The Role and Future of the Universal Copyright Convention

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I. Introduction

The Universal Copyright Convention (UCC) was created in 1952 in order to enable a number of countries, including in particular the (then) Union of Soviet Socialist Republics and the United States of America, to adhere to a multilateral treaty on copyright protection, and to secure international copyright protection at a universal level at a time when a split between American multilateral treaties and the Europe-centred Berne Convention threatened the overall aim of universal protection. The already then existing Berne Convention was not acceptable to the above mentioned and other countries at that time because its level of minimum protection was too high as compared to the relevant national laws, or did not correspond to the copyright system. For example, moral rights, the principle of "no formalities" and the minimum duration of 50 years after the author's death were some of the obstacles for the USA to adhere to the Berne Convention. The UCC was revised once, in 1971, and, after the entry into force of the Revision Act, could be adhered to, only in its version of 1971. To date, 99 states are Contracting States to the UCC, out of which 64 are bound by the text of 1971. However, from the late 80ies on, the importance of the UCC started to decrease, due to the adherence of the USA and of most of the successor countries of the USSR, to the Berne Convention for the Protection of Literary and Artistic Works (BC); consequently, these countries were governed in their relations to each other and to all other Berne Union Members exclusively by the BC. Today, there is only one country which is bound exclusively by the UCC rather than also by the BC, TRIPS Agreement or WIPO Copyright Treaty (WCT), namely Laos. The countries which are not party to any multilateral instrument covering copyright protection are Afghanistan, Cook Islands, Eritrea, Ethiopia, Iran, Iraq, Kiribati, Marshall Islands, Nauru, Niue, Palau, San Marino, Sao Tome and Principe, Seychelles, Somalia, Timor Leste, Turkmenistan, Tuvalu, Vanuatu and Yemen. Although it might be possible that some of those countries would in the future adhere to the UCC (as the multilateral treaty with the lowest available level of minimum protection) at least as a first step, it is also not excluded that they would either continue to stay outside of international copyright treaties or, as it occurred frequently in the past, would directly adhere to one of the high level treaties such as the BC or the TRIPS Agreement. Given this current

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situation of a strongly decreased importance of the UCC, it is timely to reflect on its role and prospects for the future. This study aims to do so on the basis of analyses regarding the relation of the UCC to the other multilateral treaties in the field, its possible application and importance in current situations, and regarding the specific provisions relating to developing countries.

II. Relation of the UCC to the BC at the Time of the Adoption of the UCC and under its Revision Act of 1971

This relation is regulated in Art. XVII UCC and the related Appendix Declaration. In its Geneva text of 1952, Art. XVII(1) UCC simply states the obvious, namely that the UCC shall not in any way affect the provisions of the BC nor the membership in the Berne Union. In other words, the UCC does not replace or repeal the BC in any of its Acts. This is obvious because the 1952 Geneva Conference adopting the UCC did not constitute a conference of revision of the Berne Convention, nor did it represent the unanimous consent of the Berne Union Countries and therefore was not even in a legal position to alter the provisions of the BC or affect the membership in the Berne Union.\(^1\)

Secondly, Art. XVII(2) in connection with the Appendix Declaration\(^2\) regulates two different issues: The letter (a) of the Declaration aims at minimising the risk of withdrawals from the Berne Union by its Member Countries; indeed, Berne Union Countries at the time felt that such Countries could consider that they fulfilled their international obligations in the field of copyright sufficiently well by adhering to the UCC and therefore could abandon the BC with its higher level of protection.\(^3\) Since the BC, which provides for the possibility of denunciation (Art. 35 BC), could not be amended by the Conference adopting the UCC, the UCC provision achieves the deterrence from denunciation by excluding from the protection by the UCC all works which have as their country of origin (under the BC) a country which has denounced the Berne Union after January 1, 1951. In other words, works from such a Berne Union Country which denounces the Berne Union after that date are denied protection also under the UCC, in all Berne Union Countries.\(^4\) Today, the likelihood that a Member of the Berne Union would denounce the BC seems extremely low, not only against the background of the history of denunciation of the BC so far, but also given the fact that most Berne Union Countries today are also bound by the TRIPS Agreement\(^5\) under which they are obliged to comply with the substantive law provisions of the BC (see Art. 9(1) phrase 1 TRIPS Agreement). Although this does not constitute an obligation to become or to be a member of the BC, it would be of little use to denounce it while still being bound to comply with its substantive provisions.

Letter b) of the Declaration is the main reason for the decrease of the importance of the UCC after most countries of the world have adhered to the Berne Union. It excludes the application of the UCC to the relationships among Berne Union Countries insofar as they relate to the

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\(^1\) *Bogsch*, The Law of Copyright Under the Universal Convention, 3rd. ed. 1968, p. 113.

\(^2\) See on a number of inconsistencies in the wording thereof *Bogsch*, op.cit. pp. 114 et seq.

\(^3\) *Bogsch/Roach*, Commentaire du supplément à la demande d'avis concernant une convention universelle sur le droit d'auteur, document UNESCO/CUA/10, 1951, p. 11, with reference to the Swiss response to the first "demande d'avis" of UNESCO, which is also reprinted in UNESCO Copyright Bulletin Vol. III no. 2 (1950), p. 47.

\(^4\) See for problems arising in detail in the application of this provision *Bogsch*, op.cit. pp. 117 et seq.

