the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Its impact is also felt in the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and in the proposals for WIPO treaties concerning audiovisual performances, broadcasts and databases.

Before turning our attention to the Berne Convention (Paragraph 3.3) and subsequent treaties (Paragraph 3.4), the position of foreign authors under national copyright regimes will be discussed (Paragraph 3.2). As we shall see it was the

ineffective protection of foreign authors under domestic copyright law, combined with the fact that intellectual property was a young and unresolved field of law, which profoundly influenced the structure and basic rules of the international copyright system.

3.2 Foreign Authors Prior to The Berne Convention

It has been pointed out in the previous Chapter that private international law was a less clearly demarcated discipline in the 18th and 19th centuries than it is today. It was not viewed as quite so separate from what we would now call ‘public’ international law, nor was the law on aliens routinely treated as a distinct body of law. Also, there was not one single coherent method for determining the applicable law, despite the popularity of Savigny’s allocation method from the late 19th century onwards.

In its turn, copyright was nowhere nearly as well defined and embedded in private law as it has since become. Broadly speaking, in countries with statutory copyright, it was regarded as a subjective right which enabled the right owner to prohibit reproduction of a work. Notions about its fundamental nature, scope and duration developed as more statutes and bilateral and multilateral treaties were drafted and revised.

These are important points to remember, especially when one tries to ascertain the meaning of the Berne Convention—or any other 19th century intellectual property treaty—for contemporary choice of law. A literal interpretation of the Berne Convention could lead to conclusions which neither a historical nor a teleological interpretation would bear out. To put the BC in perspective, the next Paragraphs will be dedicated to the position of foreign authors as it evolved during the time leading up to the BC.

In short, the international copyright system developed as follows. National copyright laws of the first half of the 19th century seldom provided for the outright protection of authors who were not residents or nationals. Neither could foreigners claim protection on the basis of—what for want of a better term I will call—private law equality clauses. This equality in the eyes of private law meant that as a rule foreigners have rights and obligations under private law just as nationals do and it became a widely accepted principle in the course of the 19th century. To protect the interests of their authors and the printing industry, countries began to conclude bilateral treaties. From the 1850’s on a growing body of opinion was formed that international copyright protection should be sought through multilateral treaties. Authors, artists and publishers in different countries organised themselves and inspired the drafting of the Berne Convention of 1886.
3.2.1 **Foreigners Under Early Domestic Copyright Laws**

Many factors contributed to the rise of ‘modern’ copyright laws in the 19th century, which replaced the existing printing privileges.\(^\text{123}\) In the late 18th and early 19th centuries it became common opinion in Europe that the state’s objective is to facilitate the ‘pursuit of happiness’ of the individual.\(^\text{124}\) Education was made available to more people and illiteracy rates fell steadily. By the second half of the 19th century, three in every four persons in Scandinavia, Scotland, Germany, the Netherlands and Switzerland could read and write. In France, Belgium, Austria and England more than half of the population was literate. The printing industry and book trade experienced an enormous growth.\(^\text{125}\)

International ‘piracy’ of books, plays and music was the rule rather than the exception, not in the least because national copyright laws were mostly unfriendly to foreigners. In some countries, only nationals could invoke protection (Germany, Greece, Portugal, Spain, Sweden, Finland), whereas other states granted protection to all authors domiciled within their borders (Switzerland Hungary,\(^\text{126}\) the United States\(^\text{127}\)). Generally, works published abroad were not protected. That is not to say that national laws knew no rights pertaining to foreign works. In the Netherlands, as we have seen in the *Seven Capital Sins* case (see Par. 1.1), whoever was first to register a copy of a foreign work and declare his intent to publish a translation, obtained the exclusive right to do so.

By the mid-19th century, states increasingly extended national copyright protection to foreign authors. In France, an 1810 copyright decree had already protected foreign authors who first published their works in France. More precisely: the decree provided that copyright could be transferred to French citizens and foreigners alike, which implied that foreigners could invoke copyright protection.\(^\text{128}\)

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123 The development from privilege to modern copyright took place over the course of the 15th–19th centuries (for a short history, see Cavalli 1986, pp. 9–27), but with a marked leap in the second half of the 19th Century. Early examples of intermediate intellectual property laws are the English Statute of Anne (1710) and the Danish copyright decree of 1741; see Renouard 1839, pp. 228–230.


125 Schultze 1994, p. 147, 161.


127 Renouard 1839–1, p. 241.

128 Terré 1960, p. 362 et seq., reports on the 1810 decision of the *Cour de Cassation* in which the assignment of exploitation rights to a foreigner was deemed possible. In a 1804 ruling, the same court decided that the 1793 Act (although it was silent on issues of foreign works and authors) only protected works of French citizens that were published in France.
In the 1839 French draft Copyright Act, the Government proposed to protect works first published abroad from unauthorised reproduction within France, on condition of reciprocal protection for works of French authors who had first published abroad. The proposal was the subject of fierce debate. Some members of parliament felt that authors should be sheltered from unauthorised reproduction, regardless of their nationality or the place of publication. Others argued that France owed nothing to foreign authors and that unilateral protection of foreign works would seriously hamper France’s position in ongoing bilateral negotiations on mutual recognition of intellectual property rights. Eventually the proposal was rejected.\textsuperscript{129}

A few decades on, opinion had changed. The famous 1852 French Copyright Decree made unauthorised reproduction in France of works first published abroad a penal offence,\textsuperscript{130} without demanding reciprocal protection of French nationals abroad. Reciprocity was a statutory condition for protection of foreign works in quite a number of countries: the 1828 Danish Decree and the 1844 and 1852 British Acts\textsuperscript{131} provided for it, as did the law of Greece (1833), Bavaria (1840), Saxony and Sweden (1844), Austria (1846), Portugal (1851) and Spain (1879), among others.\textsuperscript{132}

As Ricketson indicates,\textsuperscript{133} the reasons for the development towards protecting foreign authors were manifold. The French, for one, had come to regard copyright (droit d’auteur) as a universal, natural property right of authors, which consequently should not be restricted by borders or nationality. The increased economic importance of cultural products was another factor that encouraged countries to seek protection for ‘their’ output. Particularly the major producing countries such as France, Germany and the United Kingdom had a stake in protecting their authors and printing industries from piracy, for which the printing industries of countries such as the Netherlands, Belgium and the United States were notorious.\textsuperscript{134}

\textsuperscript{129} Renouard 1839–II, pp. 177–178, 485–486.
\textsuperscript{130} Decree cited in: Weiss 1925, p. 273.
\textsuperscript{131} Previously, a 1838 act had provided for the protection of authors of written works first published abroad against unauthorised reproduction in the United Kingdom, on condition of reciprocity. The 1844 Act replaced the one from 1838, extending protection to foreign authors of prints, musical compositions, theatre pieces and sculpture. The 1852 Act facilitated the issuing of royal ordinances that effectuated the protection of foreigners. (BIRP I 1904, pp. 313–314; Romberg 1859–II, pp. 44–49).
\textsuperscript{132} Romberg 1904–I, p. 60; Le Droit d’Auteur 1890, pp. 33–34; Cavalli 1986, p. 38, 46 et seq.
\textsuperscript{133} Ricketson 1987, pp. 20–21.
\textsuperscript{134} On the scope of ‘piracy’ and the call for international cooperation to combat it, see among others: BIRP 1904, pp. 314–315; De Beaufort 1909, pp. 32–39, 53–54; Kruseman 1886, pp. 532–544; Loosjes 1915, pp. 114–115.
3.2.1.1 Equal Treatment Clauses

It may have been that the protection of foreign authors was also promoted by the more general trend to recognise the capacity of foreigners to have rights and obligations under national private law. With the rise of the modern nation, a state came to be viewed as a community of people, living in a steady geographical area, recognising a common authority.\textsuperscript{135} It is particularly the community-element of a state that raised the question of the extent to which non-community members may have legal rights within the boundaries of a country.

In the course of the 19\textsuperscript{th} century, it became a generally accepted principle of international law that states should recognise foreigners as legal subjects being capable of having rights and obligations under private law, just as nationals were.\textsuperscript{136} Savigny maintained that ‘...Fremde haben gleiche Rechte mit Einheimischen wo nicht das Gegenteil bestimmt ist.’\textsuperscript{137} The Romanist school actively opposed the discrimination of foreigners.\textsuperscript{138} By 1889 the German scholar L. Von Bar could write that if people went abroad today, they would not consider that their (civil) rights would disappear or be weakened. It seems out of the question –so he continues– that the law of another state should deny us protection.\textsuperscript{139}

Following the French Revolution of 1789, the essentially discriminatory law on aliens (droit d’habitat) was revoked because it was felt to contradict the idea of brotherhood.\textsuperscript{140} This improvement in the legal position of foreigners was only temporary, as the 1804 French Code Civil contained a partial retraction. According to Article 11 Code Civil: ‘L’étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartient’.

Taken literally, Article 11 Code Civil appears to deny rather than grant foreigners rights due to the reciprocity clause. However, the judiciary ultimately interpreted it so that it meant: foreigners have full rights under private law unless the law explicitly denies them.\textsuperscript{141} That copyright was among these ‘civil’ rights was first unequivocally confirmed by the French Supreme Court as late as 1959, in

\textsuperscript{135} Schultz 1994, p. 108 et seq.
\textsuperscript{136} Bar 1862, p. 64; Battifol 1947, pp. 13–14; Dungs 1910, p. 33 refers more specifically to property rights of foreigners that are recognised and can be protected under local law.
\textsuperscript{137} Savigny 2000, p. 89.
\textsuperscript{138} Bar 1889, pp. 100–101.
\textsuperscript{139} Bar 1889, p. 1.
\textsuperscript{140} Battifol 1947, pp. 13–14.
\textsuperscript{141} Weiss 1925, pp. 250–259; Despagnet 1891, pp. 71–75; Josephus Jitta 1916, p. 27.
the (in)famous ‘iron curtain’ case involving the protection of Russian musical works.\textsuperscript{142}

What exactly the rights of foreigners were under French private law, was disputed before the liberal interpretation of Article 11 \textit{Code Civil} took hold. Some scholars argued that even though the equality-clause was part of the Preliminary Chapter of the \textit{Code Civil}, this Chapter was in fact meant to have a more general scope, so that the equality and other clauses also applied to rights and obligations other than those in the \textit{Code Civil} proper.\textsuperscript{143}

There was also widespread difference of opinion on what these ‘droits civils’ of Article 11 \textit{Code Civil} exactly were. According to jurisprudence and to the judiciary, Article 11 \textit{Code Civil} did not address natural rights and given their nature, foreigners enjoyed these without any form of reciprocity. Consequently, those who saw copyright as a property right—at the time itself perceived as belonging to the realm of natural rights—would conclude that foreigners enjoyed it as well as French nationals. Those who regarded it as a true civil right, would argue that foreign authors were only protected if reciprocal protection was available for French authors.\textsuperscript{144} Since moral rights found their basis in the protection of a person’s integrity or reputation, the argument could be made that moral rights were not \textit{droits civils}, whereas the economic rights, as a purely legal creation, were.\textsuperscript{145}

The Belgian Civil Code, based as it was on the French, contained a clause identical to Article 11 of the French \textit{Code Civil}. According to Wauwermans it is based on the principle that any person who is on Belgian territory is entitled to protection of his person and goods.\textsuperscript{146} In 1854 the Ghent Court ruled that the \textit{droit d’auteur} is not purely a \textit{droit civil}, but derives from the \textit{droit des gens}, as do, for instance, the right to marry or to bequeath property. Foreign authors therefore own copyright as Belgian nationals do.\textsuperscript{147} A few years later, in a case involving the unauthorised use of operas by Verdi, the French \textit{Cour de Cassation} said that intellectual property rights are derived from natural law, thus giving a ruling similar to the Belgian one.\textsuperscript{148}

\begin{footnotes}
\item[143] Opzoomer 1873, p. 3.
\item[144] Colombet 1997, pp. 324–325 reports some cases where copyright was placed in the realm of natural rights, but that most regarded it as a purely civil right.
\item[145] Barin 1935, at pp. 58, 62–63 explores this position but does not unequivocally promote it.
\item[146] Wauwermans 1894, p. 392; see also Cattreu 1889, p. 75.
\end{footnotes}
In the Netherlands, foreigners could, in principle, also acquire and dispose of property, inherit, have contractual rights and obligations, etc. The *Wet Algemene Bepalingen* of 1829 (General Provisions Act or *Wet AB*), which was drafted simultaneously with the *Burgerlijk Wetboek* (Civil Code or *BW*), lays down that the private law of the Netherlands is the same for foreigners as for Dutch citizens, unless the law explicitly provides otherwise (Article 9 *Wet AB*).149 Article 3 of the Italian Civil Code of 1866 contained a similar equality clause, as well as detailed choice-of-law rules.150 Both provisions were a generous variation on Article 11 of the French *Code Civil*.

