1. The Berne Convention: Historical and institutional aspects

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INTRODUCTION

Declarations, let alone ‘solemn declarations’, are grand things. They have a tradition that goes back at least as far as the US Declaration of Independence and are exemplified, in the twentieth century, by various declarations in the international sphere, beginning with the Universal Declaration of Human Rights at the end of World War II. Other more contemporary declarations of rights have proliferated in specific areas of concern, for example, the rights of indigenous peoples,1 the human genome2 and human genetic data,3 and bioethics.4

Authors’ rights, too, have been the subject of a ‘solemn declaration’, although one that is perhaps less well known. This declaration was made by members of the Berne Union at the celebration of the centenary of the Berne Convention for the Protection of Literary and Artistic Works meeting in formal assembly in Geneva on 11 September 1986. Reaffirming their commitment to protect the rights of authors in ‘as effective and uniform manner as possible’, these states went on to:

*Solemnly declare that copyright is based on human rights and justice and that authors, as creators of beauty and learning, deserve

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4 International intellectual property

that their rights in their creations be recognized and effectively
protected both in their own country and in all other countries of the
world,

Solemnly declare that the law of copyright has enriched and will
continue to enrich mankind by encouraging intellectual creativity
and by serving as an incentive for the dissemination throughout the
world of expressions of the crafts, learning and information for the
benefit of all people,

Solemnly declare that international respect for the law of copyright
opens paths across frontiers for works of the mind, this contributing
to a better international understanding and to the cause of peace,

Solemnly declare that the Berne Convention for the Protection of
Literary and Artistic Works, by providing an outstanding, compre-
hensive and harmonized codification of the rights of authors, has
guaranteed for a hundred years the most effective international
protection of those rights.\(^5\)

It then ended with the exhortation that members:

\textit{Pledge} themselves to continue to work together to safeguard the
rights of authors against all forms of piracy and other unlawful acts
and to ensure the effective application of those rights in the
framework of new opportunities for communication between
authors and the public created by economic, social, scientific and
technological progress,

\textit{Urge} all States that so far have not done so to join them by
adhering to the Berne Convention for the Protection of Literary and
Artistic Works.\(^6\)

While lofty, and even self-congratulatory in tone, this document provides
a good vantage point from which to look both backwards and forwards –
to the origins and development of the Berne Convention, and to what has
happened in the more immediate past as the Convention entered its
second century. The year 1986, in fact, was a watershed year, the point at
which the 'old' Berne Union had reached its fullest bloom before
entering the brave new world of personal computers, digital media,

\(^5\) The text of the Declaration appears in [1986] \textit{Copyright} 373.

\(^6\) Adopted by ‘acclamation’ by Berne members at a meeting of the Berne
Assembly convened in the same place where the Convention was signed 100
years previously.
online communications and trade negotiations (to mention only some of the significant post-1986 developments).

The solemn declarations set out above provide a perfect reflection of the ‘old’ Berne Union as an agreement between states with a largely Euro-centric focus. While there was a significant membership of countries with common law systems, this membership had not had a large influence on the development of the Convention; a similar lack of influence was true for both the small bloc of ‘socialist countries’ and the larger and steadily increasing group of developing-country members. In 1986, however, many large and economically important countries – namely, the United States (US), the Union of Soviet Socialist Republics and the People’s Republic of China – still remained outside the Berne Union. The same was true of many emerging economies, such as Malaysia, Indonesia, the Republic of Korea and a large swathe of South American, African and other Asian countries. The Union was far from universal and the world was divided into two almost equal blocs of Berne and non-Berne countries.

Within a decade, this picture had changed substantially. By 1996, each of the countries mentioned above were members of the Berne Union and the overall membership of the Union had expanded to 121. At the time of writing, this number had increased to 168. Throughout this period, the actual text of the Berne Convention has remained unchanged from its last revision in 1971, but the legal and wider context within which the Convention applies has changed radically. At the international level, this includes the advent of the World Trade Organization, with its annexed Agreement on Trade-Related Intellectual Property Rights 1994 (‘TRIPS Agreement’), followed in 1996 by the WIPO-sponsored negotiation of two special agreements linked to Berne (the WIPO Copyright Treaty and...
the WIPO Performances and Phonograms Treaty). Two other WIPO treaties have followed in the past two years: the 2012 Beijing Treaty on Audiovisual Performances, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled (the VIP Treaty) signed on 27 June 2013.

At the broader technological, cultural and economic levels, the rapid shift into the online environment has radically changed the modes of creation and dissemination of works, while the re-emergence of developing countries as a major and potent factor has brought about a significant change in the setting of international norms, including a heightened awareness of human rights issues. All of these matters will be taken up in the succeeding chapters of this volume. Our present task, however, is to step back from these immediate concerns, and to provide a reflection upon the history and development of the Berne Convention, both up to and after these changes. The 1986 solemn declaration, with its powerful exhortation, furnishes a good starting point for such reflection.

HUMAN RIGHTS AND JUSTICE

While the first Act of the Berne Convention adopted in 1886 was a very limited and pragmatic document that was chiefly directed at obtaining protection for authors in their literary and artistic works in members’ territories through application of the principle of national treatment, there was nonetheless a background to it that we would now describe as a ‘human rights’ one. English translations of the original French text may serve to blur this humanistic dimension given that ‘copyright’ is an imperfect reflection of the French expression ‘droit d’auteur’ or the German or Italian equivalents. Nevertheless, even in common law copyright traditions, there was a natural rights focus, beginning with the United Kingdom’s Statute of Anne, in which authors were made the starting point for protection. Although a more cynical view may be that

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13 Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (adopted 27 June 2013) VIP/DC/8 Rev (VIP Treaty).
'authors' in this context were simply stalking horses for publishers (in this view, the real beneficiaries of the new statutory rights), the Statute of Anne endeavored to ensure that authors in fact benefited from the rights with which the statute vested them. This was because section 11 of the Act provided that, at the expiration of the 14-year term of protection, if the author was still living, then '[t]he sole right shall return to the Author' for another 14 years.14

Writing more than 150 years later, a leading British commentator, WA Copinger, argued that the claims of authors were based on the principles of natural rights. Copinger traced this claim back to the writings of John Locke, who had significantly set the bounds of political and philosophical discourse in late-seventeenth and early-eighteenth century England.15 Similar thinking underlies the adoption of colonial and early state copyright acts in the US and, more significantly, was embodied by the Framers of the US Constitution, who sought to promote the ‘progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries’.16 The term ‘copyright’ may therefore serve to mask the natural rights origins of these new rights, placing them in a more utilitarian and functional light (the rights of those who exploit the protected works, rather than those of the actual creators).17 Nonetheless, authors and their concerns were in the forefront in the debates over the extension of

14 For an extensive discussion of Section 11 and its successors, see Lionel Bently and Jane C Ginsburg, ‘“The Sole Right … Shall Return to the Author”: Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright’ (2011) 25 Berkeley Technology LJ 1475.