\(^5\) 134 out of 162 Berne Union Countries are also TRIPS Members.
protection of works whose country of origin is a Berne Union Country. This rule which deviates from the classical solutions of conflicts between two treaties in the same field, in particular lex posterior or lex specialis, aims at ensuring the application of the BC with its higher level of protection than that of the UCC in all such cases of relationships among countries of the Berne Union in respect of works whose country of origin is a Berne Country. The relevant definition of "country of origin" has to be taken from the Revision Act of the BC by which both countries are bound. If, for example, both countries are UCC Members and also bound by the Rome Act of the BC, an unpublished work whose author is a citizen of one of these countries or a work first published there has its country of origin there and, hence, is governed exclusively by the Rome Act of the BC. Where, however, the work is first published in a country that is only a party to the UCC, and therefore has its country of origin outside the Berne Union, the work is exclusively governed by the UCC in the relationship between the two Berne Countries.6

Regarding the relation of the UCC to the BC under the 1971 Revision Act of the UCC, one important amendment to the Appendix Declaration related to Art. XVII UCC has to be mentioned: The new letter b) provides for an exception to the sanction under letter a) in case of denunciation of the BC by developing countries: Where a developing country deposits a notification with the Director General of UNESCO stating that it considers itself to be such country and then denounces the BC, letter a) will not apply so that the UCC continues to apply in Berne Countries to works which have their country of origin in the country which has denounced the BC. This is valid only as long as the country remains a developing country or may avail itself of the exceptions in accordance with Art. Vbis UCC. Again, since the likelihood of denunciation of the BC by developing countries seems very low, given also the compliance clause under the TRIPS Agreement,7 this provision also should be of little importance today.

III. The Relation of the UCC to the TRIPS Agreement

The UCC itself regulates only its relationships with the BC, with multilateral or bilateral conventions between American Republics (Art. XVIII UCC) and with already existing other multilateral or bilateral conventions (Art. XIX UCC). The TRIPS Agreement of 1994, which covers in its Arts. 9-13 the field of copyright (and, in the general provisions of Part I, principles applying also to copyright) explicitly regulates its relation only to the BC by a non-derogation clause in Art. 2(2) TRIPS Agreement. Where a treaty does not provide for any explicit rule regarding the relation to another treaty, in theory, different possibilities have to be considered. Firstly, the second treaty might consist in a termination of an earlier one. However, under Art. 54 Vienna Convention on the Law of Treaties, this possibility exists only if all parties to the earlier treaty give their consent. Regarding the UCC, not all parties to the UCC have given consent to the TRIPS Agreement, so that the UCC certainly has not been terminated (apart from the fact that necessary procedures under Art. 65 Vienna Convention were not followed). Secondly, the copyright provisions in the TRIPS Agreement might be interpreted as a revision of the UCC for the parties being Contracting States to the UCC. However, under general international public law, a revision must be unanimous, unless

6 See for more details hereunder, section V.
7 See already above, p. 2.
specific exceptions to that rule are provided (which is not the case). Since not all Contracting States to the UCC have adopted the TRIPS Agreement and all the more since the procedural provisions under Art. XII UCC regarding a revision have not been followed, the TRIPS Agreement cannot be interpreted as a revision of the UCC neither. Thirdly, also Art. 59 Vienna Convention on the implicit termination of a treaty or suspension of its application due to the conclusion of a later treaty does not apply in the relation between the UCC and the TRIPS Agreement, because not all Contracting States to the UCC have adopted the TRIPS Agreement. One may also not interpret the TRIPS Agreement as a suspension of the application of the UCC by agreements between only some of its Contracting States to the UCC under Art. 58 Vienna Convention due to the mere fact that the prescribed procedure under Art. 65 Vienna Convention was not followed (apart from doubts about conditions such as the temporary suspension, etc., under Art. 58 Vienna Convention). Finally, it is even not possible to interpret the TRIPS Agreement, for the UCC Contracting States, as an agreement with the aim of modifying the UCC in the relations between some of its Contracting States under Art. 41(1)b) Vienna Convention, since nothing in the TRIPS Agreement points at the will of the relevant parties to do so; in addition, one has to keep in mind that the TRIPS Agreement was concluded in a forum (i.e. the GATT) which is different from UNESCO by which the UCC is administered. For these reasons also, Art. 2(2) TRIPS Agreement which provides that nothing in its Parts I to IV shall derogate from existing obligations under the BC only, as regards copyright protection, cannot be interpreted a contrario so as to mean a derogation from other, non-specified copyright treaties such as the UCC. Rather, both treaties are separate and independent treaties; the TRIPS Agreement has left the UCC unaffected. Potential conflicts between them are governed under general international law by the principles of lex posterior as laid down in Art. 30 Vienna Convention, subject to specific regulations (that are lacking in the TRIPS Agreement).9

However, these rules only apply if there is a conflict between two treaties. Where, by way of interpretation, one may arrive at the conclusion that there is indeed no conflict but both treaties may apply at the same time, then there is no justification for applying the rules of Art. 30 Vienna Convention. In order to ascertain whether or not there is a conflict, the rule of lex specialis is often applied and may result in the conclusion that the later treaty is simply more specific but not incompatible with the earlier one.10 In the case of the TRIPS Agreement, one may not state that the degree of specification would be higher than under the UCC; it only provides for a higher level of protection. However, one might argue that there is no conflict between the UCC and the TRIPS Agreement because, regarding the level of protection to be provided, the TRIPS Agreement would not be contrary to that of the UCC, since it only requires a higher level of protection. This argument falls short, though, since a conflict consists indeed in the fact that the TRIPS Agreement, different from the UCC, would no longer permit the UCC Contracting States to rely on the lower minimum to be provided under the UCC. Yet, one might also argue that any potential conflict between the UCC and the TRIPS Agreement can be solved on the basis of the following interpretation: Art. XVII UCC and the related Appendix Declaration give absolute priority to the BC in order to ensure that the higher level of protection applies between countries that are parties to both the UCC and the BC. This purpose of the UCC-provision arguably also applies to the BC-standards as

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9 See on these rules for example Verdross/Simma, Universelles Völkerrecht, 3rd ed. Berlin 1984, § 786.
integrated into the TRIPS Agreement and to the higher level of protection granted by other TRIPS provisions. Hence, even if the UCC itself does not explicitly give priority to the TRIPS Agreement (and could not do so since the latter did not exist at the time of the last revision of the UCC), but only to the BC itself rather than its provisions incorporated into the TRIPS Agreement, the interpretation according to its purpose of safeguarding the higher level of protection between countries that are members to such higher level-treaties results in giving priority to the TRIPS Agreement.11