The link between equality-clauses and copyright protection for foreign authors or works did not escape the attention of critics of the 1881 Dutch Copyright Act. Since the legislature recognised in this Act that copyright is part of private law and an absolute proprietary right, it was felt that the equality clause of Article 9 *Wet AB* 1829 entitled foreign authors to the same protection as Dutch citizens.151 However, the Copyright Act provided otherwise: it stated in Article 27: ‘This law applies to works [read: first, move] printed and published in the Netherlands or Netherlands Indies and to unpublished works of authors domiciled in the Netherlands or Netherlands Indies.’152 Consequently, it did not protect the majority of foreign authors and works.

An implicit reference to the equality principle in France can be found in the explanatory memorandum to the 1852 French Copyright Decree. It states that

‘...although a foreigner can acquire and possess property under the protection of our laws, he cannot prevent the exploitation of his works through piracy, in the otherwise so hospitable soils of France. That is a state of affairs one can deplore, not just because it is not in accordance with the rules that our positive law incessantly strives to generalise, but even because it goes against universal justice.’153

149 It was disputed what this provision meant for choice-of-law rules, as it seemed to imply that the personal statute no longer governed issues of capacity, marital status etc., even though at the time that was the common conflict rule throughout Europe, including the Netherlands. See: Opzoomer 1873, p. 156 et seq.
152 ‘Deze wet is van toepassing op in Nederland of in Nederlandsch-Indië gedrukte en door den druk gemeen gemaakte werken, op niet door den druk gemeen gemaakte werken afkomstig van in Nederland of in Nederlandsch-Indië woonachtige auteurs.’
153 ‘L’étranger ... qui peut acquérir et possède sous la protection de nos lois des meubles et des immeubles, ne peut empêcher l’exploitation de ses oeuvres, au moyen de la contrefaçon, sur le sol d’ailleurs si hospitalier de la France. C’est là un état de choses auquel on peut reprocher, non seulement de n’être pas en harmonie avec les règles que notre droit positif tend sans cesse à généraliser, mais même d’être contraire à la justice universelle.’ Cited in Weiss 1925, p. 273.
In retrospect it may seem a little odd that countries did not opt for the simple solution of putting foreign authors on an equal footing with nationals by way of the general equality clause that already gave foreigners such diverse rights as to own and dispose of real property, enter into contractual obligations, etc. It is beyond the scope of this study to thoroughly examine why this road was not taken; some tentative answers will have to suffice.

An obvious possibility is that since copyright was relatively young, it had not yet found a firm place in private law. Copyright was still shedding its printer's privileges roots and it was not common everywhere to bestow privileges on foreigners. Privileges were exploitation rights given by (local) authorities for the territory under their control and this territorial approach to copyright persisted when it became a right rather than a privilege.

The privilege-background possibly influenced the idea that intellectual property is public law more than private law. Some writers felt intellectual property belonged to the realm of public law rather than private law and public law typically is not concerned with rights of (foreign) persons abroad.

Even when considered as part of private law, the position of copyright was problematic. It was not unequivocally considered a droit civil, natural right, or personal right. Some found its basis was the respect for a person's integrity (the personal rights basis popular in Germany) or property (the natural law basis with many proponents in France). Other countries were more inclined to see its rationale in expediency: to allow authors to reap the fruits of their labour was to encourage the production of works of art and science, which is in the general interest (the dominant opinion in the US). Intellectual property as an instrument of national cultural policy meant there was no reason to protect authors of works that were produced elsewhere. The free use of foreign works suited national policies that were aimed at stimulating local production (including translating foreign works).

Not only was the nature of copyright uncertain, its object and scope were not that well-defined either and varied more substantially from country to country than today. A biting description by the English Royal Commission on Copyright of 1897 illustrates the point. The Commissioners said of the law of copyright, then found in 14 statutes stretching from 1735 to 1875, that it was: 'wholly destitute of

154 Huard 1903, p. 15.
155 Anders 1881, pp. 79–80; Bartin 1935 referring to Ducrocq, p. 57.
156 See among others: Kohler 1907, pp. 84–94, Leuze 1962, pp. 80–85. On copyright in 19th century Germany, see Dambach 1871; in 19th Century Austria, see Helmensdorfer 2001.
157 On 19th-century theories regarding the nature of copyright, see among others: Anders 1881, pp. 79–159; De Beaufort 1909, pp. 70–125; Huard 1903, pp. 29–40; Kohler 1907, pp. 61–99; Wauwermans 1894, pp. 90–95.
any sort of arrangement, incomplete, often obscure and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it.\textsuperscript{15}

Another, more simple, explanation is that given the scope of copyright law at the time, there was no real need for (theoretical) equality because it would not have made much of a difference in practice. Particularly in the first half of the 19th century it was a common rule that the translation or reprint of a work first published abroad was not a restricted act, i.e., a copyright infringement (delict). Of course, the interest of foreign authors was primarily to be able to control the translation or reprint of their work in other countries. Being put on a par in these countries with local authors under an equality-clause would not have helped them much, since foreign authors typically published their work in their home-country first.

Illustrative of the above problem was the situation under the 1810 French copyright decree. It did not differentiate between nationals and foreigners, but since only the unauthorised reproduction of works first published in France was a restricted act, in effect most foreign works fell in the public domain in France, even though foreign authors could invoke the Decree.\textsuperscript{15} When the French pioneered a more liberal stance in the 1852 Copyright Act and also provided for protection of authors who had first published outside France, they went on to export it through bilateral treaties.

3.2.2 \textbf{The Appearance of Bilateral Copyright Treaties}

The common condition that foreign authors could only invoke copyright if reciprocal rights were available to nationals led to an intricate web of bilateral negotiations between European states. Some German states made agreements on mutual protection as early as the 1820's.\textsuperscript{16} In 1840 the kingdom of Piedmont-Sardinia and its 'neighbour' Austria (which still ruled Lombardy at that time) concluded what is regarded as the first true bilateral copyright treaty, although it became multilateral soon afterwards as Italian states such as Parma, Tuscany and the Papal State adhered to it.\textsuperscript{16} It contained substantive provisions as well as a national treatment clause.

\textsuperscript{15}Cited in Vaver 2001, at 1
\textsuperscript{15}Renouard 1839, pp. 177–178; Montagnon 1883, pp. 13–14; Huard 1903, p. 37; Bartin 1935, pp. 59–61.
\textsuperscript{16}Ricketson 1987, pp. 25–26; Cavalli 1986, pp. 70–75.
\textsuperscript{16}Cavalli 1986, pp. 71–72.
A flurry of bilateral treaties ensued, concluded among others between France, Belgium, Denmark, Spain, Great Britain, Russia and some states that were later to dissolve (Austria-Hungary, Norway-Sweden) or united into larger states (German Empire 1871, Italian Kingdom 1861). Many of the earlier treaties were not proper copyright treaties, but commerce treaties with a copyright paragraph added. Since commerce-treaties were rather easily denounced, depending on the political and economic priorities of the day, authors rights based on these were not very secure.

The general principle in these treaties appeared to be national treatment: foreign authors or works were assimilated to nationals. Under some treaties, foreign authors did not have to fulfil formalities other than those in the country of origin to be able to claim protection, which was a deviation from assimilation. Also, various demands of (material) reciprocity limited the actual significance of national treatment. A typical clause in earlier bilateral treaties read ‘Nevertheless, these advantages are only reciprocally ensured during the existence of their rights in the country where the original publication took place and the duration of enjoyment, in the other country, cannot surpass that which is laid down for national authors.’ One possible interpretation of this type of provision was that the term of protection could not exceed that accorded by the law of the country of origin. However, it could also be—and often was—interpreted more broadly, to the extent that material reciprocity was required for protection.

By 1879, the departures from national treatment caused Fliniaux to sigh that the national treatment principle had little meaning. In practice, he argued, the actual principle governing most bilateral treaties was more adequately described as: contracting states give foreign authors (procedural) recourse to protect their rights, whereby the content and duration of the rights depend on the law of their country of origin. It was not until later that national treatment became the truly dominant principle in bilateral treaties, with a corresponding reduction in the number of reciprocity clauses.

The ‘modern’ 1883 Franco-German treaty on copyright states in Article 1: ‘the authors of works of literature or art will, regardless of whether these works have
been published, enjoy in both countries mutually, the benefits that its law offers for the protection of works of literature or Art. They will enjoy there the same protection and the same means of redress against harm done to their rights, as if this harm had been done to an indigenous author.” This provision can also be found in the Berne Convention and has become the source of confusion over choice-of-law rules, as we shall see later.

3.3 The Foreigner in the Berne Convention

By the end of the 19th century an international copyright system had developed that was based on national copyright laws that made—in conformity with the commonly held notion that each state has exclusive jurisdiction over its own territory—the protection of works, either first published within their respective borders or created by national authors, a matter of domestic legislation. Protection for non-nationals was not based on general equality clauses, but on specific rules in domestic copyright law and on bilateral treaties.

These agreements primarily involved European countries, although Latin American states concluded quite a number of treaties as well. It is estimated that up to the Berne Convention some ninety treaties were concluded, dealing either exclusively or in part with copyright. France was party to over half of these. By 1886, thirty treaties were in force between fifteen contracting states.

3.3.1 The Road to Berne

In the second half of the 19th century, authors and artists increasingly organised themselves to further their interests, the primary one being to improve control over the fruits of their labour both at home and abroad. During various international conferences—in 1858, 1861, 1877, 1878, 1881 and 1882—they fiercely debated the nature of copyright. Some held copyright to be an absolute and eternal right.

167 ‘Die Urheber von Werken der Literatur oder Kunst sollen, gleichviel ob diese Werke veröffentlicht sind oder nicht, in jedem der beiden Länden gegenseitig sich der Vorteile zu erfreuen haben, welche daselbst zum Schutze an Werken der Literatur oder Kunst gesetzlich ingeräumt sind oder eingeräumt werden. Sie sollen daselbst denselben Schutz und dieselbe rechtshilfe gegen jede Beeinträchtigung ihrer Rechte geniessen, als wenn diese Beeinträchtung gegen inländischen Urheber begangen war.’

168 Numbers based on the list composed by Cavalli 1986, pp. 73–75.
whereas others flatly denied its existence.\textsuperscript{169} Yet others were favourable to the idea of copyright as a type of absolute right, but strongly opposed an indefinite term of protection. At the 1858 conference of authors, Delegate Calmels expressed his abhorrence of eternal copyright thus:

\begin{quote}
Messieurs, il faut bien reconnaître que la plupart des hommes qui ... fonts des œuvres, se sont inspirés de ceux qui les ont précédés et n'ont rien fait de nouveau... Accorderez-vous pour cela un droit de perpétuité? Mon Dieu, messieurs, il y a peu d'idées nouvelles.'\textsuperscript{170}
\end{quote}

National copyright laws differed extensively, not only with regard to categories of works protected, but also in their scope and term of protection. The myriad bilateral treaties were not regarded as an effective means to guarantee protection on the international level. It is therefore not surprising that once writers, artists and publishers of different countries assembled together, their preferred solution was the unification of all copyright laws.