16 Consistent with James Madison’s Federalist Papers (No. 43) observation that ‘the copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law’, US pre-Constitutional state copyright statutes adopted natural rights rhetoric. Jane C Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’ in B Sherman and A Strowel (eds), Of Authors and Origins (OUP 1994) pp 138–9.

17 The ‘masking’ may also result from a misapprehension of the meaning of ‘copyright’ as a right over the production of physical copies; in fact, for the drafters of the Statute of Anne, the meaning of the ‘copy’ was the incorporeal ‘work’. Properly understood, ‘copyright’ means the right in the work of authorship, not merely in its physical instantiations. John Locke, ‘Memorandum’
Copyright protection that occurred in the UK during the nineteenth century. These concerns were also reflected in the scholarly and professional commentary on copyright that occurred on both sides of the Atlantic during this period.

Understandably, natural rights justifications were more explicit in France, beginning with the recognition in two French revolutionary decrees of 1791 and 1793 of authors’ and artists’ rights to perform and reproduce their works. While such thinking quickly spread to other continental European countries in the first part of the nineteenth century, the notion of these rights as universal (i.e., extending beyond national boundaries) was much slower to evolve. As a consequence of this asymmetric progression, ‘free riding’ problems frequently arose, particularly in countries with a common language. The case of the UK and the US is well known and has attracted some distinguished scholarly writing, but the same phenomenon was present in French- and German-speaking countries, particularly in the period before unification of the German states (and, likewise, in the Italian


18 Notably in the parliamentary debates that occurred in 1841 and 1842 in relation to the proposals of Serjeant Talfourde to extend the term of copyright protection in the UK: see House of Commons Debates, 29 January 1841, pp 146–7; 4 February 1841, pp 1250–8; 5 February 1841, pp 342–60; 6 April 1841, pp 1348–402. See also C Seville, Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Literary Copyright Act (CUP 1999), and R Deazley. “Commentary on Copyright Amendment Act 1842” in Bently and Kretschmer (eds), Primary Sources in Copyright (n 15).


20 Ricketson and Ginsburg (n 7) 5ff.

21 For example, see C Seville, The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century (CUP 2006); JJ Barnes, Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854 (Routledge & Kegan Paul 1974).

22 For example, see Alfred Villefort, De la propriété littéraire et artistique au point de vue international: Aperçu sur les législations étrangères 11
states). Bilateral treaties provided some safeguards as between some important markets for authors and publishers, but the coverage was incomplete and inconsistent as to the level of protection granted, the term of such protection, and the conditions under which protection was available.

Hence, by the second part of the nineteenth century, the time was ripe for some multilateral initiative, particularly if it could bring the US into some kind of international arrangement. More broadly, this was the beginning of an era of multilateralism, as states began to seek common and uniform solutions for a range of practical problems arising in relation to such matters as international communications, standards of measurement, trade relations, and humanitarian aid. Significant milestones were the establishment of the International Red Cross (1863), the International Telegraph Union (1865), the Universal Postal Union (1874), and the Metrics Convention (1875). In the case of industrial property, moves towards the adoption of a multilateral agreement had begun with the calling of a patents congress at the time of the Vienna International Exhibition in 1873 and a further congress dealing with patents, trademarks and designs during the Paris Universal Exhibition of 1878. These last-mentioned initiatives led, within a short space of time, to the drafting and adoption of the Paris Convention for the Protection of Industrial Property in 1883 (Paris Convention).

The Paris Convention was clearly a model for what might be achieved in the sphere of authors’ rights, particularly with its somewhat amorphous concept of a ‘Union’. But the seeds for such a union in the case of authors’ rights had already been sown some years previously. Against the patchwork coverage of national laws and bilateral treaties, there was a growing recognition that authors’ rights were peculiarly vulnerable in the cross-border context in the absence of some overarching system of protection. Authors’ groups, publishers, academics and lawyers from

(Imprimérie et Librairie Générale de Jurisprudence 1851) (French lawyer complaining of Belgian practice of copying French books and exporting them back to France: ‘There is a country at our gates, whose territory is separated from ours only by the imaginary line drawn in treaties, and whose name is in effect synonymous with piracy.’).

24 See further Congrès international de la Propriété Industrielle tenu à Paris du 5 au 17 septembre 1878, Comptes-rendus sténographiques, No 24 de la série 1879, Paris imprimerie nationale.
different European countries had articulated the need for such protection as early as 1858 during a congress in Brussels. A series of resolutions was passed calling for the adoption of a universal copyright law, in particular declaring that the ‘principle of the international protection of the property of authors in their literary and artistic works should be enshrined in the legislation of all civilized peoples’.26 A subsequent conference of over 1,000 practicing artists in Antwerp in 1861 gave its support to these resolutions and called for efforts by governments to negotiate between themselves for the protection of artistic property.27 Following these early meetings, it appears that there were no more international meetings of this kind, but there were some important national meetings, notably in France and Germany, that continued to agitate for more comprehensive protection.28 Interest in international protection for authors’ rights was also taken up by two important non-governmental associations of international lawyers that were founded in the early 1870s: the UK-based Association for the Reform and Codification of the Law of Nations (later the International Law Association) and the Ghent Institute of International Law. In the case of the International Law Association, Draft Outlines of an International Code that were prepared and discussed in several conferences in the early 1870s referred to the need to accord international protection to patents, trademarks and copyrights.29 More immediate impetus for international action, however, came at the time of the Paris Universal Exhibition in June 1878, where a parallel international literary congress – organized by the French Société des gens de lettres and presided over by Victor Hugo, the preeminent French literary figure of his day – was held. This Congress passed a number of resolutions calling for enhanced protection of authors’ rights; for this to be available in all other countries on the

27 See further Ricketson and Ginsburg (n 7) pp 44ff.
basis of national treatment, free of formalities other than those imposed in the country of origin; and to be available in perpetuity, subject to a system of paying public domain at a fixed time after the author’s death.\textsuperscript{30} The most concrete achievement of this meeting was the establishment of the International Literary Association.\textsuperscript{31} This Association was open to literary societies and authors from all countries and adopted the following objects: (1) the protection of the principles of literary property; (2) the organization of regular relations between the literary societies and writers of all countries; and (3) the initiation of all enterprises possessing an international literary character.\textsuperscript{32}