Even if one does not follow this argument according to which the UCC may be interpreted as giving priority also to the TRIPS Agreement, one will arrive at the priority of the TRIPS Agreement on the basis of Art. 30(4) a) in connection with Art. 30 (3) Vienna Convention which applies because there is one country which is party to the UCC but not to the TRIPS Agreement;12 Art. 30(3) Vienna Convention directly applies only where all parties to the earlier treaty are also parties to the later one. Under this rule, the earlier treaty applies only to the extent that its provisions are compatible with those of the later one, where the relations between countries that are parties to both treaties are concerned.13 The lex posterior rule applies only to successive treaties dealing with the same subject matter.14 In its Arts. 9-13 and the relevant Articles of Part I TRIPS Agreement, the same subject matter as under the UCC is covered, namely copyright protection, so that the later treaty, i.e. the TRIPS Agreement, applies where there is a conflict between the UCC and the TRIPS Agreement, between countries that are parties to both treaties. It has been claimed that a condition of the lex posterior rule is that the same subject matter has been regulated in the same degree of detail and that otherwise the rule of lex specialis applies. However, as stated above, there is no obvious difference in specification which would make this rule applicable. Accordingly, one may state that, if a conflict between the UCC and the TRIPS Agreement is assumed, the lex posterior rule of Art. 30(4) in connection with Art. 30(3) Vienna Convention results in the priority of the TRIPS Agreement.

In fact, the question of the relation between the UCC and the TRIPS Agreement to date is mainly of a theoretical nature, because all countries (except Cambodia) that are Members of the TRIPS Agreement and the UCC are in fact also Members of the BC and, as such, are bound by the obligation under the Appendix Declaration to Art. XVII UCC to no longer apply the UCC among themselves. Although this rule applies only to countries of the Berne Union, the far-reaching identity of UCC countries that are parties both to the Berne Union and the TRIPS Agreement15 and the fact that Art. 20 BC has been incorporated into the TRIPS Agreement which therefore cannot be interpreted so as to provide for less protection than the BC or for any provisions contrary to it means that TRIPS Members are not allowed to apply the UCC among themselves.

12 Laos; UCC countries which are TRIPS and also Berne Union Countries have not been taken into account here for the reason given in the following paragraph.
13 In the (here not interesting) relation between a country that is party to both treaties and another one that is party only to one of them, only the treaty to which both of them are parties governs their relations, Art. 30 (4) b) Vienna Convention.
14 Art. 30(1) Vienna Convention.
15 All except Cambodia. The few countries which are not even UCC members but only members of TRIPS while not of the Berne Convention are: Angola, Burundi, Hong Kong/china, Kuwait, Macao/China, Maldives, Mozambique, Myanmar, Papua New Guinea, Sierra Leone, Solomon Islands, Chinese Taipei, and Uganda.
IV. The Relation of the UCC to the WIPO Copyright Treaty (WCT)

Like the TRIPS Agreement, the WCT provides for a non-derogation clause in respect of existing obligations under the BC (only) (Art. 1(2) WCT) and integrates not only the Arts. 1 to 21 and the Appendix of the BC (including Art. 20 BC)\(^{16}\) into the WCT but also explicitly specifies that the WCT is a special agreement in the meaning of Art. 20 of the BC (Art. 1(1) WCT). In addition, under Art. 1(1) phrase 2 WCT, the WCT shall not have any connection with treaties other than the BC, nor shall it prejudice any rights and obligations under the other treaties. "Connection" in this provision means any legal connection comparable to that determined by Art. 20 BC.\(^{17}\) The non-prejudice clause in Art. 1(1) phrase 2 WCT simply confirms the independence of the WCT from other treaties and the fact that the WCT does not affect the existing rights and obligations under those treaties. This clause clearly prevents any interpretation of the WCT as a termination, revision, suspension or modification of the UCC, apart from the obstacles to such interpretation for the above-mentioned reasons.\(^{18}\)

Accordingly, one will have to analyse whether there is a conflict between the UCC and the WCT and if so, whether the *lex posterior* rule under Art. 30(4) in connection with Art. 30(3) Vienna Convention applies. Regarding a potential conflict or rather the compatibility of both treaties, similar considerations as those set out in respect of the relation between the UCC and the TRIPS Agreement apply here, because the WCT and the TRIPS Agreement are comparable in the relevant aspects, in particular the higher levels of protection as compared to that of the UCC, and the degree of covered detail. Accordingly, the conclusions are the same, namely that one may possibly argue that there is not even a conflict. However, if one does not follow this argument, the *lex posterior* rule applies also here, with the effect that the WCT prevails over the UCC. Finally, the above considerations regarding the factual situation\(^{19}\) apply equally to the relation between the UCC and the WCT, because all Contracting Parties to the WCT are in fact also Members of the BC and, even considering future accessions to the WCT, will be so. Consequently, these Berne and WCT member countries which are, in addition, Contracting States to the UCC, are bound by the obligation under the Appendix Declaration to Art. XVII UCC to no longer apply the UCC among themselves.

V. Applicability of the UCC to Relations Between States as of Today

Currently, the UCC is applicable in the following situations: Firstly, to the relationship among countries that are only Contracting States to the UCC but not parties to any other treaties dealing with copyright protection. This situation existed between Laos and Cambodia until 2004, when Cambodia adhered to the TRIPS Agreement; it does not exist anymore today. This scenario occurred also where a work was created by a national of a country not party to any multilateral copyright treaty but first published in Laos or Cambodia; this work was then protected in the other country. Secondly, the UCC applies to relations between one country that is a Contracting State to the UCC only and a second one that is a party both to the UCC and the BC or any other treaty dealing with copyright protection. This will concern only the relations of third countries with Laos. Thirdly, it is – at least theoretically – not excluded that a developing country which is Member of the Berne Union and a Contracting State to the UCC will in the future withdraw from the Berne Union and follow the procedure under letter

\(^{16}\) Art. 1(4) WCT.


\(^{18}\) The same reasons as mentioned in the section on the relation to the TRIPS Agreement apply here, see above, pp. 2 - 3.

\(^{19}\) See above, p. 4.
(b) of the Appendix Declaration relating to Art. XVII UCC (Paris text); in this case, as an exception from letter (a), the UCC will apply to such developing country in its relations with other countries that are both parties to the UCC and the Berne Union. However, this seems a more theoretical rather than practical scenario.