Precisely because of the disparity between national laws, this was an unrealistic goal. So authors limited themselves to identifying the basic principles to which any advanced copyright legislation should adhere. The 1858 conference in Belgium agreed on the following principles: an exclusive right to authorise publication, reproduction and performance should be legislated for authors of books, plays and other written works, for composers of music and for artists with respect to their drawings, paintings and other works. The term of protection in all laws should be the life of the author plus 50 years after the death of the surviving spouse.\textsuperscript{171} Authors should have the exclusive right to authorise translations of their work, provided they make their first use of this right within three years after publication of the original.\textsuperscript{172}

Foreign authors and owners of copyright in works published abroad would have to be treated the same as nationals.\textsuperscript{173} The principle of national treatment (seen as territorial) was not wholly undisputed, some favoured the principle that authors be treated the same as under their personal law (based on nationality). The idea that the rights as provided by the law of the author's home country should follow him wherever he was, or wherever he published, seemed more attractive.

\begin{footnotes}
\item[169] Romberg 1904–1, p. 2 et seq.; Société des Gens de Lettres de France 1879, p. 39 et seq. At the 1878 annual meeting of the \textit{Nederlandsche Juristenvereniging} (Dutch Law Association), a majority of the jurists present considered that copyright can not be based on any particular legal principle, only the general interest can justify the protection of authors (see Hugenholtz 1998, pp. 1–2).
\item[170] Cited in Romberg 1904–1, p. 108.
\item[171] The idea seems to have been that copyright persists after the death of the author only if there is a spouse or direct descendant to benefit from it.
\item[172] Romberg 1904–1, pp. 61–162.
\item[173] Romberg 1904–1, p. 75.
\end{footnotes}
particularly for those who regarded the ‘droit d'auteur’ as an absolute and eternal right of the creator.\textsuperscript{174} However, national treatment was ultimately favoured as the second best solution to unification.

In 1878 France hosted the international literary conference where the ALAI was founded. The ALAI called upon the French government to prepare a draft international treaty. Shortly afterwards, the 1878 Conference on artistic property voted resolutions including:\textsuperscript{175}

- international intellectual property treaties should be separated from commerce treaties;
- it is desirable that European states and their overseas territories develop uniform copyright provisions;
- the infringement of the artist’s right is a ‘délit commun’;
- for an artist to be allowed to enforce his right it suffices that he justifies his property right in the country of origin.

The French appointed a committee, but when no draft treaty followed, the initiative moved to Switzerland. In 1883 a proposal was drafted, a work influenced greatly by the then German president of the ALAI, Professor Ulbach and French professors Pouillet and Clunet. They saw national treatment, coupled with a few basic substantive provisions, as a mechanism and first step for further unification.\textsuperscript{176}

3.3.2 The 1884-1886 Conferences and Subsequent Revisions

The 1884 Berne conference was a preparatory one, which resulted in a proposal that the delegates\textsuperscript{177} present submitted to their respective governments and that was also sent to other governments. The year 1885 saw another conference with more countries represented\textsuperscript{178} and the resulting text of the Convention was signed with minor alterations during the 1886 conference.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{174} Fliniaux 1879, citing Pataillé, p. 32.
\item \textsuperscript{175} Cavalli 1986, p. 138.
\item \textsuperscript{176} Cavalli 1986, pp. 158–175.
\item \textsuperscript{177} From Austria-Hungary, Belgium, Costa Rica, France, Germany, Haiti, the Netherlands, Sweden & Norway, Switzerland, the United Kingdom (Actes BC 1884, pp. 71–72, 19–20).
\item \textsuperscript{178} Costa Rica and Austria-Hungary were not represented as in 1884, but Argentina, Italy, Spain, the United States, Paraguay, Honduras and Tunisia were (Actes BC 1885, pp. 11–12, 33).
\item \textsuperscript{179} Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the United Kingdom were the signatories. The United States and Japan and Liberia had observer status (Ricketson 1987, p. 79).
\end{itemize}
To understand the outcome of the project it is essential to keep in mind a number of circumstances. First of all, given that the aim was to have as many Union members as possible, there were likely to be many compromises. Secondly, the disparity between national copyright laws allowed for modest substantive provisions only. Thirdly, countries with relatively extensive copyright protection such as France and Germany had little to gain from a pure national treatment scheme. Their own citizens would still have little protection abroad and they would have to justify why foreigners enjoyed more rights at home than their own authors did abroad. The ‘advanced’ countries therefore had an interest in as many substantive provisions as were attainable and in exceptions to national treatment by way of some form of reciprocity.

Fourthly, countries with limited copyright protection had opposite interests. Even though the Berne Convention was aimed at improving protection only of foreign works and authors, agreeing to a *jure conventionis* level of protection that exceeded national protection would give these countries a similar problem that advanced countries would have with national treatment. They would have to explain on the home-front why foreigners were better protected than their own nationals. The practical consequence would be that countries would have to adapt their copyright laws to give their own citizens the same level of protection as they were obliged to grant foreigners. Agreement on substantive rules was therefore only possible in so far as countries were prepared to incorporate them into domestic copyright law, or were able to make reservations.

The impact of all of these factors is easily recognised in the design of the Berne Convention. National treatment is made the leading principle, but it is regularly thwarted by reciprocity. Minimum substantive rights are interspersed with facultative provisions. The BC as agreed upon in 1886 allowed for more deviation from the national treatment principle than the 1883 proposal, which contained just ten short Articles.

Three dealt with national treatment: the central Article 1 for authors, Article 4 equating successors in title with authors and Article 7 specifying that foreigners should have the same legal remedies against infringement as nationals. Another

180 Ricketson notes that the drawbacks of a pure national treatment scheme for countries with a high level of protection also caused the pre-Berne Convention bilateral agreements to contain substantive provisions (Ricketson 1987, pp. 25–26). In a sense, the Berne Convention was a continuation of old practices on a grander scale.

181 Belgium is a case in point: because the pre-1994 Copyright Act offered less moral rights protection than Article 6bis BC does, the courts extended domestic Belgian copyright to the BC standard; see Doutreloupont 1997, pp. 223, 292–293.

182 Josephus Jitta in his treatise on private international law describes the BC and other intellectual property treaties as ‘...having the character of a politically motivated scheme of mutual protection, rather than a regulation of private law issues.’ 1916, pp. 267–268.
three Articles clarified the subject-matter of copyright: works of literature and art (Art. 2), including unpublished manuscripts (Art. 3) and translations (Art. 6). Since the exclusive right to authorise translations was deemed the most important right from the international perspective—but it was also a controversial issue—it was included explicitly in the proposal (Art. 5). The last three Articles specified that the Convention would be applicable to all works that had not come into the public domain in the country of origin of the work (Art. 8), that contracting States could conclude special agreements as long as these were not in contravention of the Convention (Art. 9) and that an international bureau would be established for the deposit of national copyright acts (Art. 10).

The official draft for the Diplomatic Conference of 1884 was twice the size of the proposal tabled in 1883. It encompassed all but one of the earlier Articles, some of which in revised language. It also contained additional procedural clauses on entry into force, future revisions, etc. Debate during the 1884-1885 conferences concentrated on the extent to which the Convention should contain uniform substantive copyright and the scope of national treatment. Subsequent revisions in 1896 (Paris), 1908 (Berlin), 1928 (Rome), 1948 (Brussels) and 1967 (Stockholm) were dominated by attempts to clarify and expand the substantive minimum rights and weed out the possibilities for (later) signatories to make reservations.

To illustrate the tug-of-war between national treatment and reciprocity, between compulsory minimum rights and facultative protection, it is instructive to look at the developments surrounding the duration of protection, the translation right and the gradual extension of the categories of protected subject-matter to include works of photography and other works. The solution reached for the controversies surrounding ownership of copyright in films is especially interesting from our perspective, because (as we shall elaborate in the next Chapter) it involves the only straightforward conflict rule in the Berne Convention.

### 3.3.2.1 Term of Protection

An important issue in 1884 was whether national treatment should also govern the term of protection. Some countries found it unacceptable to have to continue to grant protection to foreign works once these works had come into the public domain at home. The committee that dealt with the issue felt it was preferable to have a uniform term. However, since the terms of protection *post mortem auctoris*...
(PMA) differed substantially in national codes, the delegates accepted—albeit with some difficulty—the German proposal to make the duration of copyright dependent on the term accorded under the law of the country of origin. In 1928, a uniform term of 50 years post mortem auctoris was established for most, but not all works. As long as this term was not universally accepted by Union countries, however, each country could maintain its own term and limit the term of protection for foreign works to that in their country of origin (Art. 7 BC 1928).

Some changes have been made since then, but the 50-year-rule still allows for exceptions. Union members may for instance maintain a shorter term of protection for photographs and applied arts (minimum of 25 years on completion) and may choose to protect film for 50 years on completion or the time it was first made available to the public rather than 50 years PMA (Art. 7 BC).

3.3.2.2 Translations

From the beginning, a very important and controversial issue was translations. Writingss were a major category of works and the normal way to exploit them abroad was of course to publish a translation. Some countries felt that translations should be equated with reproductions; the author would thus have the exclusive right to authorise translations of her or his work as long as it was not in the public domain. For others this was unacceptable. They preferred a right to authorise translations for a much shorter period (three or ten years). Given the great differences in national laws, national treatment was not considered a good alternative either, certainly not where it concerned the period during which the author has the exclusive right to authorise translations. Ultimately, the 1884 Conference decided on a rather intricate scheme: it an author had authorised a translation that was published in a Union country within three years of publication of the original work, the author had the exclusive right to authorise further translations, but only for a period of ten years after publication of the first translation (Art. 6 Draft BC 1884). The issue was raised again in 1885 and the delegates managed to expand the protection a little: authors resident in a Union.

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185 Actes BC 1884, pp. 30, 41–43.
186 Dates after Articles refer to the ‘Berne’ version (1886), Berlin revision (1908), Rome revision (1928), Brussels revision (1948), Stockholm revision (1967). Articles not followed by a date are those in the current version of the Convention (i.e., the latest revision of Paris 1971).
187 Actes BC 1884, pp. 31–32.
188 Actes BC 1884, pp. 31, 45–49.
country enjoyed the exclusive right to authorise translations for a minimum of ten years after publication of the original work (Art. 5 BC 1886). The quest for equation continued at the 1896 Revision Conference and a new compromise was reached: authors would have the translation right during the term of protection of the original work, but if within ten years after publication of the original work they still had not used this right for a given language, others were free to publish a translation in that language (first Article, at III Additional Act Paris 1896). As long as the original work remained unpublished, the translation right stayed intact. In 1908 the ‘translate within ten years’ requirement was dropped (Art. 8 BC 1908), so that authors enjoyed the translation right for as long as they enjoyed other economic rights.

3.3.2.3 Works Protected

The development of Article 2 of the Berne Convention (Art. 4 in the 1886 text) is another illustrative example of the painstaking effort it took to reach agreement on substantive issues. From the start, there were differences of opinion on what the inclusion of a certain type of work in the list of Article 2 meant. Some held it to be merely illustrative, while others felt that signatories had a duty to protect at least the type of works mentioned (if original). The latter point of view was confirmed as the right one in 1908 (with Art. 2 sub 3, BC 1908 stating as much).

As to the type of works protected, the 1884-1886 conference delegates were in minor disagreement only, compared to what ensued during the 1896, 1908, 1928 and 1948 revision conferences.

In 1885, France and Italy wanted photographs to be listed explicitly as works of literature and art, which was unacceptable to Germany which had a separate regime for protection of photographs. The conference decided to give photography a place in the closing protocol: countries that protected photography under copyright law could choose to protect foreign photography on the basis of reciprocity.

In 1896, photography was again an issue of debate and some progress was made on the matter. The protocol now stated that Union authors

could also benefit from national laws other than copyright laws that protected photography, without the condition of reciprocity.\(^{193}\)

The 1908 Revision Conference saw many proposals to change the (illustrative) list of works protected. Photography featured on the list of recommendations, as did applied arts, pantomime and anthologies.\(^{194}\) It was not included in Article 2 and kept its separate position, but it was now confirmed that countries were obliged to protect photographic works (Art. 3 BC 1908).

The 1928 revision did not result in any major changes to the list of protected works, although speeches and the like were now included.\(^{195}\) In 1948, however, photography, together with film and other audiovisual works, architecture, applied arts and industrial design was finally included in the main list.