A parallel congress on artistic property was held at the same time, and, while passing similar resolutions, also called for the constitution between the different states of Europe and elsewhere of ‘a General Union which would adopt a uniform law in relation to artistic property’.\textsuperscript{33} A similar call was made by the literary congress, which requested the French Government to undertake the summoning of a diplomatic conference to establish such an agreement.\textsuperscript{34} This request was not taken up by the French Government (perhaps because it was then in the throes of revising its own national law\textsuperscript{35}), but the International Literary Association met regularly after its foundation in 1878 and became a strong advocate for the adoption of some kind of international agreement on authors’ rights, ultimately adopting a resolution calling for the preparation of a draft convention at its Congress in Rome in 1882.\textsuperscript{36} In the following year, the Association extended its membership to include artists, and the present

\textsuperscript{30} For the resolutions of the Congress, see \textit{Congrès littéraire international de Paris 1878 : prédépendence de Victor Hugo: comptes rendus in extenso et documents} (hereinafter termed \textit{Congrès littéraire 1878}), Société des gens de lettres de France, Paris (1879) p 369–70.

\textsuperscript{31} Ibid., 370. See also \textit{Association littéraire et artistique internationale, son histoire, ses travaux, 1878–1889} (Bibliothèque Chacornac, Paris, 1889) (hereinafter termed \textit{Histoire}) pp 3 ff.

\textsuperscript{32} Article 2 of the Resolution passed by the Congress on 28 June 1878. \textit{Histoire}, p 4.

\textsuperscript{33} \textit{Congrès international de la propriété artistique tenu à Paris du 18 au 21 septembre 1878} (hereinafter termed \textit{Congrès artistique 1878}), Exposition universelle, 1878, Paris, 117 (resolution 20).

\textsuperscript{34} \textit{Congrès littéraire 1878}, 370 (fourth ‘wish’). A similar wish was expressed by the Artistic Congress: \textit{Congrès artistique 1878}, 117.

\textsuperscript{35} The suggestion of Numa Droz, a Swiss Federal Councillor, who was himself instrumental in the Swiss Government undertaking this role some years later. \textit{Histoire} (n 30) 130–1.

\textsuperscript{36} Ibid, p 123.
name, International Literary and Artistic Association was adopted (or ALAI, as it is more commonly known, from the French ‘Association littéraire et artistique internationale’). In that same year, ALAI also adopted a draft of an international convention, which it then presented to the Swiss Government as the likely international sponsor of such a project. The Swiss Government responded favorably and took the next vital step, which was the convoking of a diplomatic conference in Berne in 1884. The role of ALAI as the catalyst for the calling of the diplomatic conference is akin to that of the Congress on Industrial Property that was held at the same time as the Paris Universal Exhibition in 1878. The Congress was essentially a private initiative that also provided draft treaty provisions that were then taken up by the French Government, which convoked a diplomatic conference in Paris in 1880. This meeting led, in turn, to the adoption of the Paris Convention for the Protection of Industrial Property at a further conference in 1883.

The history of the Berne drafting conferences – two substantive ones in 1884 and 1885 respectively, and then a final conference for formal signature and adoption in 1886 – has been well documented and analyzed elsewhere; accordingly, there is little point in retracing such ground here. Still, there are some generally relevant points that should be made about the process that led to the final adoption of the Convention in 1886.

- Even though the ALAI draft of 1883 and the Swiss Federal Council’s draft program of 1884 were relatively limited documents as compared to more ambitious previous projects, there was still considerable debate among delegates as to the scope of the proposed
convention. In this regard, it is notable that there was a strongly worded proposal from the German delegates that asked delegates to consider seriously the question of aiming for a codification, in the framework of a convention, to regulate copyright protection in a uniform manner. This document, in turn, had a significant effect on subsequent discussions, flowing over to the next conference of 1885.

- While the final text adopted was very far removed from the ideal of a universal codification, it nonetheless was an instrument that had authors at its heart and was directed, through the application of national treatment, at securing the same level of protection for foreign and local claimants in each member state. The significance of this achievement in a multilateral instrument cannot be underestimated. In addition, the language of 'rights' was highlighted in the first article of the 1886 text, which constituted a 'union' of the contracting states for the protection of 'the rights of authors in their literary and artistic works' ('des droits des auteurs dans leurs oeuvres littéraires et artistiques'). At a textual level, this contrasts with the wording of the corresponding article of the Paris Convention text of three years earlier, in which contracting governments constituted themselves in a 'Union for the Protection of Industrial Property'. While the preamble of that Convention did refer in passing to the rights of inventors, there was also a more overtly commercial tone in its provisions (the protection of the 'fairness [loyalty] of commercial transactions'). The Berne text, however, was quite unambiguous in its focus on authors and continues to be so today in its latest iteration in the Paris revision of 1971.

- While specific substantive norms of protection were largely absent from the 1886 text (the particular case of translations remaining a point of contention between member states), some of its provisions

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42 See further *Actes de la Conférence internationale pour la protection des Droits d’auteur réunie à Berne du 8 au 19 septembre 1884*, International Office, Berne (1884), p 24 (first session, 8 September 1884).

43 Paris Convention, art 1.

44 Ministère des affaires étrangères, *Conférence internationale pour la protection de la propriété industrielle*, Paris, (1883) p 51. Importantly, the preamble of this text did refer specifically to the 'rights of inventors': ‘Egalement animés du désir d’assurer, d’un commun accord, une complète et efficace protection à l’industrie et au commerce des nationaux de leurs Etats respectifs, et de contribuer à la garantie des droits des inventeurs et de la loyauté des transactions commerciales, ont résolu de conclure une Convention à cet effet et ont nommé pour leurs Plénipotentiaires.’
were prescient in pointing to permissible limits on the scope of the protection to be granted. This is reflected in the oft-quoted statement of Numa Droz in his closing speech to the 1884 Conference that ‘limits to absolute protection are rightly set by the public interest’. At an early stage, therefore, this was a reminder of something that we have now come to recognize in modern human rights discourse – namely, that rights may come into conflict with each other, and that there will be a need to strike a balance between them in given circumstances.

- Quite apart from its multilateral character, the Berne text of 1886, like that of the Paris text in 1883, was seen as a ‘work in progress’, a text that would be revised and upgraded at regular intervals. In this regard, its success throughout its first century, particularly when contrasted with that of the Paris Convention, was notable.