In addition, the UCC may also apply today in relations among countries of the Berne Union that are at the same time Contracting States to the UCC, in respect of works having as their country of origin (within the meaning of the BC) a country outside of the Berne Union, if at the same time the criteria for eligibility under the UCC are fulfilled. Several cases are conceivable in this respect:

a) If relations among two countries are concerned that are both Contracting States to the UCC and parties to either the Rome Act or the Brussels Act of the BC, and the country of origin (under the rules of the Rome Act or the Brussels Act of the BC respectively) is a country outside the Berne Union (in particular because the first publication took place outside the Berne Union), the work, if it is a work of a citizen of one of the Berne Union countries, will be protected in the other Berne Union country under the UCC only (if the conditions of Art. II UCC on the criteria of eligibility are fulfilled). In other words, if countries A and B are UCC and Berne Union countries bound by either the Rome Act or the Brussels Act, and country C is a country outside the Berne Union, and if the work of a citizen from A is first published in country C, and is also not published within thirty days thereafter in a Berne Union country, country B will protect the work under the UCC because also the requirements under Art. II(1) UCC are fulfilled: In this case, if country C where the first publication takes place is a Contracting State to the UCC (only), the UCC applies under Art. II(1) UCC because the work was first published in a UCC country; if the country of first publication (C) is not only outside the Berne Union but also outside the UCC, the UCC applies if the author is a national of a Contracting State to the UCC (as in the above case) or if he is not a national thereof but domiciled in a Contracting State to the UCC (see Art. II (3) UCC). In any case, however, where published works are concerned, the UCC applies only to works published as defined in Art. VI UCC and, hence, in particular not to works recorded on phonograms; the definition of "publication" is limited to reproductions in tangible form and to the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived. If the work of the citizen of country A is unpublished, there is no country of origin under the Rome and Brussels Acts of the BC, so that also no Berne Union country would be such country of origin. Therefore, also in this case, the UCC applies between countries A and B; under Art. II(2) UCC, unpublished works are protected under the UCC if they are created by nationals of a Contracting State to the UCC, such as countries A and B.

b) If countries A and B are both parties to the Paris Act of the BC, the situation is different to the extent that the definition of "country of origin" is different. Accordingly, if countries A and B are both parties to the Paris Act of the Berne Union and to the UCC, and country C only to the UCC, the UCC may apply only in rare cases, because Art. 5(4)c BC (Paris Act) provides additional ways of determining the country of origin as one of the Berne Union, namely where the first publication takes place outside the Union, and in respect of unpublished works. Accordingly, where the first publication takes place in a country outside the Union (in this case: C), without simultaneous publication (publication within thirty days after the first publication) in a country of the Union, Art. 5(4)c BC (Paris Act) still results in country A being the country of origin, because the author is a national from country A. Since in this case, the country of origin of the work is country A, a Berne Union country, the UCC does not apply in the relationship among countries A and B. The same result applies where
the work is unpublished: In this case also, the country of origin according to Art. 5(4)c BC (Paris Act) is the Berne Union country of which the author is a national (in this case: A), so that the UCC does not apply.

c) Where, in the above case, countries A and B do not adhere to the same Revision Act but, for example, country A adheres to the Paris Act and country B to an earlier Act, the relationship between both is governed by Art. 32 BC (Paris Act). Accordingly, among the then (1971) existing Berne Union countries, the most recent version applying to both of two countries applies among them (Art. 32(1) BC). If a country from outside the Union becomes party to the Paris Act, such acceding country has to apply the Paris Act towards all other Berne Union countries, while the Berne Union countries bound only by an earlier Act are free to apply only such earlier Act in their relation to the acceding country, or even to adapt the protection to the level provided by the Paris Act (Art. 32(2) BC (Paris Act)). Accordingly, the solutions in the above-mentioned cases (see a)) where both Berne Union countries are bound either to the Rome or the Brussels Acts (and where the UCC applies) apply also in the relation among one Berne Union country that is party either to the Rome Act or to the Brussels Act and a second Berne Union country that has become a Berne Union Member after 1971 (in this case, it had to ratify or accede to the Paris Act, see Art. 34 BC (Paris Act)). Since many countries have acceded to the BC only after 1971, there is still some room for application of the UCC in their relations to those (currently ten) Member States that have adhered only to the Rome (currently 5 countries) or the Brussels Acts (currently 5 countries).

Where, in the above-mentioned case, country A adheres to the Rome Act and country B to the Brussels Act of the BC, the situation with a view to the applicability of the UCC is more complicated; it was not explicitly regulated before 1971. Different views have been expressed in this respect. In particular, it has been argued that the different Revision Acts of the BC are separate, successive treaties, so that a state acceding only to the latest text would not have any relation to Berne Union members that had ratified only an earlier text. Therefore, one might have argued that there is no relationship between the two countries and that, therefore, the Appendix Declaration relating to Art. XVII UCC letter c (Paris Act) (or, respectively, letter b) under the Geneva Act) would not apply and, consequently, the UCC would apply in the relationship among one country adhering to the Rome version and another one only to the Brussels version. According to a different view, it would suffice that both countries are members of the Berne Union, in order to have a relationship with each other, and the UCC would not apply where the country of origin of the work would be a Member of the Berne Union, such as in the following case: If country A has ratified only the Rome Act and country B only the Brussels Act, they would not grant each other any protection under any Berne text. Where a work is first published in country B, it would not be protected by the Rome Act in country A. Nevertheless, according to this view, the UCC would not apply, because both the country of first publication (i.e. the country of origin) and the country where protection is claimed are Berne Union countries. According to another opinion leading, though, to the same result, there was a relation between a country which acceded to the most recent Act of the Berne Union (up to the Brussels version) and a Berne Union Member that was only party to an earlier Act, because one had to presume that the acceding country tacitly accepted all the previous Acts, even if it did not declare that this accession would be valid also for the previous Acts, and thereby enabled its relations with countries parties only to the earlier Acts on the basis of such earlier Acts. It was stated that such “legal position was arguable, but the