3.3.2.4 Ownership of Audiovisual Works

At the 1967 Revision Conference, the ownership of rights in audiovisual works was a much debated issue. Since the production of film involves many contributors, it is important for film producers to secure the rights from the contributors, in order to be able to exploit the film. That countries have different rules for ownership complicates the position of a film producer. Harmonisation was therefore attempted.

Roughly speaking, there are three different kind of systems in use for rights allocation in audiovisual works. Under the first, all creative contributors (director, screenwriter, cameraman, etc.) are considered as co-authors, but the economic rights are granted to the producer by law. In the second system, creative contributors are recognised as (co-)right owners, but the producer is considered to own copyright (or at least to have an exclusive licence to exercise the rights necessary for normal exploitation of the film) by way of a rebuttable assumption of assignment (presumptive cession). The third system directly allocates copyright to the producer of a film.\(^{196}\) The co-existence of these three systems in Union states complicated the discussions on the inclusion of film copyright in the BC.

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196 In the EC, attributing initial ownership of copyright in an audiovisual work to the producer exclusively, is no longer allowed since the 1992 Rental and Lending Directive. The principal director of the film must be considered as author and (co-)owner. Member States are free to designate other contributors as co-authors-owners (Art. 2(2) Rental and Lending Directive, Art. 2 Term of Protection Directive).
Some countries did not want any special reference made to the ownership of rights and preferred to leave national treatment intact. Other countries feared that their film industry would suffer if producers could not expect the copyright they acquired at home to be respected abroad. However, the alternative—leaving ownership of a particular film to be regulated solely by the producer’s domestic law—was unacceptable to countries that were most protective of the rights of individual contributors. The compromise is a rather intricate reaffirmation of the national treatment principle, coupled with a substantive clause and a conflict rule.

The national treatment principle is repeated in the first paragraph of Article 14 bis(2): deciding who owns copyright in audiovisual works is a matter for domestic legislation of the country where protection is claimed. It is further prescribed that in countries where the exploitation rights are (or all copyright is) not assigned to the producer by law, the (co-)contributors cannot resist normal exploitation acts with regard to the film to which they have agreed to contribute. This substantive clause comes in the form of a rebuttable presumption: the contributor and producer can agree otherwise. Whether the agreement must be in writing or not, is to be judged by the law of the country where the producer has his seat or habitual residence. This conflict rule can be set aside by Union members who demand that any agreement must be in writing.

The presumptive licence clause of Article 14 bis (2a) is potentially robbed of much of its significance by Article 14 bis(3). Under this provision, countries remain free to exempt important contributors to any film—the screenwriter, the composer of music specifically written for the film, the dialogist, the principal director—from the presumptive cession. In effect, unless national laws provide otherwise, the presumptive cession does not concern these contributors.

At the time of the Paris Act, there were no special rules for ownership of audiovisual works in Dutch law: every person who made a creative contribution (director, scriptwriter, cameraman, etc.) was a co-author of the work. The film producer only owned the copyright if the film was made by employees (Art. 7 Aw) or if he had acquired it from the actual creators. According to the Dutch Government, the reason to introduce special provisions was not that there was a need for them in the (Dutch) film industry, but because it was desirable to adjust domestic copyright law to the changes in the 1971 BC.

In sum, the Dutch Government argued that Article 14 bis BC is inspired by the need to promote the unhindered circulation of films and that this would only be achieved if there is adequate legal certainty as to the exploitation rights of the producer, or else the necessary investments in films would not be made. The

197 Article 14 bis(2)h BC actually names the acts that cannot be resisted (reproduction, distribution of copies, screening in public, broadcast, etc.).
198 See Geller 2001 at 6[2][ii].
government first wanted to introduce only a presumption of transfer of economic rights, since this seemed to match Article 14 bis(2) BC the best. The government’s influential Advisory Committee on Copyright (Commissie Auteursrecht) however, favoured a system of full transfer by operation of law (cessio legis). Although this variation was proposed in a later, revised legislative draft, the more ‘author-friendly’ option, that of presumptive transfer of economic rights, was legislated for.\textsuperscript{199} In reality, there was no need to change the Auteurswet, because under Dutch law producers of foreign films can invoke Article 14 bis(2) directly. The changes to the Auteurswet also go further than the BC requires, because in the BC there is no presumptive transfer of economic rights, but a presumptive licence, exclusive at best.

The development of Articles 2, 7 and 8 BC shows the uneasy relationship between national treatment and unification. On the one hand countries were frequently opposed to national treatment if that meant that foreigners could rely on more protection than nationals. On the other hand every provision that introduced a form of reciprocity (e.g., photography until 1896) or made maximum protection dependent on the country of origin (e.g., duration), would go flatly against the basic principle that foreign works authors be treated as nationals. Harmonisation was the solution but proved difficult to achieve, particularly where it required parties to extend the scope of their national copyright laws.\textsuperscript{200}

The resulting rules have mixed properties. The protection of photography developed from being facultative and reciprocal, to non-reciprocal and eventually compulsory. Provisions that reflect outright substantive harmonisation remained rather sparse, e.g., the exclusive right to authorise translations (Art. 8), the freedom to cite legitimately published works (Art. 10 at 1) and the exclusive right for authors of musical and dramatico-musical works concerning public performance and transmission of their work (Art. 11).

Other provisions are a combination of harmonisation, national treatment and a form of reciprocity (references to the country of origin), e.g., the duration of protection (Art. 7) and the scheme for applied arts and industrial design (Art. 2(7)). Another category of provisions are the facultative exemptions, e.g., the possibility to exclude official texts from copyright (Art. 2(4)), the press exemption for public speeches in Article 2bis, the exemptions to the reproduction right in Article 9, the possibility to exclude moral rights after the death of the author in

\textsuperscript{199} De Vries 1989, p. 152 et seq. As for moral rights, the author is presumed to have waived only the right to resist adaptations of her contribution \textit{vis-a-vis} the producer (Art. 45 Auteurswet).

\textsuperscript{200} Although all substantive provisions only reflect the minimum protection that must be given to copyright owners of works that originate from another Union country, it is clear from the proceedings of the Berne conferences that countries planned to apply the substantive provisions to domestic works also.
Article 6bis(2), the *droit de suite* and the freedom to reproduce works for the purpose of education or science.

Compared to the initial elegant draft of 1883, which contained only a national treatment clause and a handful of shared principles, the Berne Convention has a rather disorderly structure and many exceptions to both the national treatment principle and substantive rights. There is certainly some truth in the unflattering characterisation that the influential German scholar Kohler gave of the Berne Convention when he called it "...ein zusammenhängloses Durcheinander von Prinzipien...". All the same, it was of course quite remarkable that a major multilateral treaty was concluded on a subject as young and tentatively defined as copyright.

### 3.3.3 A Closer Look at National Treatment

In his opening address to the 1884 Diplomatic Conference, Chairman Droz put a number of (rhetorical) questions to the delegates. Was it not right that every author should retain his right to his work everywhere it is used? Should one not admit that the nature of copyright does not depend on the place where the work is reproduced? Differences in national laws were less a matter of principle than of subjective appreciation. Even though the Swiss proposal was based on national treatment, Droz told his audience that they would have to decide whether national treatment was the best way of ensuring protection, or whether a system by which copyright follows the author was to be preferred.

Apparently the audience felt it was self-evident that the international instrument in the making would be based on national treatment. The records of the 1884 and 1885 preparatory conferences do not indicate that any serious discussion took place on the suitability and desirability of national treatment as a means of securing international copyright protection. The absence of such a debate is not surprising, considering that national treatment was a common principle in bilateral copyright treaties and that it leaves the contracting states freedom to decide on issues for which no unified rules have been agreed upon.

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201 Kohler 1907, p. 402. In his draft convention, Kohler took the national treatment principle to its extreme, allowing for no exceptions and proposing that all nationals of Union countries be protected, regardless of where they first published their work. See Röthlisberger 1909, pp. 492-492.


203 This is not to say that there were no proponents of the idea that the author should be given the same protection that he or she has in his or her home-country (on the basis of nationality or domicile), see Bastide 1890, p. 97 et seq.
The German delegation did ask whether instead of drafting a convention based on national treatment, it would not be better to envisage codification of uniform substantive provisions. Since most countries agreed that the time for substantial unification had not yet come, national treatment took its place as the central notion in the Berne Convention, which it retains unto this day. The 1884 draft stated:

‘Les auteurs ressortissants à l’un des pays de l’Union, ou leurs ayants cause, jouissent, dans les autres pays, pour leurs œuvres, soit manuscrites ou inédites, soit publiées dans un de ces pays, des avantages que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux.

Toutefois, ces avantages ne leur seront réciproquement assuré que pendant l’existence de leurs droits dans leur pays d’origine.’...

In 1885 the draft was revised, because it was feared that the language of the second paragraph (especially the words ‘...quand pendant l’existence...’²⁰⁶) could induce courts to never accord more protection than was available under the law of the country of origin. This was the common interpretation of similar clauses in the 1883 Franco-German Treaty and other bilateral treaties. Article 2(2) of the Franco-German Treaty stated that authors could only enjoy protection in the other state for as long as their copyright in the country of origin existed and that the duration of protection could not exceed that in the country of origin.

In Germany it was taken to mean that the scope of protection afforded in Germany to a work first published in France could not exceed the protection available in France. So it was always the lowest degree of protection that counted. In order to determine what protection a French author could claim in Germany it had to be established: (a) that a work was the object of protection in France, (b) that the term of protection in France had not expired and (c) what the scope of protection in France was.²⁰⁷

If such a system were followed in the Berne Convention, it would ‘have the grave disadvantage of demanding courts or publishers to have profound knowledge of all particular laws...which would go against the notion that the Union means to create’.²⁰⁸ Therefore an explicit reference was made to what the paragraph really was, namely a reciprocity clause for the duration of copyright and nothing more. Paragraph 2 became: ‘elle [the enjoyment of the rights, mve] ne

²⁰⁶ Dambach 1883 at pp. 1–4 supports this interpretation; Bastide 1890 at pp. 101–102 criticises it but reports that it is common, also in other treaties.
²⁰⁷ Actes BC (1885), p. 41.
peut excéder. dans les autres pays, la durée de la protection accordée dans ledit pays d’origine."

In the final 1886 text national treatment was phrased thus:

‘Les auteurs ressortissants à l’un des pays de l’Union, ou leur ayants cause, jouissent, dans les autres pays, pour leurs œuvres, soit publiées dans un de ces pays, soit non publiées. des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux.’ (Art. 2(1) 1886).

The Swiss Government had proposed to add a sentence stating that ‘consequently, they will have the same protection and means of redress against every infringement of their rights [as nationals], notwithstanding the fulfilment of conditions and formalities in the country of origin of the work’. This was a standard phrase in existing bilateral treaties. It was, however, not incorporated into Article 2 (1886 version) because national treatment was held to imply as much. A proposal to expressly state that procedures before the courts and the jurisdiction of the courts were matters for internal legislation, shared the same fate for the same reason (Swiss draft of Art. 1 Closing Protocol 1884).

When in 1908 progress was made on unification of the term of protection, a new Article on duration was introduced (Art. 7 BC 1908). The reciprocity clause for duration was moved from the old Article 2 to the new Article 7. Article 2 on national treatment was renumbered Article 4 and a clause prohibiting the requirement of formalities was added to it. These last changes were possibly made partly because some British courts inferred from the national treatment principle that foreign authors were required to conform to English formalities just as English authors were, even though the 1886 text had only provided that for an author to enjoy protection elsewhere he must comply with the formalities in the country of origin.

Likewise, German courts still had problems interpreting the BC, as some continued to rule that foreign authors were entitled to national treatment only if the work in question was protected in the country of origin. In France it was
established case-law that authors of works first published abroad could only successfully enforce their copyright if under the law of the country of first publication they had a *droit privatif*, i.e., a subjective right. The German delegation insisted that the revised Article 2 (Art. 4 1908) explicitly include an even stronger reminder than it had in 1886, that the rights granted in one Union country were not dependent on the scope of protection in the country of origin. Accordingly, Article 4(2) (5(2) current) was changed in:

‘La jouissance et l’exercice de ces droits ne sont subordonnées à aucune formalité: cette jouissance et cet exercice sont indépendants de l’existence de la protection dans le pays d’origine de l’œuvre. Par suite, en dehors des stipulations de la présente Convention, l’étendue de la protection ainsi que les moyens de recours garantis à l’auteur pour sauvegarder ses droits se règlement exclusivement d’après la législation du pays où la protection est reclamée.’