- An important (though unnecessary) corollary to the multilateral character of the new instrument was that it was open to membership by any state, old world or otherwise. Indeed, its initial membership of nine masked its vast potential territorial reach: six of these

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45 *Actes de la Conférence internationale pour la protection des Droits d'auteur réunie à Berne du 8 au 19 septembre 1884*, International Office, Berne (1884), p 67. Examples of such articles in the Berne Act of 1886 were Article 7 ('news of the day') and Article 8 ('the making of extracts of works for educational or scientific purposes'). At the same time, it should be noted that the Berne Act did require some limited recognition, in addition to national treatment, of certain exclusive rights that were to be accorded to Convention claimants – notably, translation rights for ten years from first publication of the original work (Article 5); public representation of published or unpublished dramatic or dramatico-musical works and public performance of published musical works where rights had been expressly reserved (Article 9); and protection against certain kinds of 'illicit reproductions' (Article 10).

46 To claim that this was the first multilateral copyright convention would go too far: as early as 1840, such a convention already existed between Austria and Sardinia, and this convention was extended over time to include the other Italian states. The Convention of 22 May 1840 concluded between His Majesty the King of Sardinia and the Emperor of Austria in favor of property rights in and against infringement of scientific, literary and artistic works. On the Austro-Sardinian treaty, see generally Laura Moscati, 'Il caso Pomba-Tasso e l’applicazione della prima convenzione internazionale sulla proprietà intellettuale' in *Mélanges en l’honneur d’Anne Lefebvre-Teillard* (Panthéon-Assas 2009) pp 747, 754–7.


48 Berne Convention, art 18.
signatories had significant colonial possessions and dependencies\textsuperscript{49} and were generally, over time, to extend the application of the Convention to these territories.\textsuperscript{50} At a later stage, this colonial past served to extend individual state membership, as newly independent countries would usually choose to continue the Berne membership of their metropolitan state.

- The continental Euro-centric character of this first text of 1886 cannot be denied. Indeed, although the UK – the sole common law country represented – was involved in all stages of the negotiations, little (if any) UK influence is to be seen in the text that was adopted (though the UK delegates were generally in support and recommended adoption to their government). But the real reason for this apparent lack of influence may have been that the UK’s interest in the negotiations was a more strategic one, focused on achieving a multilateral instrument that might succeed in finally bringing the US into the web of international copyright relations. But while the US delegates themselves were favorably inclined towards accession,\textsuperscript{51} this was ultimately not the view of Congress, and the US remained outside the new Union for the next century (this isolation was to become more marked after the Berlin revision of 1908).\textsuperscript{52}

Notwithstanding the absence of the US, the British Government remained part of the negotiations in Berne, directing its efforts principally towards ensuring that any text that was adopted would require minimal readjustments to its own disorganized national

\textsuperscript{49} Namely, France, Italy, Spain, Germany, Belgium and the UK.

\textsuperscript{50} Berne Convention, art 19.

\textsuperscript{51} The issues here were well-summarized in the report of the UK delegates (FO Adams and JHG Bergne) to the Marquis of Salisbury (Foreign Secretary as well as Prime Minister) on the conclusion of the 1885 Conference: report dated 25 September 1885, in \textit{Correspondence Respecting the Formation of the International Copyright Union (Switzerland, no 1, 1886) C-4606 (January 1886)} (hereinafter termed \textit{Correspondence 1886}) 55:

In fact, from the friendly interest in the objects of the Conference which has been expressed by the United States’ Delegate, we are justified in anticipating that when once the Union has been formed, and has been acceded to by the more important European countries, the United States will before long feel it difficult to abstain from becoming a party to it also.

For better or worse, however, it was now part of an international framework of protection that gradually came to affect its domestic legislation in an increasingly substantive manner.

It is worth noting that, compared with today’s diplomatic conferences, the Convention was discussed and drafted in terms of comparative intimacy and informality. Only ten countries were ultimately represented at the 1884 sessions, and only 16 persons were present at its opening session. The common language was French, and there was clearly a commonality of assumptions – both cultural and legal – between the participants. Even though many of the delegates were career diplomats accredited to Switzerland, there were also some delegates experienced in copyright matters, such as Ullbach (the president of ALAI) from France, d’Orelli from Switzerland, and Dambach from Germany. Furthermore, some of the diplomatic delegates, such as Adams from the UK, Arago (France) and Reichardt (Germany) already had considerable familiarity with the issues raised by international copyright protection. In such an environment, agreement can be more readily expected.

Hence, it must be concluded that the first paragraph of the 1986 solemn declaration does resonate with the history of the Convention and its adoption. Even with just nine founding members, the 1886 text was a very considerable advance on the protection of authors’ rights, with a clear mechanism for extension of this protection in the coming years.

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53 Adams and Bergne, the UK delegates, expressed their desire for a wholesale codification of UK copyright law in keeping with the recommendations of the Copyright Commission of 1878, arguing in their report to the Foreign Secretary that this would enhance accession to the new multilateral agreement. They went on to say that if ‘Her Majesty’s Government should not think proper to undertake the complete reform of British Copyright Law which we suggest, it might be possible to allow Great Britain to enter the Union by a simple amendment of the existing International Copyright Acts’. *Correspondence 1886* (n 48) p 56. This was duly done in the International Copyright Act 1886 (England). For a commentary on the background of this Act, including the attitudes of the British Government during the Berne Conferences, see R Deazley, ‘Commentary on International Copyright Act 1886’ in Bently and Kretschmer (eds) *Primary Sources on Copyright*, (n 15).

54 See further Ricketson and Ginsburg (n 7) s 2.22ff.
ENRICHMENT AND INCENTIVE

Theories of authors’ rights protection differ greatly from one national system to another and from one legal tradition to another. How does one test the assertion that the law of copyright has ‘enriched and will continue to enrich mankind by encouraging intellectual creativity and by serving as an incentive for the dissemination throughout the world of expressions of the crafts, learning and information for the benefit of all people’? If one accepts the general proposition that people are ‘enriched’ by having access to the products of intellectual creativity of all kinds, and the more arguable assertion that intellectual property protection provides an incentive for authors to engage in this kind of activity, the successive revised texts of Berne have been notably successful in achieving these objects. Consider, for example, the following:

- **Works protected**: Beginning with an impressive and inclusive list of specific categories of literary and artistic works of the kinds current in 1886, the definition of this term in the Berne Act 1886 concluded with the following general residual formulation: ‘in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction’.\(^{55}\) This definition was reshaped in the Berlin Act 1908, with the general formulation coming first, followed by the inclusive list of examples introduced by the words ‘… such as’.\(^{56}\) The Berlin and subsequent revisions have expanded this list of examples to include choreographic works and entertainments in dumb show (Berlin, 1908), derivative works (translations, Berne 1886, and then adaptations and the like (Berlin 1908), cinematographic works produced by a process analogous to cinematography (Brussels 1948, although these had previously received protection under separate provisions