20 See these examples and views in Bogsch, op.cit., pp. 120, 121.
system was the only practicable one”, all the more since, “without that tacit acceptance system, the State acceding to the latest text [up to the Brussels version] would have no relations with half the membership of the Union”.21

d) Also in the following scenario it is not clear under the UCC whether the UCC applies. The following case shall illustrate this scenario: Countries A and B are parties to both the UCC and one of the Acts of the BC, whereas country C is party to the UCC only, and country D is party to neither. If a work of a citizen of C or D is first published in country A and protection is claimed for this work in country B, it is clear that the country of origin is country A, a Berne Union country. However, it is not clear how to interpret the condition of "relationships among countries of the Berne Union" in the Appendix Declaration relating to Art. XVII, c) UCC (Paris Act). If one considers the relationship between countries A and B (the country of origin and the country where protection is claimed), the UCC would not be applicable in their relationship. At the same time, one may consider that there is a relationship between country B and either country C or D (the country where protection is claimed, and the country of which the author is a citizen). In these relationships, it seems that the UCC applies, because countries C and D are not Berne Union countries, but the criteria of Art. II (1) UCC are fulfilled (the author is a national of country C, a Contracting State to the UCC; although country D is not a Contracting State to the UCC, the work was first published in a UCC country (A) which is sufficient under Art. II UCC.22 Accordingly, it seems that in such a scenario, there are two relationships: The first one between Berne Union countries (A and B) where the UCC would not apply, and the second one between a country member of both conventions (country B) and either a country not member of the Berne Union but Contracting State to the UCC (country C) where there is no relationship between two BC countries, so that the UCC applies, or a country not Member to both (country D) where the UCC arguably applies due to the first publication in country A.

Although in many cases the results of applying either the BC or the UCC would be similar, due to the principle of national treatment contained in both treaties, there are a number of diverging provisions such as the minimum duration, etc., so that a solution of the problem in one or the other way would matter. Different arguments have been brought forward in favour of the applicability and of the non-applicability of the UCC. In the end, it has to be admitted that there is no clear answer to the problem, so that it can at least not be excluded that the UCC applies also in such cases as described above under c) and d), namely where a work of a national from a country only Member to the UCC (or a country that is not part of any copyright treaty) is first published in a Berne Union country and protection is claimed in another Berne Union country, as specified above. Given the limited number of countries being Contracting States only to the UCC or not even to any copyright treaty, such cases would anyway not be frequent.23

e) Another set of cases in which the UCC might apply at first sight are those relating to works created in a UCC country before it adhered to the BC, TRIPS Agreement or the WCT. The question is whether such works continue to be governed by the UCC or, instead, are governed from the accession on by the BC, TRIPS Agreement or WCT. This question is to be answered

22 See however the doubts about the applicability of the UCC in the latter case where the country D is not a Contracting State to the UCC, Bogsch, op.cit., p. 122.
23 See on the described scenarios, the possible arguments and conclusions, Bogsch, op.cit., pp. 121-124.
under Art. 18 of the BC, Art. 70(2) phrase 2 TRIPS Agreement in connection with Art. 18 BC and Art. 13 WCT in connection with Art. 18 BC. Accordingly, and subject to conditions under national law (Art. 18(3) BC), the BC, TRIPS Agreement and WCT apply to all existing works which, at the time of accession to those treaties have not yet fallen into the public domain in the country of origin through the expiry of the term of protection (Art. 18(1) in connection with 18(4) BC). For example, if a work first published in country A, a UCC country only, is still protected under the duration of 25 years after the author's death according to the national law of country A at the time of accession of country A to the BC, TRIPS Agreement or WCT, these latter treaties apply to such work instead of the UCC. If it has fallen into the public domain in country A through the expiry of the term of protection, the latter treaties do not apply to this work. However, this only means that they will not be protected in the member countries of the BC, TRIPS Agreement and WCT; it does not mean that the UCC would apply instead of the other treaties in principle (rather, it is Art. 18 of the BC itself (or, as integrated in the TRIPS Agreement and the WCT) which applies). For the same reasons, the UCC does not apply where Art. 18 (2) BC provides that such a work shall not be protected anew if it has fallen into the public domain of the country where protection is claimed, through the expiry of the term of protection previously granted. In conclusion, the UCC does not apply in relation to a UCC country after its accession to the BC, TRIPS Agreement or WCT. If transitional provisions have been provided under national law (or under "special conventions" such as bilateral agreements between countries according to Art. 18 (3) BC), they may not put into question the principle of Art. 18 (1), (2) BC and therefore must have rather a short duration of application. Also, they would constitute provisions specifying the application of Art. 18 BC during the period of transition rather than maintaining the applicability of the UCC.24

The UCC remains important today in cases where it is necessary to know whether a specific work in relation to particular countries is still protected in this relationship today. In such cases one has to verify chronologically the status of protection in the relation between such countries. Even if today both countries are members of the BC, TRIPs or the WCT, the status of protection at a pre-Berne/TRIPS/WCT point of time may involve the verification on the basis of the UCC. However, in such cases, the UCC itself does not apply but is only used in order to find out the history of protection (leading to the current status) in international relations.

VI. Provisions Relating to Developing Countries: Their Practicability, Functionality and Possibility for Revival in Connection with Other Currently Existing International Instruments

The contents of the special provisions in favour of developing countries in the UCC and in the Appendix to the BC are very similar to each other and show only very few divergences. In sum, the main privileges granted to developing countries are the possibilities to benefit from compulsory licenses regarding the rights of translation and reproduction under further circumstances (and, under Art. XVII UCC/Appendix Declaration (b), the Berne safeguard clause described here-above25). Developing countries can avail themselves of such