From the above it may be clear that the changes that were made in the phrasing of the national treatment principle during 1884-1908 were largely due to continued misinterpretations of the original text. This in turn seems to have been caused at least partly by the fact that some courts stuck to the interpretation of national treatment and reciprocal protection of foreign authors that they had developed as they applied bilateral treaties. They seemed reluctant to accept the more liberal application of the national treatment principle that the Berne Convention called for.

The phrase that the means of redress for safeguarding rights are governed by the law of the country where protection is claimed, is repeated in Article 6 bis on moral rights. It was introduced when moral rights first were incorporated in the BC in 1928, to stress that it applies not only to economic, but also to moral rights.

3.3.3.1 Country of Origin

The determination of the country of origin is important for two reasons: it regulates which authors or works are protected under the BC and it sets the boundaries for reciprocal treatment.

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212 See also Lucas & Lucas 1994, p. 887.
213 Locher 1993, at pp. 6–7 notes that the drafting of the BC was an exercise in overcoming the law on alien-provisions that were common in domestic copyright acts.
214 Massouyé 1978, p. 46 et seq.
The BC is only involved with ‘international’ copyright cases, it does not purport to affect domestic copyright law for domestic cases. As the French Supreme Court reiterated in the Utrillo case:

‘en vertu de l’Article 5.3 de la Convention de Berne...la protection des œuvres dans le pays d’origine est régie par la législation nationale, de sorte qu’à défaut d’élément d’internationalité, la situation litigieuse demeurait, en l’espèce, soumise au droit français.’

In this case, the successors in title to the copyright of French painter Maurice Utrillo, sought an injunction against a French auctioneer to prevent the reproduction of some paintings in a sales catalogue for an auction that was to take place in France. Under French law such reproduction is allowed. The copyright owners invoked the substantive rules of the BC in vain, since France was the country of origin and the allegedly infringing act took place in France.21

At first glance, the national treatment clause seems to mean that authors who are nationals of Union countries are eligible for protection in all other Union countries. In effect, however, to enjoy protection under the BC, the country of origin of the work must be a Union-member. For published works the country of first217 publication217 is the country of origin. Consequently, if a Dutch national first publishes in France, the work is ‘nationalised’. For BC purposes it is no longer considered to be Dutch, but French.

Nationals or habitual residents of Union countries who first publish their work in a non-Union state are kept under the BC’s protective mantle by Articles 5(4)b and c BC. If first publication takes place in a Union and a non-Union country simultaneously,218 the Union country is regarded as the country of origin. If first publication takes place in a non-Union country only, the Union country of which the author is a national or habitual resident219 is the country of origin. There are

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216 While the 1886 text was still a little ambiguous, the 1896 Additional Act made clear that only if the first publication had taken place in a Union country could Union nationals expect the benefits of the Berne Convention (Art. 1–1 Additional Act 1896, Art. 4(1) BC 1908).

217 What is to be understood by ‘publication’ considering today’s communication technologies will be addressed later. The initial BC considered publication the making available of a fair number of copies to the public. Performing a musical work or play is not publication, nor is the exhibition of a work of art or the construction of a work of architecture (Art. 3(3) BC).

218 ‘Simultaneous’ meaning within a period of 30 days.

219 Article 5(4)c speaks of the author as a national, but Article 3(2) prescribes equal treatment for habitual residents. Massouyé is not altogether sure whether Article 5(4)c also applies to habitual residents: 1978, p. 39.
two exceptions to this rule: one for audiovisual works and one for works of architecture.

For audiovisual works the habitual residence or ‘headquarters’ of the producer\(^{220}\) is the country of origin. The term ‘headquarters’ (\textit{siege social} in the French text) seems to correspond with the notion of the ‘principal place of business’, which is a commonly-used connecting factor in private international law. The place where the production company is incorporated or where a legal person is otherwise registered is not a relevant factor. For architecture and works of graphic or visual art incorporated in them, the place where the structure was erected determines the country of origin.

Initially, the place of first publication upstaged the nationality of the author as the predominant criterion for a number of reasons. An obvious one is that it was a commonly-used standard in national copyright laws and bilateral treaties. Another reason has to do with the fact that the term of protection cannot exceed that in the country of origin (Art. 2(2) second sentence BC 1886).\(^ {221}\) A practical argument to use place of publication rather than nationality, was that the former was considered easier to determine for publishers and users who wanted to find out whether a work was (still) protected, presumably because printed matter tends to contain information on the place and date of publication. Potential problems with multiple nationalities in cases of co-authorship would also be avoided, at least in cases where authors had published their works.\(^ {222}\)

Yet another reason involved the protection of non-Union authors. The Swiss Government initially proposed to assimilate non-Union nationals to Union nationals, on condition that they had their habitual residence in a Union country or published their works there. Some delegations opposed the idea of protecting non-Union authors altogether. Others were concerned that this type of assimilation would invite countries to stay outside the Union. A compromise was reached: not the non-Union authors, but their publishers\(^ {223}\) were given protection in the Union countries (Art. 3 BC 1886).\(^ {224}\)

From the viewpoint that authors ought to be the initial copyright owners, this construction was a legal monstrosity. It was therefore revised by the Paris 1896 Additional Act. to the extent that authors of non-Union countries who \textit{first} published their work in a Union country, could invoke the minimum rights granted in the Berne Convention (Art. 1 II Paris Additional Act 1896), but were not

\begin{footnotesize}
\begin{enumerate}
\item \(\text{\textquoteleft Maker\textquoteright} \) in the English text of Article 5(4)b i BC, but \textquoteleft producteur\textquoteright in the French text.
\item Actes BC (1884), p. 30, 42.
\item Actes BC (1885), p. 1.
\item These were understood to be publishers who were nationals of Union countries, or who had a stable establishment in a Union country; Actes BC (1885), p. 42.
\end{enumerate}
\end{footnotesize}
entitled to national treatment. Although some countries (Belgium, Switzerland Germany) again strove to assimilate non-Union authors who first published in the Union to Union authors, to the majority this was not acceptable. It was only after further revisions in 1908 (Art. 6 BC 1908) and in 1967 (Art. 3(1) sub b and c. 3(2) BC 1967) that the initial Swiss proposal became a reality.

The focus on the country of first publication as a determining factor for BC protection has drawn criticism for being detrimental to the interests of authors and giving undue preference to the interests of publishers. The Union publishers benefited not only from the protection of works of Union authors, but also from the first publication in their countries of works of non-Union authors. Union authors, on the other hand were in practice forced to do business with Union publishers, because a first publication outside Union territory would place their work outside the BC's reach.

This criticism was partly addressed by the 1967 revision, which introduced the clauses protecting Union authors with regard to the works they first publish in non-Union countries. Other criticism which has not been addressed is that the notion of 'publication' may have been adequate in the predominantly paper world, but that it is no longer so as new media (broadcasting, Internet) have developed.

For unpublished works, the country of origin is the country to which the author 'belongs' ('le pays auquel appartient l'auteur'. Art. 2(4) BC 1886). The terminology used is somewhat ambiguous. Apart from the phrase mentioned, Article 2 also identifies Union authors as 'les auteurs ressortissant à l’un des pays de l'Union'. In the same clause national treatment is expressed as giving the same protection as nationals ('nationaux'). In the conference proceedings, the first two expressions are said to mean that the author is an 'indigénat' of a Union country.

It would thus seem that these terms are not equal to 'nationals' or citizens, but they certainly do not refer to habitual residency. This can be inferred from the

226 In 1908 non-Union authors who first published in a Union country were granted national treatment in that country, while in other BC countries they could—as before—invoke the minimum rights of the Convention. In the Additional Protocol of Berne 1914, a retorsion rule was introduced at the request of Canada. As a Union member, Canada had to afford protection to US authors who first published in Canada, while Canadian authors were not protected in the US. The retorsion clause was incorporated into the 1928 revision (Art. 6(2) BC 1928, current 6(1)). It provides that if a non-Union country does not have a sufficient level of protection, a BC country is entitled to restrict protection for works first published in its country by nationals from that non-Union country (unless they are habitual residents of a Union country). If a country invokes the retorsion rule, other Union countries may also withhold protection to the works concerned.
227 For an overview of pre–Stockholm criticism, see Koumantos 1964, p. 7 et seq.
228 Actes BC 1885, p. 42.
assimilation of non-Union authors who are habitual residents of a Union country to Union authors: "les auteurs ne ressortissant pas à l’un des pays de l’Union mais ayant leur résidence habituelle dans l’un de ceux-ci sont...assimilés aux auteurs ressortissant audit pays" (Art. 3(2) BC 1967). Whatever the ambiguity of the language, it is of no great significance today since Union protection extends to both nationals and habitual residents of Union countries.

Another issue is what the country of origin is of a work that was conceived by a Union author, but had not been published upon his death. According to the proceedings of the 1885 Conference, national treatment extends to successors under general or specific title, whatever their nationality. The rights of successors of a Union author (national or habitual resident) are therefore protected within the Union. The question remains what the country of origin of such a work is: is it the country of which the author was a national or habitual resident at the time of the creation of the work, or is the decisive moment at the time of his or her death? The former solution seems more logical, but the latter has the advantage that all the author’s works would be treated the same. Given the large number of states that are party to the Convention, this is more of a theoretical problem than a practical one, although it could prove to be relevant in instances where (material) reciprocity is allowed (term of protection, protection of design, resale right).

A potential problem that has not been addressed by the drafters was how to determine the country of origin of unpublished works that have multiple authors with different nationalities, or one author with no or multiple nationalities (a- and bipatrides). Similarly, for works published simultaneously (i.e., within a 30-day period) in various countries, the BC only partly answers the question which country is the country of origin. If publication takes place in more than one country (Union and non-Union), there are two criteria which help to determine the country of origin. The first is that Union countries qualify before non-Union countries (Art. 5(4) b BC). The second is that a Union country with a shorter term of protection comes before one with a longer term (Art. 5(4) a BC). This leaves unidentified the country of origin in cases where publication takes place in more than one Union country with the same term of protection. This is a problem from the perspective that the BC’s substantive provisions cannot be invoked in the country of origin (as in the Utrillo case mentioned above in Par. 3.3.3.1).

229 Actes BC 1885, p. 42.
230 This is only relevant of course if more than one Union country is involved as potential country of origin (non-Union countries are only relevant for deciding whether a work is within or without the scope of the BC).
231 Massouye 1978, at p. 39, suggests that domestic courts compare the different editions (exact date of publication in each country involved, relative importance of markets) to determine the appropriate country of origin.
Simultaneous publication is of course not a new phenomenon, but given developments in information production and distribution, it will occur on a much larger scale than before. In certain industries, such as software and music, it is common to release copies of a new work in several countries simultaneously. Likewise, electronic publishing—from the posting of illustrations on a personal website to professional web journals or on-line databases—increases the number of simultaneous first publications. That is, of course, if electronic publishing is to be regarded as publication in the sense of Article 5 BC to begin with.232

On a brighter note, as far as can be told from published Dutch case-law, the incompleteness of the BC when it comes to defining the country of origin, is not a serious problem in practice.233

The Dutch legislator has not filled the gaps either. Articles 3 through 5 BC are copied almost to the letter in Article 47 Dutch Auteurswet. Section 1 of Article 47 Aw states that the act applies to all works that are first published in the Netherlands (or simultaneously published in the Netherlands and elsewhere) and to all unpublished works of Dutch nationals. Assimilation of habitual residents (Art. 3(2) BC) is prescribed by Article 47(2) Aw. the definition of what does and does not constitute 'publication' of Article 3(3) BC is copied in Article 47(3) and (4). Article 5(4)c BC finds its equivalent in Article 47(5) and (6), albeit in a strange way. The BC first says construction of a work of architecture is not publication and then designates the place of construction as the country of origin. The Dutch Copyright Act achieves the same result by defining 'construction' as first publication.234

As for audiovisual works, in addition to the normal rule of section 1, the Dutch Copyright Act applies to films made by producers who have their seat or habitual

232 See among others the discussion that was held on the subject during the 1995 Naples WIPO meeting on Copyright in the digital environment (WIPO 1996).
233 Most cases where the determination of the country of origin is an issue involve reciprocal protection of works of design or applied art (Art. 2(7) BC). See note 334 for examples.
234 There is however a difference in terminology between the Auteurswet and the BC which could create a problem. For example, when a Dutch architect designs bridge, which is then built in a non-Union country. According to the BC, the bridge is unpublished. Since it is not located on Union territory either, the Union country of which the author is a national is the country of origin, i.e., the Netherlands (Art. 5(4)c first paragraph BC). However, under Article 47 Aw the bridge is a published work because it has been built. Since it has not been built (i.e., first published) in the Netherlands, the Dutch copyright act does not claim application. As the BC does not demand that authors get the substantive protection of BC provisions in the country of origin of the work (Art. 5(1) BC), it would seem that authors who are Dutch or reside in the Netherlands, are not protected under Dutch copyright law with regard to their architectural works which have been built in a non-Union country (e.g., if someone erects a copy of the building in the Netherlands, the architect could not oppose that on the basis of copyright law). All of this equally applies to works of visual arts that are incorporated in the structure. The fact that the drawings will normally be considered as protected works in their own right gives the architect a means to protect his design.
residence in the Netherlands (Art. 47(6) Aw). Whether ‘seat’ means principal place of business, any place of business or place of incorporation cannot be inferred from the explanatory memoranda to the Copyright Act.