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55 Berne Act 1886, art 4. This provided in full as follows:
The expression ‘literary and artistic works’ shall include books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of drawing, painting, sculpture and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

56 Berlin Act 1908, art 2.1.
of the Berlin 1908\textsuperscript{57} and Rome 1928 texts\textsuperscript{58}), photographic works and works produced by a process analogous to photography (Brussels 1948, although these had also received protection under separate provisions going back to Paris 1896\textsuperscript{59}), collections of works (a sub-category of compilation, Berlin 1908) and works of applied art (Brussels 1948, although limited protection had been required under Rome 1928\textsuperscript{60}). While these steady accretions to the categories of protected works kept pace with changing modes of cultural production, some claimants failed to make the cut at successive revision conferences – namely, performers, phonogram producers and broadcasters – notwithstanding some clearly ‘literary’ or ‘artistic’ aspects of their activities.\textsuperscript{61} Overall, in a conceptual sense, this was a Convention for the hard copy, print environment; the challenges of the computer age, let alone the virtual environment of the Internet, were far ahead.

\begin{itemize}
\item \textit{Exclusive rights accorded:} the extension of protection for exclusive rights accorded under national laws to Berne claimants, regardless of national treatment, was equally impressive, reflecting changing technologies in the context of reproduction and dissemination of works. Alongside public representations of dramatic or dramatic-musical works,\textsuperscript{62} translation rights (albeit in a limited form) were first recognized in Berne 1886;\textsuperscript{63} and adaptation rights, mechanical reproduction rights and cinematographic reproduction and public representation rights were adopted at Berlin in 1908.\textsuperscript{64} Protection for the following was then adopted in subsequent revisions: broadcasting and limited wired public communication rights (Rome 1928\textsuperscript{65}); full public performance and representation rights and public recitation rights (Brussels 1948\textsuperscript{66}); and a broadly framed
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\item \textsuperscript{57} Berlin Act 1908, art 4.1.
\item \textsuperscript{58} Rome Act 1928, art 4(2).
\item \textsuperscript{59} Paris Additional Act 1896, art 2.I.B.
\item \textsuperscript{60} Rome Act 1928, 2(4).
\item \textsuperscript{61} See further Ricketson and Ginsburg (n 7) ss 8.109–8.114. See also the comparative table of works protected under different Acts of the Convention. Ibid, s 8.134.
\item \textsuperscript{62} Berne Act 1886, art 9.
\item \textsuperscript{63} Berne Act 1886, art 5.
\item \textsuperscript{64} Berlin Act 1908, arts 10, 13.1 and 14.1. There have also been adaptations to the Berne Act 1886, art 10.
\item \textsuperscript{65} Rome Act 1928, art 11\textit{bis}(1).
\item \textsuperscript{66} Brussels Act 1948, arts 11 and 11\textit{ter}.
\end{itemize}
reproduction right (Stockholm 196767). Equally significant was the requirement to protect the moral rights of attribution and integrity at Rome 192868 – an unfamiliar concept for common law countries, and one that took them many years properly to digest and apply within the context of their own national laws.69

- **Formalities**: A significant step taken in the Berlin revision of 1908 was the abolition of formalities conditioning protection,70 thereby affirming the principle that the rights accorded under the Convention did not require state endorsement or authentication after the points of attachment (nationality or place of first publication) required under the Convention were made out. Together with the principle of the independence of protection, also adopted in Berlin in 1908,71 authors’ rights in a work vest automatically throughout the Berne Union upon the work’s creation (or first publication), without regard as to whether the work’s country of origin would protect the work. This universal and immediate character of Berne Convention rights stands in stark contrast to the industrial property rights protected under the Paris Convention, where territorial registrations usually play a critical role in ensuring entitlement, most notably through the right of priority following first filing in a Paris Convention country.72

- **Duration of protection**: Finally, the general rule as to duration, again adopted in Berlin 1908,73 underlines the attachment of the rights the Convention secures to the person of the author: with rare exceptions (the most significant being cinematographic works), the term of protection is tied to the life of the author. This is in sharp contrast to the Paris Convention (which does not contain any stipulations as to duration) or the TRIPS Agreement (which provides finite minimum terms of protection for patents,74 designs75 and trademarks,76 respectively (but not for copyright).

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67 Stockholm Act 1967, art 9(1).
68 Rome Act, art 6bis.
69 For example, see Copyright, Designs and Patents Act 1988 (UK) ch IV; Copyright Act 1968 (Australia) pt IX. To date, US law recognizes these rights only to a limited extent: Copyright Act 1976 (US) s 106A.
70 Berlin Act 1908, art 4.2.
71 Ibid.
72 See generally Paris Convention, art 4A–H.
73 Berlin Act 1908, art 7.1.
74 TRIPS Agreement, art 33.
75 Ibid, art 26.3.
76 Ibid, art 18 (albeit renewable indefinitely).
INTERNATIONALIZATION AND WORLD PEACE

For most (if not all) of its first century, it may be said that the Berne Convention has opened ‘paths across frontiers for works of the mind’. The steady increase of membership, first across continental Europe and then into significant Asian and South American countries, reveals a consistent upwards trajectory. Berne membership in the period before World War I extended to all of Western Europe, and the post-war years saw the entry of a number of newly created states in Eastern Europe, including the former Yugoslavia and the Baltic states. Non-European members during the first 50 years were outliers, but included Japan (1899), Brazil (1922), Thailand (1931) and a number of self-governing dominions of the British Empire that had become members of the Union in their own right by the time of Rome in 1928.77 From the end of World War II to 1986, membership increased again in Africa and Asia as many former colonies opted either to declare their continuing adherence to the Convention or to accede anew. Of particular significance here (in territorial terms) were India, Pakistan, the Congo, the Philippines (following independence from the US) and, for a brief time, Indonesia.78 In the years following 1986, the accessions of the US, Russian Federation and China have brought in their wake a slew of other states, including the emerging Asian ‘tigers’ such as Malaysia, Singapore, the Republic of Korea, and Indonesia (again), the new States that have sprung up from the dissolution of the former Soviet Union and Republic of Yugoslavia, the various countries of Central and South America that had been outside the Berne Union, and sundry other African and Asian-Pacific countries.