24 For an example of such transitional provisions regarding the formalities of copyright notice and registration under pre-Berne US law see Ginsburg/Kernochan, One Hundred and Two Years Later: The US Joins the Berne Convention, Columbia-VLA Journal of Law & the Arts, Vol. 13 no. 1, 1988, pp. 1 et seq., 21-24.
25 See p. 3.
compulsory licenses only if they deposit a notification in this regard with the Director General of UNESCO or, respectively, of WIPO at the time of ratification, access or later; such notification will be effective until the expiration of ten years and must be renewed for further periods of ten years by a corresponding notification.\textsuperscript{26} In addition, in order to obtain a compulsory license under both instruments, particular procedures have to be followed; for example, the applicant for a license must show that he unsuccessfully tried to obtain a license from the right owner or that appropriate efforts did not result in finding the right owner.\textsuperscript{27} These provisions aim at encouraging contractual licenses rather than compulsory licenses. In both the UCC and the BC, the possible compulsory licenses must be non-exclusive and non-transferable, and provided only for particular periods of time, against payment of a just compensation for the right owner. The license does not permit export of the copies, and each copy must bear a notice stating that it is available for distribution only in the country or territory to which the license applies.\textsuperscript{28}

In the context of the compulsory licenses provided in the text, it should be mentioned that only the UCC in addition provides for a compulsory license in favour of all Contracting States (including the industrialized countries) in respect of translations, under the conditions specified in Art. V(2) UCC.

The compulsory licenses in favour of developing countries in respect of the translation right have been shaped similarly in Art. V\textsubscript{ter} UCC and Art. II Appendix to the BC, including the restriction of the license to certain privileged purposes, the respect of certain time periods such as three years after first publication as a starting point, and a number of conditions. A compulsory license regarding the translation of a work for the benefit of broadcasting organizations has been provided under specified conditions in Art. V\textsubscript{ter}(8) UCC and Art. II(9) Appendix to the BC; the partially diverging wording of both provisions does not result in a diverging meaning thereof.\textsuperscript{29} It is to be taken into account that the compulsory license applies only to the translation for the purposes of broadcasting, however not to the reproduction by broadcasting organizations and the broadcasting itself, which are governed by the general rules.

Finally, the compulsory licences regarding the reproduction right are again regulated in a comparable way in the UCC and the BC.\textsuperscript{30} The high degree of similarity in the wording under both treaties does not least result from the cooperation of the Intergovernmental Committee of the UCC and the Permanent Committee of the Berne Union during the preparation of the Revision Acts of 1971 and the common formulation of the provisions in favour of developing countries.\textsuperscript{31}

\textsuperscript{26} Art. I Appendix to the Berne Convention and Art. Vbis UCC; see these articles also for more details regarding the periods of validity of the notification, etc.
\textsuperscript{27} See Art. V\textsubscript{ter}(1)c and d), V\textsubscript{quater}(1)a and d) UCC and Art. IV(1), (2) Appendix to the BC.
\textsuperscript{28} Art. IV(4)-(6) Appendix to the BC and Art. V\textsubscript{ter} (4)b), V\textsubscript{quater}(2)a) UCC etc.; regarding the just mentioned notice, the UCC in addition requires that the copyright notice must be applied also to the copies made on the basis of the compulsory license, if the work used has contained a copyright notice, Art. V\textsubscript{ter}(5) and V\textsubscript{quater}(2)b) UCC/Art. V\textsubscript{ter}(4)a) and Art. V\textsubscript{quater}(1)f) UCC.
\textsuperscript{29} See also Ulmer, Die Revisionen der Urheberrechtsabkommen, GRUR Int. 1971, pp. 423 et seq., 423 (note 46).
\textsuperscript{30} See Art. V\textsubscript{quater} UCC and Art. III Appendix to the BC.
\textsuperscript{31} See Ulmer, op.cit., p. 435.
Therefore, the question of a possible revival of these provisions in connection with other more recent treaties dealing with copyright does not seem to be relevant, because the provisions of the Appendix to the BC have been integrated into the TRIPS Agreement and the WCT\textsuperscript{32} and therefore have to be complied with under these instruments anyway. Therefore, the provisions of the UCC in favour of the developing countries would not add anything to the current situation and therefore cannot be considered as a potential model for better meeting the needs of developing countries – needs that are currently again expressed vigorously by the developing countries in different fora.\textsuperscript{33}

In any case, it seems that little use has been made so far of the compulsory licenses; only about ten countries have made use thereof so far. At the same time, one has to acknowledge that the threat of potential compulsory licenses alone may show its effects, namely the increased readiness of right owners to grant licenses on a contractual basis and on reasonable terms and conditions. UNESCO and WIPO in this context facilitate the search for the right owners and the application of the system of contractual licenses. Also private initiatives such as information services with a view to facilitating contractual licensing have been reported.\textsuperscript{34} It seems that the needs of developing countries are largely met by such activities encouraging voluntary licensing and avoiding the compulsory licenses which have been claimed to be little functional and rather complicated in their application, due to the procedural and other conditions. A future field study could be useful with a view to confirming or rejecting this assumption.\textsuperscript{35} In the context of compulsory licences, one also has to consider the aspect that they might have an adverse effect on the local creation, given the easier access to foreign as compared to local works. While the easier access to foreign works may be important in the area of technical and scientific publications, this situation may be different in the proper field of culture and may even lead, to some degree, to an alienation of the own culture.\textsuperscript{36}

VII. Prospects for the Role of the UCC in the Future

The current importance of the UCC, evaluated against the number of countries and of scenarios where it is still applicable, as shown under V. above, is very modest. For the future, it is very unlikely that it will gain any more importance, as has been shown in this study. Although the UCC may be more favourable to developing countries that have not yet a highly developed infrastructure or cultural industry – and it was indeed the UCC's purpose to enable in particular countries with a low level of development to become part of the international copyright community – it is rather unlikely that they would denounce the BC, the WTO/TRIPS Agreement or even the WCT, particularly because many countries have an interest in being part at least in the WTO be it for other reasons than intellectual property. Often, they have to provide for a higher level of protection under bilateral treaties anyway. In other words, even in the current situation where it seems that many countries would like to be under lower level obligations in the field of international copyright, it may not be expected

\textsuperscript{32} See Art. 9(1) TRIPS Agreement and Art. 1(4) WCT.
\textsuperscript{33} For example in the WTO and in WIPO; see in particular the WIPO Development Agenda adopted in 2004, www.wipo.int.
\textsuperscript{35} See already Dietz, Urheberrecht und Entwicklungsländer, Munich 1981, pp. 38 et seq. with a view to the encouragement of contractual licenses.
\textsuperscript{36} See also Dietz, op.cit., pp. 33 et seq., with a reference in particular to Mouchet, “Some Notes on Copyright in Latin America”, Copyright 1971, 223 et seq.
that they would denounce the BC, the TRIPS Agreement and the WCT respectively and thereby allow the application of the UCC.
DOCTRINE AND OPINIONS

CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS AND THE PROTECTION OF AUTHORS' RIGHTS*

Thierry DESURMONT**

At its 33rd session on 20 October 2005, the General Conference of UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

This text, which seeks to protect and promote culture through its diversity, lies in harmony, in principle, with the protection of literary and artistic property, itself an essential instrument for the existence and development of an abundant and diversified production of quality cultural goods.