Other national copyright laws have been adapted - or drawn up, as was the case in the Netherlands- with the national treatment principle and country of origin of the BC in mind, but often with less recognisable adaptations than the Dutch Copyright Act.235

3.4 Post-Berne Convention Copyright and Related Rights Treaties

The entire international intellectual property edifice is built on national treatment combined with substantive minimum rights. This is not only true for copyright, but also for patents, trademarks, the protection of geographical indications, etc.236 Each sub-category of intellectual property has its own treaties. Apart from the Paris Convention on the protection of Industrial Property, the one multilateral treaty that deals with a wide range of intellectual property is the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs 1994).

Copyright is - as their names suggest - the subject of the Universal Copyright Convention and the WIPO Copyright Treaty.235 Related to copyright are the international agreements concerning ‘neighbouring rights’. These are the exclusive rights of performing artists (musicians, actors and the like), record producers and broadcasting organisations with regard to their respective activities. Relevant treaties are the 1961 Rome Convention, the 1971 Geneva Convention and the WIPO Performances and Phonograms Treaty (WPPT 1996). Two multilateral instruments are in preparation, for audiovisual performances and for broadcasts respectively.

235 See, for instance, Chapter VII of the Portuguese Copyright and related rights act (No. 45/85 of September 17, 1985), Part V Section 1 German UrhG 1965, Chapter 8 Finnish Copyright Act 1961, Chapter 8 Danish Copyright Act 1995.


237 The 1889 Montevideo Treaty on Copyright is still in force between a number of primarily South American countries. It is based on the notion of copyright as a droit acquis, i.e., Contracting States are bound to provide an author copyright protection if he or she also enjoys copyright in a work under the law of the country of which the author is a national (droits acquis, see Paragraph 4.1.2). Given its limited significance, the Montevideo Convention will not be considered in this study.
3.4.1 TRIPS Agreement

Intellectual property became a prominent item on the international free trade agenda in the course of the Uruguay round (1986-1994) of the General Agreement on Tariffs and Trade (GATT). Until that time, the concern with intellectual property had not been its protection, but rather the fear that exclusive rights may be used to undermine free trade. The combat of counterfeit goods had been an issue at earlier rounds, but it was not addressed seriously until after a 1985 GATT report concluded that the existing international intellectual property regime did not provide efficient means to control piracy.238

The most important aim of the Uruguay Round was to set up a permanent multilateral World Trade Organisation (WTO) with extensive dispute resolution mechanisms. If these were to apply to intellectual property arrangements, this would make it easier to make member states live up to their obligations, especially where these included the duty to provide effective civil remedies against (potential) infringements of intellectual property.

Another important reason why GATT/WTO became an important forum for intellectual property was the wish to adapt the international system to developments in information and communication technology. The last toilsome revision of the Berne Convention had taken place in Stockholm in 1967 and was formalised in the 1971 Paris Act. Since then the chances to bring about an update were slim (see below in Par. 3.4.2). The US and European pharmaceutical, information and communication industries were ardent supporters of TRIPs, as they stood to gain the most from extended intellectual property rights and increased enforcement.239

The general part of the TRIPs Agreement requires member states to adhere to both the national treatment and most-favoured nation treatment for the intellectual property rights it covers (copyright, patents, trademarks, etc.). The second part of TRIPs, first section, obliges WTO members to adhere to all substantive provisions of the Berne Convention (Art. 6 to 21 BC), with the exception of moral rights (Art. 6bis BC). In addition, it contains a number of substantive provisions which increase the minimum level of copyright protection. For example, software and databases must be protected under copyright and all exemptions should meet a strict test similar to the one the BC asks for exemptions to the reproduction right in Article 9(2) BC.240 Part three of TRIPs contains rules that oblige member states to provide effective remedies in cases of (imminent) infringement: the judiciary...

238 For a history of TRIPs, see: Gervais 1998.
239 For a critical analysis of TRIPs impact on extended commercial control of knowledge to the detriment of public availability, see May 2000, p. 67 et seq.
should, for example, have the authority to order parties to desist from infringement, order restitution, recovery of damages, etc.

Since the 1961 Rome Convention and the 1971 Geneva Convention, both of which deal primarily with the protection of rights in sound-recordings, little happened in the international arena with regard to neighbouring rights (see Paragraph 3.4.3 below). The TRIPs Agreement does not call on WTO members to adhere to the substantive provisions of the Rome and Geneva conventions as it does for the Berne Convention\(^{241}\) in the field of copyright (Art. 3(1) TRIPs).

TRIPs lists essentially the same catalogue of rights for performing artists and record producers with regard to the live-transmission, fixation, reproduction and communication of sound-recordings (Art. 14(1)-(2) TRIPs) as the earlier related rights treaties do. It adds a rental right, which is to say: an exclusive right to authorise commercial rental for neighbouring rights owners (Art. 14(4) TRIPS). Alternatively, member states can maintain a right to equitable remuneration as long as rental does not substantially cannibalise the reproduction right of right owners (Art. 14(4) TRIPS).

Protection of broadcasting organisations is not mandatory (Art. 14(3) TRIPs), but if WTO members choose not to grant broadcasters related rights with regard to the reproduction of fixations and retransmission of their broadcasts, these rights should at least be granted to copyright owners.

The term of protection is not unified, rather. Article 14(5) sets it at a minimum of 50 years after first fixation or performance (for performers and record producers), or 20 years from the date of broadcast (for broadcasting organisations). This is a substantial increase, as the term of protection under the Rome and Geneva Conventions is 20 years.

TRIPs does not affect member states’ reservations made or reciprocity clauses invoked under the Rome Convention 1961. Equally, limitations to protection that are valid under the pre-existing copyright and neighbouring rights treaties can be maintained.

As to the beneficiaries of protection, that issue has to be decided on the basis of the corresponding provisions of the Berne, Rome and Geneva Conventions (Art. 1(3) and 3(1) TRIPs), i.e., points of attachment are —depending on which right is involved— the place of first publication or nationality of the author or record producer, the place of first performance or broadcast, fixation of sound-recording, etc.

As can be inferred from the description above, TRIPs is concerned with re-enforcing intellectual property rights by making states who want to join WTO respect existing treaties. The number of parties to the Berne and Rome

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\(^{241}\) Moral rights (Art. 6bis BC) are excluded from TRIPs.
Conventions has grown significantly since 1994: the BC had 103 signatories before 1994 while 46 have joined since. The RC’s numbers went up from 45 in 1994 to 70 by 2002.

TRIPs also extends the scope of intellectual property protection, through various substantive provisions. It is aimed at economic rights rather than moral rights and seeks to improve the possibilities for right owners to enforce these rights across the globe. In a way, with the inclusion of intellectual property in multilateral trade law, copyright’s position has come full circle, since the first international law relating to copyright is often found in commerce treaties of the 19th century (see Par. 3.2.2).

3.4.2 COPYRIGHT TREATIES

For a long time, the United States was not keen to become a party to the Berne Convention. Initially, the fact that the US was an importing country of information products was a major reason not to join. As the US became an exporter, inconsistencies between US copyright law and BC provisions were the primary obstacles, especially as regards moral rights (Art. 6bis BC) and the prohibition of formalities (Art. 5(2) BC). In these circumstances, a new multilateral copyright treaty was conceived under the aegis of the United Nations: the Universal Copyright Convention of 1952 (UCC). This treaty provides for less protection than the BC and it does not affect obligations states have under the Berne Convention (Art. XVII UCC). Since the United States ratified the latter in 1988, the UCC has lost much of its significance.

Another reason why the UCC is overshadowed by the Berne Convention is that through TRIPs, the number of signatories to the Berne Convention has grown to include virtually all WTO members. Consequently, the BC takes precedence over the Universal Copyright Convention in the relevant relations between virtually all countries. Given its limited significance, the UCC will not be considered any further.

The Berne Convention has been revised roughly every twenty years between 1886 and 1967. By then, adjusting it to new technological and economic developments had become very difficult, partly because as more and more countries joined the Union in a decolonising world, the interests of members of the Union diverged more widely. As has already been stated, the unanimity that changes to the BC require did not help matters either.

The 1967 Stockholm Protocol enabled developing countries to temporarily maintain exceptions concerning the reproduction and translation of foreign works, especially for the purposes of education and science. It was replaced by the more restricted 1971 Paris Act of the Berne Convention, which allows developing countries to legislate for compulsory licences under certain conditions. The Paris revision will probably turn out to have been the last. Since then, the modernisation
of the international copyright regime has taken place through TRIPs, which cleared the way for the 1996 WIPO Copyright Treaty (WCT).

### 3.4.2.1 WIPO Copyright Treaty 1996

The 1996 WIPO Copyright Treaty is a special treaty within the meaning of Article 20 of the Berne Convention, i.e., it is an instrument that increases copyright protection. It more or less repeats TRIPs where the protection of databases and software, the extension of rental rights and the admissibility of exemptions are concerned. Besides that, it explicitly adds both the rights to distribute and to communicate a work to the public to the catalogue of exclusive rights already recognised in the Berne Convention. It also obliges parties to provide effective remedies against the circumvention of technological measures that right owners use to protect their work against copying and other restricted acts.

An important issue about which no consensus could be reached was to the extent to which making a work available over the Internet, or over digital networks generally, constitutes publication. According to the WIPO Bureau,

> the provisions of Article 3(3) of the Berne Convention may be applied quite satisfactorily to new forms of electronic publication. The key requirement of Article 3(3) is the availability of sufficient copies to satisfy the reasonable requirements of the public. Electronic publishing over a computer network may easily meet this requirement.  

To avoid uncertainty with regard to electronic publishing, it was proposed to include an Article 3 which stated that:

> (1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available. Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.

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242 In force as of March 6, 2002. By November 2002 there were 38 contracting states, at that time the EU countries had not yet ratified the WCT.

243 WIPO (Basic proposal WCT, notes on Art. 3, point 3.05).
(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in Paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public."

The EU, however, opposed the inclusion of such an Article and it was dropped in the later stages of the diplomatic conference.244

The WCT is very much geared to bringing international copyright up to par with technological and economic developments. New technologies allow for new means of exploiting works and the content and communication technology sectors have grown to become important sectors of economic activity in many developed countries. The WCT's main objective is to harmonise substantive copyright law. From a choice-of-law perspective, it does not have any particular meaning, because it refers to the national treatment provisions (Art. 3-5) of the BC for its scope.

During the preparatory work of the Committee of Experts, there was discussion on whether the WCT should contain a choice-of-law rule for satellite transmissions. The WIPO Bureau had proposed that the WCT contain a provision which explicitly brings satellite transmissions of works under the broadcasting right of Article 11 bis (i) BC.