At a purely conceptual and textual level, this continuing extension of membership has enabled literary and artistic works to move freely across borders without formality, thereby creating the ‘paths’ referred to in the solemn declaration. Whether this has inured to the benefit of authors and owners in a practical sense across all of these territories is quite another question. The negotiation of the TRIPS Agreement in the early 1990s was a direct response to this insofar as it provided, for the first time,
The Berne Convention

Despite the occurrence of two major world conflicts during the twentieth century (to say nothing of dozens of smaller conflicts both between and within member states), the Berne Union has remained intact and has continued to grow.

It should not be surprising that this is so, given that the Convention is a multilateral instrument that is unaffected by the addition of new members or the departure of existing ones. In the case of war, there is no cessation of relations between belligerent and non-belligerent states. Even between belligerents, there is often only a temporary suspension of relations, which are resumed upon the making of peace. The obligations under the Convention for each member state are to protect the works of authors from other member states. So long as this is done, there is no breach of the Convention. An example of this occurred during the First World War where the UK vested the literary and artistic property of enemy aliens in the official custodian; this property was restored to its rightful owners after the war, and the works continued to receive protection throughout this time as required by the Convention.79 Obviously, these are issues for each belligerent state to work out for itself. The Berne Convention does not deal with issues of ownership,80 but rather with what is to be protected and the scope of this protection.

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80 Because the Berne Convention does not concern issues of ownership, it does not address wartime expropriations of the sort described above.
Accordingly, it will only be where a belligerent state completely extinguishes the literary or artistic property of enemy aliens that any question of breaching the Berne Convention will arise. So far as we are aware, this has not happened at any point during the history of the Convention.

- The member states of the Berne Union have generally had a very open attitude towards questions of membership; indeed, political and/or ideological considerations have not usually played a role here. There is only one clear instance of refusal of a purported application for membership (that of Turkey in 1931), and the reason for this is more correctly described as legal (the making of a reservation as to translation rights that was not allowed under the relevant Berlin text of 1908) rather than political. 81 The reference in later texts to ‘countries’ rather than ‘states’ has also allowed for the accession of various territorial entities that did not strictly meet the full requirements of statehood, such as protectorates, mandated territories of the League of Nations, the Free City of Danzig, and the Holy See, to say nothing of microstates such as Monaco, Liechtenstein and Andorra. Oddities in the history of the Convention are also to be found, such as the accession of the puppet state of Slovakia in 1944 (extinguished in 1945 and reabsorbed into the reconstituted Czechoslovakia, more recently reconstituted as the Slovak Republic – and as a sovereign state – following the ‘velvet divorce’ from the Czech Republic in 1992). More significantly, for over 40 years the Federal Republic of Germany and the Democratic Republic of Germany maintained separate memberships of the Convention, 82 and the same is true of the two Koreas today (although Taiwan – the Republic of China – remains outside). Likewise, although the State of Israel does not have diplomatic relations with many of its surrounding Arab neighbors, all are

81 See further Ricketson and Ginsburg (n 7) s 17.18.
82 Due to this division, both countries were called upon to celebrate the centenary of Germany’s accession to the Berne Convention in the special studies that were published in Le Droit d’Auteur/Copyright in 1986. E Ulmer, ‘The Federal Republic of Germany and the Berne Union’ [1986] Copyright 82 (writing for the FRG) and H Püschel, ‘The International Union of the Berne Convention and the National Copyright Law of the Member States, with Particular Reference to the Legislation of the German Democratic Republic’ [1986] Copyright 144 (writing for the GDR).
Berne members. If world peace is advanced by common membership of a treaty such as Berne, this is clearly an achievement of sorts.

- A related explanation for the continuity of the Berne Convention is also to be found in the notion of ‘Union’ that was adopted at the outset. The Berne Convention is not simply a multilateral instrument – by its establishment of a Union of states for the protection of the right of authors, it is a separate international legal entity that has its own ‘organs’ and finances. This was the case from its inception, when an international office of the Union was established, and the constitution of more formal deliberative bodies of an Executive Committee and Assembly following the Stockholm Revision of 1967.

- Throughout the history of the Berne Union, the role of the International Office has been critical in providing a central point of reference for member states, and has been an impressive source of information and intelligence, as well as a general clearing house. It has done this, not only through its liaison role with the relevant hosting state in the preparations for each revision conference, but also through its central record-keeping functions and the comparative and other studies provided in its monthly publication *Le Droit d'Auteur* (from 1887 to 1997) and its English version *Copyright* (from 1964 to 1997). While these functions have now been taken over by the much larger World Intellectual Property Organization and the monthly journal is no longer published, for most of its first century the International Office had a small coterie of skilled legal professionals who did much to add to the systematic understanding of the national and international laws relating to authors’ rights. They also played a considerable intellectual role in its development.83

- The concept of ‘Union’ also provides a basis for a legal link between members, where they are not bound by a common text of the Convention: until recently, at least, there was a particular problem where there were members who continued to be bound by earlier texts of the Convention (for example, Rome or Brussels) but had not acceded to the Stockholm/Paris revision. Where both had once been bound by the earlier text, it was possible to say that their relations *inter se* should be on the basis of the earlier text by which they were bound. Problems arose, however, when a state from

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83 See further Ricketson and Ginsburg (n 7) s 16.34ff.
outside the Union acceded to the latest text, such as Paris, without ever having been bound by any of the earlier texts. This problem yields no strictly legal solution, but common membership of the overall Union provided a basis for the practice that each member should apply to other members the latest text by which it was bound.\(^{84}\) This problem has now receded, as almost all members have now acceded to the Stockholm/Paris Act, but several countries at the time of this writing still remain bound by earlier Acts of the Convention (for example, Fiji, Lebanon, Madagascar, New Zealand and Zimbabwe\(^{85}\)).

**CODIFICATION AND HARMONIZATION**

Self-congratulation was clearly to the fore when Berne members in 1986 solemnly declared that the Convention had provided ‘an outstanding, comprehensive and harmonized codification of the rights of authors’. If ‘outstanding’ means that there had been nothing like it before, such a statement was certainly true, but the adjectives ‘comprehensive’ and ‘harmonized’ need careful qualification:

- As noted above, successive revisions of the Convention have achieved a high degree of comprehensiveness as to the subject matter and scope of what must be protected, the level of protection to be given, conditions for its availability, and its duration. In other respects, in 1986 as today, there were significant gaps in coverage notably with respect to issues of entitlement and ownership, which, apart from enunciating a presumption regarding the identity of the work’s author,\(^ {86}\) Berne leaves to member states to regulate. With respect to enforcement and remedies, the Berne Convention itself mandates no remedies other than border seizures of infringing

\(^{84}\) See further Article 32 of the Paris Act, which requires signatories to accept that countries bound by an earlier Act may apply to such signatories the provisions of the Paris Act. There can, of course, be no obligation of this kind imposed on the non-member states. See also Ricketson and Ginsburg (n 7) 17.69–17.76.