In fact, the Convention’s adoption was supported by creators, often united within coalitions for cultural diversity, amongst which the Canadian and French coalitions played a leading role. Moreover, the goals of protecting authors’ rights and cultural diversity frequently go hand in hand in political discourse (see, for example, the statements by the French Minister of Culture, Mr Renaud Donnedieu de Vabres, on 20 December 2005 in the National Assembly during the debate on the implementation of the European Directive of 22 May 2001 on copyright and related rights in the information society).

Indeed, culture is sustained by creativity, which presupposes in turn that creators are protected and can receive adequate remuneration. In the same way, the desire of States to foster their national culture implies that they protect their creators. Thus authors’ rights work in favour of cultural diversity and the fight for cultural diversity contributes to the defence of authors’ rights.

However, this idyllic view needs to be nuanced.

Literary and artistic property is normally intended to protect creativity regardless of its origin. In concrete terms, this is reflected in particular by the fact that the principle of national treatment is one of the fundamental principles on which the international copyright conventions, including the Berne Convention, are based. And even when the principle of

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reciprocity operates, it is enough that the foreign State should grant protection to nationals of the State applying this principle for its own nationals to enjoy in that State the same protection as the latter’s nationals.

Literal and artistic property is not intended as such to reduce one State’s possible cultural hegemony over another. For example, it matters little from a copyright viewpoint that the author seeking protection is American or that the globally dominant culture is American.

It is true that the Berne Convention and the Universal Copyright Convention contain specific provisions for developing countries and that one of the purposes of these provisions is to stimulate these countries’ cultural development. However, these provisions have limited scope and deal solely with the implementation of compulsory licensing systems for translation and reproduction. Furthermore, the fight for cultural diversity is not a necessity that is limited purely to developing countries but rather a value that deserves to be preserved in all States.

The fundamental neutrality of authors’ rights in relation to cultural diversity is confirmed, moreover, by the fact that it was considered necessary to draw up the new Convention on cultural diversity and place it within a different framework from that of the copyright conventions.

In addition, during the process of drafting the Convention on cultural diversity, some rightholders expressed concern that certain States, pleading the need to protect their own cultures, might use it as a pretext to challenge the protection of authors’ rights and their obligations under the international conventions governing copyright.

Indeed, we know that certain developing countries regard literary and artistic property as an impediment to the development of their cultural industries. The Convention too pays special attention to developing countries both in its objectives, which include (Article 1(i)) that of “enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions”, and in its substantive provisions which not only place particular emphasis, in Article 14, on “cooperation for development”, devoted notably to “strengthening the cultural industries in developing countries”, but also provide, in Article 16, that developing countries are to be granted preferential treatment in cultural exchanges.

Thus, in connection this time with the rights of broadcasting organisations, Brazil relied on the adoption of the Convention on cultural diversity to table a proposal at the 13th session of the WIPO Standing Committee on copyright and related rights, held in November 2005, to the effect that no provision of the treaty being drafted on the protection of broadcasters “shall limit or constrain the freedom of a contracting party to protect and promote cultural diversity”. Accordingly, if this clause were to be accepted, the protection granted by the new treaty could be challenged by a signatory State purely on the ground that the State considered it contrary to the protection of cultural diversity. This would create a very worrying precedent that could be transposed to the field of authors’ rights.

The idea that the Convention on cultural diversity could be used as an argument to challenge the protection of authors’ rights, or related rights, is, in our view, totally unjustified.

It is true that, on a first reading, Article 20 of the Convention, which deals with its relationship to other international instruments, may give rise to some concern.
Indeed, paragraph 1 of this Article states, firstly, that the Convention is not subordinated to other treaties and that the relationship between them must foster mutual supportiveness and, secondly, that “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention”.

However, by declaring that “nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”, Article 20.2 categorically precludes any reference to the Convention as a means of challenging the protection granted to authors’ rights under existing treaties.

What is more, and this also holds for the negotiation and conclusion of future treaties, the very purpose of the Convention prevents it from being invoked in order to weaken the protection of authors’ rights.

In the first place, as we stressed earlier, there is no justification for claiming that respect for authors’ rights is a barrier to the pursuit of cultural diversity when it is obvious that there can be no cultural development without protecting creators. This is all the more true as far as the Convention is concerned because its framers made a point of emphasising, in paragraph 17 of the preamble, “the importance of intellectual property rights in sustaining those involved in cultural creativity”. To seek to use the Convention to reduce the protection of authors’ rights would thus go directly against the values that its framers took care to proclaim.

In the second place, authors’ rights lie outside the scope of the Convention. Indeed, the Convention was adopted to protect cultural diversity from the growing influence of economic liberalism in the organisation of world trade, notably in negotiations on services conducted within the World Trade Organization – liberalism that would open the floodgates to the ever greater cultural hegemony of the most powerful nations, particularly the USA.