In addition, a choice-of-law rule was proposed which would designate as applicable the law of the country where the emission of the broadcast took place. The effect would be that an organisation that acquires the right owner's permission to broadcast the works via satellite under the law of the country of emission, can be certain that it will not be held liable for copyright infringement because of unauthorised communication of the work under the laws of the countries where the transmission is received.

Many members of the Committee of Experts supported such an approach. Two exceptions were proposed, under which the law of the country of receipt of the transmission, rather than that of the country of emission, would be applied:

1. If the country of emission does not consider communication via satellite as an exclusive right of the copyright owner, or grants broadcasters permission on the basis of a compulsory licence.
2. If the law of the country of emission regards different persons as right owner than the law of the country of receipt does.

These corrections were considered to be in line with the territorial nature of copyright and in accordance with Article 5(2) BC.

244 The proposed definition of publication was still present in the partly consolidated draft (CRNR/DC/55), but after the EU amendment (CRNR/DC/79) it was dropped from the Main Committee's proposal for the substantive provisions of the WCT (CRNR/DC/82).
Eventually the Committee decided that "compte tenu de l'opinion apparentemen
to be final, it would not be advisable for the
committee to write into the protocols questions of internationa
private law such as those of private international law applicable."

The WIPO plans were inspired by the EC's Satellite and Cable Directive of
1993. This Directive introduced an exclusive right to communicate protected
subject-matter to the public for copyright owners and related rights owners. It also
aims to reduce the legal uncertainty stemming from the differences in national
laws with regard to what constitutes communication of protected subject-matter to
the public and where this communication takes place. Particularly if some
countries consider that communication takes place wherever a satellite's footprint
is (i.e., any country of actual or potential receipt), while others assume that only
the (place of) initial transmission is relevant, it may be difficult for broadcasters to
ascertain which rights they need to acquire for which territories. This in turn
hamper the 'free movement of broadcasts' in the Internal Market.

By harmonising the definition of the act and place of 'communication to the
public by satellite', it is easier for broadcasters to predict their liabilities. The
Directive does not contain a choice-of-law rule as such. However, definitions of
what the relevant act are and where it takes place do have significance for
determining the applicable law, especially where infringement is concerned.

Under the Directive, the place of emission is the sole locus of the (restricted) act
of communication, thereby excluding the place(s) of receipt from also being
regarded as the place of infringement.

To return to the WCT, one wonders whether the WIPO Committee of Experts'
deliberations imply that since the majority of the members were in favour of using
the place of emission as the primary connecting factor for infringement, in the
case of satellite transmissions, BC members are expected to endorse the use of this
connecting factor. That in turn presupposes that the Committee of Experts is of the
opinion that Article 5(2) or the territoriality of copyright do not determine the
substantive law that is applicable, but refer to the rules of private international law
of the country where protection is claimed. We are running ahead of things here.

245 Comité d'experts sur un protocole relatif à la Convention de Berne 1994, p. 228.
246 Directive 98/93/EEC, Art. 2 (a): 'communication to the public by satellite' means the act of
introducing, under the control and responsibility of the broadcasting organization, the programme-
carrying signals intended for reception by the public into an uninterrupted chain of
communication leading to the satellite and down towards the earth. (b) The act of communication
to the public by satellite occurs solely in the Member State where, under the control and
responsibility of the broadcasting organization, the programme-carrying signals are introduced
into an uninterrupted chain of communication leading to the satellite and down towards the earth.
247 The Satellite and Cable Directive contains additional definitions of the place of communication to
the public in case the place of emission is outside the EU.
as the choice-of-law calibre of the BC will be examined more closely in the next Chapter.

3.4.3 RELATED RIGHTS TREATIES

For practically as long as writers, composers, choreographers, playwrights and later photographers, film directors and the like have been given copyright in their works, the protection of the achievements of the persons performing (in) these works has been called for. Not only performing artists themselves, but the companies and organisations who were in the business of producing and distributing performances laid claim to exclusive rights in their productions. It has been suggested that rights for performers be included in the BC, but that has never been a serious option because, among other things, copyright owners were not charmed by the idea.248

The first international treaty granting such related or neighbouring rights was the Rome Convention of 1961. This treaty has for a long time not been very successful: ten years after its birth only ten states had adhered to it. It was an important reason why for one group of neighbouring rights owners, namely phonogram (i.e., record) producers, the 1971 Geneva Convention was conceived (69 contracting states as of November 2002). The latter protects record producers against the unauthorised reproduction of phonograms they have produced and against the subsequent import and further distribution to the public of illicit copies. Its clauses regarding national treatment and beneficiaries are borrowed from the Rome Convention and as it does not contain any other provisions that may be relevant for choice-of-law issues, it will not be discussed further.

As has happened in the area of copyright, the subsequent modernisation and extension of neighbouring rights was achieved through separate treaties. Initially, the 1996 Diplomatic Conference of WIPO members was meant to produce a comprehensive new treaty that would address all groups of neighbouring rights owners. However, the necessary consensus on the modalities of increased protection for broadcasts and audiovisual performances was lacking, so these were not included in the 1996 WIPO Performances and Phonograms Treaty (WPPT). Negotiations on separate instruments for these issues are ongoing.

Another subject on the international agenda is the protection of non-original databases, i.e., databases that are not protected as original works under copyright law. In the preparatory stages of the 1996 diplomatic conference, plans for an

248 See for instance the discussion during the Brussels Diplomatic Conference (1948), Actes BC 1948, at pp. 308-310
instrument still circulated, but there was so little consensus on the need for and content of database protection that the subject did not make it onto the agenda of the 1996 Diplomatic Conference.

The EU is in favour of a global protection tailored after the Database Directive, but other countries have major reservations about extending intellectual copyright to facts. They question the need for such a right and fear it will adversely affect free and open access to information, especially in domains of great public interest such as education, science and national security. WIPO members have agreed to wait for the results of a study that is due in 2002. It will address the economic and social impact of database protection, especially its consequences for education and research and for developing countries.

3.4.3.1 Rome Convention 1961

The Rome Convention of 1961 is tailored by and large after the principles of the Berne Convention. Contracting states bind themselves to grant national treatment to foreign performing artists (singers, musicians, actors, etc.), record producers and broadcasting organisations. In addition, these groups must be given a number of minimum rights with respect to their performance, records and broadcasts respectively. The minimum term of protection is 20 years (Art. 14; it has been extended to fifty years—except for broadcasts—under TRIPs).

National treatment is defined in Article 2 Rome Convention: it means that (the productions of) nationals of other contracting states must be given the same treatment as the nationals of the country where protection is claimed receive with regard to productions performed, (first) recorded, or broadcast in that country. Its beneficiaries are (Art. 4-6 RC):

- performing artists who are subjects of a contracting state: for performances that take place in any contracting state, or are broadcast in a broadcast protected under the treaty, or first recorded in a protected recording;
- producers of phonograms: if they are subjects of a contracting state, or if the record they produced has been recorded or broadcast for the first time in a contracting state;
- broadcasting organisations: if they have their principal place of establishment in a contracting state, or broadcast from transmission facilities located in the territory of a contracting state.

249 WIPO 1997a, WIPO 1997c, WIPO 1997d; see also the comments of intergovernmental and non-governmental organisations in the annexes to WIPO 1998b.
250 WIPO 2001b.
Performing artists have the exclusive right to authorise the first fixation of their performance, to authorise the live-broadcast of unfixed performances and to authorise the reproduction of their recorded performances (Art. 7). These rights do not apply to performances (a song that is sung, a poem delivered, etc.) that are part of a film or other (audio)visual work, if the performer has agreed to the fixation of his performance in the audiovisual work (Art. 19).

Contracting states are free to legislate on the rights and obligations of performers and broadcasters with respect to repeated broadcasts and the taping of them, once the performer has agreed to the initial broadcast. The performing artist must however be allowed to conclude an agreement with the broadcasting organisation on these issues (Art. 7(2) Rome Convention 1961). That means that a system of legal licences that completely bypasses the performer is not in agreement with the Rome Convention. Broadcasting organisations have exclusive rights of re-broadcast, fixation and reproduction of their radio and television programmes (Art. 14 Rome Convention 1961). Record producers have the exclusive right to authorise (in)direct reproduction of the phonograms they produce (Art. 10 Rome Convention 1961).

3.4.3.2 The WIPO Performances and Phonograms Treaty

The WPPT—39 contracting states by the end of 2002, not yet ratified by the EU countries—was concluded in 1996 with the aim of extending the protection for performers and producers by building on the existing conventions. The views on the position of broadcasters proved too disparate too reach an agreement on their rights. The protection of audiovisual performances (such as movies, advertising spots, music video-clips, TV documentaries, air safety instruction video’s, visual registrations of plays, opera, ballet) was actually discussed at the diplomatic conference itself, but was left out of the Treaty for a number of reasons that will be discussed below.

In short, the WPPT gives performers and producers ‘modernised’ reproduction, distribution and communication rights, including the right to authorise rental (of CD’s for instance). Modelled on the Berne Convention,251 Article 24 WPPT declares:

1. The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

251 The explanatory notes to the basic proposal—which was identical to the accepted text—say as much.
2. Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the performance or phonogram.

A revolution was the introduction of moral rights for performers, which are lacking in the Rome Convention. The phrasing of the moral rights provision is inspired by Article 6 bis BC. Article 5 WPPT first says that artists who play, sing or deliver an audio performance (live or on phonogram) can claim to be identified as the performer, except where omission is dictated by the manner of the use of the performance. Also, the artist can ‘object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation’.

As in copyright, the moral rights are independent of the economic rights and remain with the performer after transfer of the exploitation rights. The second paragraph of Article 5 then continues: ‘The rights granted to a performer... shall, after his death, be ...exercisable by the persons or institutions authorised by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of, or accession to, this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.’

A similar phrase is found in Article 6bis(2) BC on moral rights after the author’s death. Article 5 WPPT closes with a familiar paragraph: ‘The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.’ (identical to Article 6bis(3) of the Berne Convention).

Legal systems differ quite substantially when it comes to the duration of moral rights and their exercise after the author’s or performer’s death. For instance, in the Netherlands, the moral rights expire with the economic rights, but can only be enforced after the author’s death by the person he has indicated in a will (Art. 25 Copyright Act, Art. 5 Act on Neighbouring rights, see below Par. 4.3.2). In France and Portugal the moral rights of authors are perpetual and may be transmitted mortis causa to the heirs of the author. The exercise of these rights may be conferred on another person under the provisions of a will. (Art. L-121-1 French Intellectual Property Code; Art. 56-57 Portuguese Code of Copyright and Related Rights).

Given these type of differences it is not so surprising that harmonisation could not be attained for performer’s rights anymore than for author’s rights. The Articles 6bis(2) BC and Article 5 WPPT certainly seem to reflect the contracting states wish to maintain their own solutions.

3.4.3.3 Proposed WIPO Audiovisual Performances Treaty (WAPT)

At first glance actors and other performers that contribute to audiovisual works are within the category of right owners under the 1961 Rome Convention, but we
have seen that the protection of the Rome Convention does not extend to audiovisual works in which performances are incorporated with the authorisation of the performer. Audiovisual performances have been left out of the WPPT altogether.\footnote{252} One reason was that it proved hard to find a solution for certain side-effects of collective management. In some countries, for instance, part of the collected fees go to cultural and social funds that use them for activities in the national cultural and social interest (e.g., subsidies for productions and pension schemes for artists). If fees would also be collected on behalf of foreign right owners, part of their remuneration would be given to these funds and since the activities of the funds are aimed at locals, the foreign right owner would not benefit from them.

The primary reason why attempts to protect audiovisual performers have so far failed, is that the US film industry (i.e., the film producers) feels that the grant of exclusive rights to actors will upset the existing balance of interests. In the United States, the different groups involved in audiovisual productions (directors, actors, producers) engage in extensive collective bargaining to arrange rights and obligations.\footnote{253}

To the extent that the law does not grant them directly, it is common for producers to secure the intellectual property rights of all contributors (at least as far as is necessary to exploit the production). If actors and other performers are to get exclusive rights, the US insists that adequate arrangements must be made regarding the transfer of such rights. Since films, TV series, music videos and the like are often exploited globally, the producer must be sure that assignments of rights are recognised everywhere. Informal propositions to deal with the issue had already been made during the Diplomatic Conference of 1996 and were repeated and supplemented in the following years.