\(^{86}\) Berne Convention, art 15.
copies, but instead leaves it to member states to supply the 'means of redress'. That said, while Berne does not specify remedies, it does impose detailed conditions on the availability of compulsory licenses. A member state may not substitute an equitable compensation remedy for actual damages or injunctive relief unless, with respect to the reproduction right, the remedy passes the 'three-step test' or, with respect to certain communications to the public, meets the criteria of Article 11bis(2). One may infer that Berne anticipates that member states’ 'means of redress' will include at least actual damages and injunctive relief.

Furthermore, Berne says little about private international law issues. While Article 5(2) directs that ‘the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed’, ambiguity remains concerning the identification of that country, particularly where, as occurs frequently on the Internet, an alleged infringement may originate from one country but have an impact in many others. In addition, whatever the 'country where protection is claimed', matters of authorship and ownership remain beyond the scope of Berne by virtue of its delegation of them to national law.

Even at the level of substantive norms (for example, the exclusive rights to be protected), Berne does not 'codify' these matters in the sense of providing a strict template to be applied by all member states. State practice has long established that members possess a high degree of flexibility in giving effect to their obligations under the Convention; indeed, the Convention is concerned with questions of 'whether' rather than questions of 'how'. An example here is to be seen in the different ways in which member states protect public recitation and broadcasting rights – some doing this through the grant of specific exclusive rights and others doing it through extensions of the public performance or representation right. By the same token, determining the scope of the Conventional right of 'communication to the public' requires synthesizing the piecemeal provisions of Articles 11(1)(ii), 11bis(1)(ii), (iii), 11ter(1)(ii) and 14(1)(ii) to ascertain what gaps may exist. In a number of other instances, such as limitations and exceptions, Berne refers these

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87 Ibid, art 16.
88 Ibid, art 5(2).
89 Ibid, art 9(2).
matters back to member states, subject to certain broad parameters.\textsuperscript{90}

As these observations suggest, it can fairly be said that Berne, in its first 100 years, had, in terms of formal conventional obligations, thereby ‘guaranteed [for authors] … the most effective international protection of those rights.’ At the level of enforcement and state compliance, however, much was to be desired – hence the story of TRIPS and subsequent developments in the post-1986 period. We now turn to these matters.

FUTURE DEVELOPMENTS – THE PLEDGE AND EXHORTATION

In this regard, the ‘pledge’ that came at the end of the 1986 solemn declaration was prescient and, at one level, can be seen as having been fully redeemed, both by those states that were Berne members in 1986 and by post-1986 adherents. In this respect, the following can be said:

\begin{itemize}
  \item While lacking enforcement standards and effective means of ensuring member compliance, Berne has provided the basic corpus of substantive norms to be protected under the TRIPS Agreement. In legal drafting terms, this was certainly efficient. The substantive effect of the TRIPS Agreement has been to bolt on the Berne requirements (except for moral rights) as the baseline standards for copyright in the revised international trading system inaugurated under the World Trade Organization. These standards also come into play in the bilateral free trade agreements that have become an increasing part of the post-TRIPS environment.
  \item Berne has also leapt into the digital era, as special agreements in the shape of the WIPO Copyright Treaty (WCT) have been negotiated. Once again, Berne provides the starting point for the new obligations, even in the (unlikely) event that an adherent to the WCT is not actually a Berne member.\textsuperscript{91}
\end{itemize}

The years since the making of the solemn declaration have also borne out its final exhortation for non-members to join. Indeed, the increase in membership of the Convention in this period has been highly impressive,

\textsuperscript{90} For example, see Articles 10, 10\textit{bis} and 9(2).
\textsuperscript{91} WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121 (WCT) art 1(4).
at least in purely numerical terms – from 76 in 1986 to 168 in 2014. While some of this increase can be attributed to the creation of new states in the 1990s, only a handful of states now remain outside the Union.\footnote{That 188 states are members of the WIPO Convention means that 20 of those 186 remain outside the Berne Union (to say nothing of the few states that remain outside WIPO entirely). Of present non-Berne members, Iran (77 million), Burma (53 million), Ethiopia (86 million) and the Republic of China (Taiwan) (23 million) appear to be the most significant in terms of population and economic development. Population figures derived from 'List of Countries by Population' (Wikipedia, 29 January 2014) <http://en.wikipedia.org/wiki/List_of_countries_by_population> accessed 18 November 2014.}

In 1986, however, there was still a large and very significant group of non-Berne states, with the link between them and Berne members being provided, at least in part, by the Universal Copyright Convention (UCC). The speed with which Berne obtained new member state adherences in the post-1986 period was extraordinary, but it is probably the case that few present at the 1986 centenary foresaw this happening. In retrospect, it may all appear to have been obvious, with the linking of intellectual property rights to trade and enforcement providing the obvious vehicle with Berne being a ready-made garment of standards that could instantly be used as a starting point. In immediate terms, however, US adherence to Berne was a critical turning point, leading to the rapid atrophying of the UCC as other large states, such as China and the Russian Federation, followed suit. In consequence, the Berne Union, in its second century, has had quite a different complexion and appearance than in its first.

THE STORY GOES ON – MORE OF THE SAME OR IS THERE A NEED FOR A RE-TELLING?

In light of the preceding account, it might fairly be said that the Berne Convention has been a great success in achieving its object of protecting the rights of authors. In terms of geographical spread, subject matter, and scope of protection accorded, this is certainly correct. But is this the whole story? Is there another narrative that can be constructed about this history, particularly in its recent years?