Therefore, the statement in Article 1(g) on the need to “give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning” and the right of the signatory States in Article 2 “to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory”, entitle States to lay down specific rules to protect their national or regional cultures without falling foul of the existing or impending rules designed to liberalise world trade. Examples might include financial aid of a public or private nature notably in the form of subsidies or low interest loans, various support schemes for national creation, production and distribution systems, broadcasting quotas, public sector support, stronger partnerships between the public and private sectors, promotion of the use of new technology, incentives to conclude co-production and co-distribution agreements, linguistic support measures, education and consciousness-raising programmes to increase public awareness of the importance of protecting and promoting the diversity of cultural expressions, education, training and exchange programmes in the cultural industry sector, cooperation agreements between States, the creation in Article 18 of the Convention of an International Fund for Cultural Diversity, etc…

It should also be stressed that intellectual property was not absent from the process of drafting the Convention. Indeed, the preliminary draft text of the Convention drawn up in July 2004 by a group of non-governmental experts specifically mentioned intellectual
property and the intellectual property treaties in article 4-4 (definition of cultural goods and services), article 7 (obligation to promote the diversity of cultural expressions) and article 19, option A (relationship to other instruments). However, at the first two intergovernmental meetings of experts in September 2004 and February 2005, it became apparent that these references raised difficulties and that to address intellectual property issues in the convention entailed a risk of weakening the existing international standards on the subject. So, at the third and final negotiating meeting, in June 2005, the choice was made to remove all references to intellectual property in the articles of the future convention and just to stress the importance of intellectual property rights for cultural diversity in paragraph 17 of the preamble. This choice was not challenged at the general conference held in October 2005.

In sum, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions has neither the intention nor the effect of changing the rules of literary and artistic property protection set out in the international conventions governing the subject, notably those adopted within the framework of the World Intellectual Property Organization or under the TRIPs Agreement of the World Trade Organization.

Therefore, it cannot be invoked by signatory States to challenge obligations incumbent on them under those international conventions.

In addition, it is not an instrument to raise the international standard of literary and artistic property protection. However, it is a fact that this protection is strengthened as a result of the Convention’s adoption. As already emphasised, the protection and promotion of cultural diversity go hand in hand with the protection of literary and artistic property and the need to guarantee cultural diversity is often – rightly – put forward as one of the reasons justifying the protection of creativity. Their complementary nature is expressed, moreover, in paragraph 17 of the preamble. Lastly, paragraph 18 of the preamble proclaims that “cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value”. This fact is often underscored by the defenders of authors’ rights, notably in the face of attacks based on competition law or in order to request an exemption for literary and artistic property from the application of the rules of a purely economic nature designed to govern all goods and services. It is clearly very positive in this regard that the Convention expresses it forcefully, even in a framework that is not intended to govern the protection of literary and artistic property.

(English translation by Margaret PLATT-HOMMEL)
STRENGTHENING COPYRIGHT ENFORCEMENT IN SOUTHERN AFRICA


Ten international experts led the four-day training course that combined theoretical presentations with practical case studies to highlight the importance of copyright law enforcement as well as the detrimental consequences of intellectual piracy.

The session was designed to be highly interactive for the 34 participants from 10 countries in the Southern African Development Community (SADC), namely Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. Included in the programme was a visit to a customs' office where they were asked to distinguish between genuine and pirate DVDs, thus putting the knowledge they had acquired into practice.

Participants are now expected to organize training sessions in their own countries, passing on what they have learned to their colleagues but adapting this to their respective national frameworks.

During the opening ceremony of the workshop, the Namibian Minister of Broadcasting and Information, Ms Netumbo Nandi-Ndaitwah, officially launched the Namibian Reproduction Rights Organization (NAMRRO), the second collective management society in the country. Speaking in the presence of Mr Olav Stokkmo, Secretary General of the International Federation of Reproduction Rights Organisations (IFRRO) and Dr Claudia Harvey, Director of the UNESCO Cluster Office in Windhoek, Ms Nandi-Ndaitwah stressed the need for intellectual property protection in order to stimulate economic growth and development.

The training session was principally funded by the Spanish Agency for International Co-operation and run jointly by the UNESCO Copyright Programme and the UNESCO Cluster Office in Windhoek with the support of the UNESCO Cluster Office in Harare. The Namibian Ministry of Information and Broadcasting as well as IFRRO also contributed significantly to the organization of the workshop.

Other partners included the International Publishers Organisation (IPA), the International Federation of the Phonographic Industry (IFPI), the Southern African Federation Against
Copyright Theft (SAFACT), the Business Software Alliance (BSA) and the Recording Industry of South Africa (RISA).

Three of the beneficiary countries have already organized follow-up anti-piracy seminars in late 2006. Walvis Bay, Namibia, was the venue of the first follow-up workshop which took place on 23 November and focused on intellectual property rights and fight against piracy. It was initiated and organized by the Namibian copyright authorities and NAMRRO, the new reproduction rights organization of Namibia, set up with the assistance of UNESCO and IFRRO. It was followed by a two-days conference in Harare, Zimbabwe, on 26 and 27 November; which brought together more than 60 copyright enforcement officials – magistrates, prosecutors, customs and police officers and representatives of right-owners organizations. Initiated by the Zimbabwean participants in the APTT Windhoek, the conference was organized in partnership with the African Regional Industrial Property Organization (ARIPO). The conference ended with an Anti-Piracy march on 29 November in the central part of Harare, opened and led by the Minister of Culture. More than 100 people took part in this awareness-raising event, which was widely covered by the local media.

Last but not least, 25 copyright enforcement officials from all regions of the country, received training in the area of copyright and anti-piracy during the follow-up workshop in Lilongwe, Malawi, on 7 December. The intensive and practically-oriented programme, prepared by the Malawian participants in the APTT Windhoek, provoked an interactive discussion and raised real interest to the issues at stake.

Further reading: IFRRO October 2006 Newsletter (PDF) / December 2006 (PDF)

Concise European Copyright Law aims to offer the reader a rapid understanding of all the provisions of copyright law in force in Europe that have been enacted at the European and international levels. This volume takes the form of an article-by-article commentary on the relevant European directives and international treaties in the field of copyright and neighbouring rights. It is intended to provide the reader with a short and straightforward explanation of the principles of law to be drawn from each provision. Editors and authors are prominent specialists (academics and practitioners) in the field of international and European copyright law.

Concise European Copyright Law is part of 'Concise IP', a series of five volumes of commentary on European intellectual property legislation. The five volumes cover: Patents and related matters, Trademarks and designs, Copyrights and neighbouring rights, IT and a general volume including jurisdictional issues.

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