The EU preferred silence on the issue of transfer and to let national laws decide. The US at first proposed that the treaty contain a presumption that performing artists have assigned all of their rights to the producer. Then it was toned down, to only include the economic rights necessary for the exploitation of the audiovisual production (i.e., excluding moral rights as far as their exercise does not preclude normal exploitation and excluding the right to equitable remuneration). When that proved unacceptable, a presumption of transfer rebuttable by written contract was proposed.

\footnote{252} The following Paragraphs are based on WIPO documents, particularly those reporting the work of the Committee of experts on a protocol concerning audiovisual performances (WIPO 1998a and 1999a), documents of the 4th session of the Standing Committee on Copyright and Related Rights (SCCR/4 documents) of April 2000 (WIPO 2000b) and on the proceedings of the December 2000 Diplomatic Conference on the protection of audiovisual performances (IAVP/DC documents) (WIPO 2000a).

\footnote{253} On filmcontracts see Kabel 2002.
India, Japan and a number of South American countries favoured a provision comparable to Article 14 bis BC, i.e., it is for the country where protection is claimed to decide who owns the rights, but if countries grant the neighbouring rights to performers in addition to producers, the former cannot resist reproduction, distribution of copies and communication to the public. This option was rejected mainly because it would have affected the performing artist’s bargaining power too much.

Since agreement on a substantive ownership rule proved impossible to achieve, the attention turned to choice-of-law solutions. Several countries proposed a choice-of-law rule. The idea was that a conflict rule could serve as a compromise between leaving the transfer question to individual member states (i.e., national treatment) and including substantive provisions on transfer.

This was the approach that was retained during the diplomatic conference of 2000. Canada had initially proposed that ownership of rights be determined under the law of the country of origin of the audiovisual work. Since this may be a difficult place to determine for international co-productions and in the light of modern communication technology, alternatives to the country of origin as the connecting factor were put forward.

The one that got most support was that a transfer of rights should be governed by the law chosen by the parties and in the absence of such a choice, the law of the country most closely connected to the (production) contract. The EU wanted an escape clause, i.e., any mandatory rules of law of the country where protection is sought should not be affected by the law applicable to the contract.254 The US proposed that:

‘(1) The entitlement to exercise any of the exclusive rights of authorization shall, in the absence of an agreement to the contrary by the performer regarding the applicable law, be governed by the law of the country which is most closely connected with a particular audiovisual fixation.

(2) Among the factors that may be considered in determining ‘the country which is most closely connected with a particular audiovisual fixation’ are: the Contracting Party in which the producer of the fixation, or the person or entity which owns or controls the producer, has its headquarters or habitual residence; the Contracting Party of which the majority of performers are

nationals: and the Contracting Party in which most of the photography takes place.\textsuperscript{255}

The US proposal was a variation on the Basic Proposal’s Alternative G, in which the connecting factors of Article 12(2) were listed not as facultative and of equal importance, but incorporated in a closed conflict rule. According to Alternative G, in the absence of a choice by parties, the law governing the transfer of rights to the producer shall be governed by the law of:

‘(i) The Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or

(ii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of the performers are nationals; or

(iii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer and where there is no single Contracting Party of which the majority of the performers are nationals, the principal Contracting party in which the photography takes place.’

As the US proposal was not acceptable to the EC in particular, a number of African countries put forward an amendment to Article 12. Alternative G. It stated that in the absence of a party choice, the applicable law be that of the country which is most closely connected with a particular audiovisual fixation. The criteria for determining the country most closely connected would not be included in Article 12 itself, but be the subject of an Agreed statement. Without prejudice to international obligations, the connecting factors to be considered would be the following:

‘(i) the country of which the majority of the performers are nationals:
(ii) the country in which the producer has its headquarters; and
(iii) the country in which the greater part of the performance took place.’\textsuperscript{256}

As agreement still could not be reached, a working group was set up to save the Treaty. It came up with a provision that allowed countries to provide that the exclusive authorisation rights (i.e., the economic rights minus the right to


equitable remuneration) are transferred to, or may be used by, the producer. Notwithstanding international obligations, public or private international law, the law applicable to the (agreement regarding) transfer can be chosen by parties. For cases where a choice had not been made, the working group proposed that an open conflict rule be used: the applicable law is that of the country most closely connected to the agreement.257

This solution was to no avail. In the end, the Diplomatic Conference that was convened in December 2000 produced a provisional agreement on 19 of the 20 substantive provisions, the crucial one missing being Article 12 on the transfer of rights. The EU particularly was against Article 12, because it feared that it would lead to US law being applied to most issues of transfer of rights by performers.

The Articles on which there is provisional agreement include Article 5 on moral rights, which is worth mentioning here because of its similarities to Article 6bis BC (and Art. 5 WPPT) and its potential choice-of-law calibre. Clause 2 of Article 5 Draft WAPT is a near copy of Article 6bis (2): the moral rights of the performer are exercisable by the persons or institutions authorised by the law of the country where protection is claimed. Clause 3 is a copy of the Berne Convention’s Article 6bis(3): the means of redress for safeguarding moral rights of the performers shall be governed by the legislation of the country where protection is claimed.

During its meeting in the autumn of 2001, the WIPO General Assembly did not authorise a reconvening of the diplomatic conference, essentially because neither the US nor the EU thought a solution to the Article 12 question was near. It was decided to retain the issue on the agenda of the General Assembly session in the autumn of 2002, which has called for an informal meeting to iron out the remaining differences in 2003.258

3.4.3.4 Proposed WIPO Broadcast Treaty (WBT)

Broadcasters have traditionally enjoyed some level of protection for their broadcasts (television and radio programmes), although national regimes are quite diverse. Under the law of some countries broadcasts are protected as works (i.e., under copyright), while other countries protect broadcasters with special rights (related rights). Sometimes protection is aimed at the content of the broadcast, in

other cases not the content, but the signal is protectable subject-matter. The Rome Convention—as we have seen above—was conceived in an era when terrestrial broadcasting was the norm. It does not cover cable, nor is it adapted to satellite broadcasting direct to the public. Laws extending the rights of broadcasters, for instance as regards retransmission of broadcasts via cable, have since been introduced, but at the international level change has proven to be difficult to achieve.

After the attempt to include broadcasters in the 1996 WIPO treaties failed, preparations for a special instrument, possibly a protocol to the WPPT, soon got underway. National treatment of broadcasting organisations of other signatories would be the norm. The term 'nationals' will most likely be based on Article 6 of the Rome Convention: organisations with their head offices in a member state, or who broadcast from a transmitter in a member state.

As to the type of rights involved, it does not come as a surprise that broadcasters’ associations seek extensive control over possible uses of their broadcasts, including all types of retransmission, fixation (e.g., on video, DVD) and communication to the public (e.g., via Internet, video on demand, via cable). Particularly where content of the broadcasts is not subject to intellectual property, as is the case in many types of sporting events, the broadcasters want to be able to prevent interception of pre-broadcast signals (i.e., transmissions between production facilities and broadcasters). Since broadcaster often pay substantial amounts to acquire the television rights of sports and other events, they consider themselves robbed by the unauthorised interception and subsequent simultaneous broadcast of sporting events by third parties.

It is primarily countries in Africa and Asia that have expressed concern about whether extended rights for broadcasters will not unduly affect the interests of the public and of developing countries. The EU is primarily concerned with balancing the interests of owners of copyright with those of owners of the various related rights. As is the case with other WIPO instruments, the limitations on the

259 E.g., Art. 8–9 Satellite and Cable Directive.

260 The Brussels Satellite Convention of 1974 is an anti-broadcast piracy treaty that requires its signatories to prevent some types of distribution of TV or radio programme signals on their territory by distributors for whom the signals were not intended. It does not concern intellectual property rights directly.

261 WIPO 2001c, Standing Committee on Copyright and Related Rights (doc. SCCR/5/5 of 28 May 2001).

262 See WIPO 1999c: the Statement adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, held in Manila, from June 29 to July 1, 1999 (WIPO doc SCCR/3/6); and WIPO 1999b: comparative table of proposals issued by WIPO’s Standing Committee on Copyright and Related Rights of 3 May 2001 (doc SCCR/5/5).
broadcasters' right in the public interest will have to meet the three-step-test of Article 13 TRIPs. The type of limitations allowed would be the same as are allowed under the Berne Convention, WCT and TRIPs for copyright.

By the end of 2002, the negotiations had not yet reached an advanced stage. The Internet is becoming an alternative way to distribute content that is traditionally distributed by broadcasting organisations and technological developments in broadcasting proceed (notably digital TV). This has led WIPO members to recognise that the scope and definition of protection for broadcasts must be thoroughly reviewed and adapted to the realities of modern communications. It would seem that there is a lot of consensus building to be done before an actual Broadcast Treaty can be drafted.

3.5 Conclusions

This Chapter has been largely devoted to an analysis of the genesis of the Berne Convention and its key characteristic, namely the combination of national treatment and substantive minimum rights. These principles also underlie subsequent treaties in the area of copyright and related rights. The analysis should enable an assessment of the choice-of-law calibre of the BC and other international instruments in the next Chapter.

Some tentative conclusions as to the choice-of-law calibre are in order here, before we move on to examine how the judiciary and doctrine interpret the treaties. The identification of choice-of-law rules for copyright is difficult for a number of reasons. First, the Berne Convention was drafted in a period when the Statutist approach had been giving way to new choice-of-law methods for a some decades, particularly Savigny's allocation method. There is however no indication in the records of the diplomatic conferences of a 'Savignian' analysis of copyright, nor is any such analysis to be found in late 19th century legal writings on the international copyright system.

The few implicit references made to private international law in the conference proceedings seem to relate not to the allocation method, but to the ideas of the Italian or Romanist School. They considered nationality as a natural focal point for the applicable law. Considering that Savigny himself did not address intellectual property and that the Italian school was particularly popular in France (the most important advocate of the international copyright system), it is not surprising that the few references to choice of law that are to be found concern Romanist ideas.

So, the first reason why it is difficult to determine the choice-of-law calibre of the BC is that its development coincided with a time when private international law was at a cross-roads. The second reason for the difficulty is that at the same time copyright itself was a relatively young and still tentatively defined area of private law. Given its roots in printing privileges, copyright was seen by many as
strictly territorial in existence and operation. Some even considered it as belonging (still) to the realm of public law rather than private law, which would have placed it outside private international law altogether. This uncertain position of copyright in private law also helps to explain why countries did not ensure foreign authors copyright protection on the basis of the general equality-clauses that were recognised and codified in private law in the course of the 19th century. That in turn helps to explain the advent of bilateral copyright treaties and ultimately the BC.

A third and in my view, the most important, reason is that since the beginning the unification of copyright has been a central theme in the development of international copyright protection. Copyright treaties also predate treaties on the conflict of laws. As authors were given protection outside their home country on the basis of national laws, bilateral treaties and finally multilateral treaties, the focus was on the harmonisation of copyright law. Where harmonisation was premature, the obvious solution was for countries to give foreign authors the same protection as domestic authors. Where for some issues the result of this national treatment was considered to be unbalanced, because foreign authors would be better off than domestic ones, the logical solution was to introduce reciprocity tests.

As to treaties concluded since the Berne Convention, we have seen that they are all based on the same combination of substantive provisions regarding the object, duration and scope of intellectual property, combined with national treatment provisions and in the latest treaties, the obligation to provide adequate civil remedies against infringements.

Only with regard to the prospective WIPO instrument on the protection of audiovisual performances has a true conflict rule been proposed by some countries, i.e., for the transfer of rights. This was done because no agreement was possible on substantive provisions (such as a presumption that economic rights of audiovisual performers are transferred to the producer) and leaving the issue for individual states to decide (national treatment) was not acceptable either. As it turns out, a ‘neutral’ choice-of-law solution could not save the proposed treaty, which has been shelved because of the controversy surrounding transfer of rights.