In our view, when its broader context is considered, the real story of the Berne Convention in recent years is rather different, and its successes have been more formal than substantive, with countervailing currents and pressures that have led to its reduced relevance since 1986. At the symbolic level, the institutional importance of the Berne Union now also appears...
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diminished. While much of this development is simply a consequence of the more complex world we now inhabit, the matters listed below have operated to make the Convention more contested and less relevant than was the case in 1986; certainly, they have created an environment that would not have been in the minds of the delegates who made the solemn declaration in that year. Some illustrations of what has changed:

- As a charter of authors’ rights, Berne 1886–1971 was premised on a unilateral conception of authorship, with the flow going one way, from creator to consumer. The advent of Internet communications has enriched this paradigm: creativity increasingly is an interactive process where users themselves become ‘authors’ as part of a continuing and expanding activity with many participants. So far as ‘authors’ rights’ are concerned, this has obvious implications for the questions of who is an author and whether the traditional formulations of exclusive rights require modification or reconsideration. The dispersal of authorship activity may also call for wider formulations of exceptions and limitations in order to enable ‘downstream’ contributors to borrow from or elaborate on prior works. At the same time, the disaggregation of authorial activities may require concentration of ownership in persons or entities that coordinate or assemble diverse contributions, lest the exploitation of the ensemble prove unmanageable. Understandably, given its age, the current Berne text directly addresses none of these issues, and even the ‘special agreement’ embodied in the WCT does so only to a very limited extent. Much creative practice and usage therefore now lies outside the formal structure of Berne and its derivatives. That said, we should not exaggerate the significance of these new practices and usages. Not all interactive authors seek compensation or control over their works, but we should not assume that the arrival of disinterested amateurs has substantially displaced professional creators, for whom copyright remains a necessary means to earn a living.

- In the years since 1986, there has been increasing awareness of other human rights that are competing for attention along with those of authors. While recognition of creators’ rights now finds a place in international human rights instruments beyond the Berne Convention,93 so too do other important human rights, such as

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93 For example, see the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 27(2), and the International
rights to free speech, education, health and development. Recognizing and giving effect to these other rights may therefore come into collision with those of authors. At present, this conflict is seen in relation to the new treaty concerning access to work by visually handicapped persons (the VIP treaty of which more below). How to accommodate these claims with continued protection of the rights enshrined in Berne is therefore a major challenge (this is not confined to Berne, of course, as similar challenges arise with respect to other intellectual property rights protected under the international conventions, such as Paris).

- Linked to the discourse on human rights is the growing influence of developing countries in international forums concerned with intellectual property rights, including those of authors. In the history of Berne, this is nothing new – the debates over compulsory educational and development licenses almost brought an end to the Convention in the late 1960s. But the concerns and views of developing countries have now moved more fully to the center in the various forums of the WIPO, the WTO and other international agencies, providing a weighty backing to the human rights arguments referred to immediately above. Balancing these concerns is a difficult process in the case of an international agreement such as Berne, given that its roots are still strongly anchored in the intellectual and cultural traditions of the late nineteenth century. Again, this development may point to the sidelining of Berne.

- Institutionally, the Berne Union has suffered the fate of many older institutions, both national and international: it has become subsumed into the framework of a larger international organization, the WIPO, and has now lost much of its former identity. Thus, its administrative functions are all carried out by WIPO and its finances are part of the larger block contributions made by WIPO members. While the Assembly still meets in a formal sense, this is now part of the series of regular meetings of assemblies of all the ‘unions’ administered by WIPO and is really a matter of formality rather than substance. No longer is there the monthly journal of record and informed commentary dedicated to authors’ rights that

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was published from 1888 until 1997. Finally, the activities of the Executive Committee are now subsumed into those of a broader Standing Committee that deals generally with copyright and related rights. Participation in the Standing Committee no longer requires Berne membership, and widespread observer participation from intergovernmental and non-governmental interest groups have shifted the character of these meetings from discrete assemblies of experts to occasionally boisterous gatherings of strong-willed (if not always technically proficient) advocates. All these developments are readily understandable in administrative terms and may certainly be said to make these processes more transparent, if not more time consuming. Furthermore, the deliberations of the Standing Committee, which is now more than 15-years old, have led to some significant initiatives, such as the protection of audiovisual performers and, most recently, access to published works for visually handicapped persons. However, there has been the loss of a distinct institutional identity for the Berne Union, which means the Convention is now simply a text, albeit a foundational one, that no longer has the iconic importance that it had for its founders in 1886 or even for those celebrating its centenary in 1986.

These are the realities, then, in any contemporary account of the Berne Convention: it is an ancient text that retains high formal importance but is under significant challenges from all directions.

### IF 1986 WAS THE HIGH-WATER MARK, IS BERNE NOW IN DECLINE? SOME CONCLUDING REFLECTIONS

If the preceding analysis is correct, one might inquire whether Berne’s emphasis on the effective ‘protection of the rights of authors in their literary and artistic works’ has become a quaint relic of a time when national legislatures and international institutions honored authorship. To parody the ‘grand declaration’, some today would maintain that ‘copyright is antithetical to human rights and justice and that authors, as

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94 There is now a twice-yearly journal carrying some scholarly and other commentary generally in relation to intellectual property matters. This is the WIPO Journal: [http://www.wipo.int/about-wipo/en/wipo_journal/](http://www.wipo.int/about-wipo/en/wipo_journal/).

95 [Beijing Treaty, supra n 12.](http://www.wipo.int/about-wipo/en/wipo_journal/)

96 [VIP Treaty, supra n 13.](http://www.wipo.int/about-wipo/en/wipo_journal/)
alleged creators of beauty and learning, have no greater claim to rights in their creations than does the society at large which is the ultimate source of authors’ creativity in any event’. Calls to redress Berne’s perceived imbalance and indifference (or even hostility) to users’ rights97 have garnered political acceptance among WIPO member states, leading most recently to the conclusion on 27 June 2013 of the VIP Treaty.98 Some WIPO member states have urged further treaties designed to limit the scope of copyright protection.99

Whatever these treaties’ socially laudable substantive objectives, it is appropriate to step back from the particular issues confronting their beneficiaries and to consider more broadly an institutional quandary: Are copyright-limiting treaties in fact consistent with the Berne Convention? The VIP treaty asserts in its first article that ‘[n]othing in this treaty shall derogate from any obligations that Contracting Parties have to each other under any other treaties’. But such declarations do not necessarily make this so.

Careful examination of the structure and policies underlying the Berne Convention suggests a fundamental tension between that Convention’s norms and the norms of treaties whose explicit goal is to limit the scope of copyright. Article 20 of the Berne Convention allows member states

97 Of course, one may take issue with the characterization of Berne as ‘unbalanced’. Berne and the TRIPS Agreement already include ‘balancing’ features such as exclusions from the subject matter of copyright; a panoply of permissible exceptions (most notably the ‘three-step test’, which allows member states broad leeway to allow copying ‘in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’); and the Article 10(1) requirement that member states permit ‘quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries’. As such, the Berne-TRIPS package, while designed primarily to further the international circulation of works of authorship by ensuring effective protection, nonetheless takes into account countervailing considerations of free expression and access to culture. One of the original Framers of the Berne Convention, Swiss jurist Numa Droz, recognized this in 1884 when he emphasized that ‘limits to absolute protection are rightly set by the public interest’. Actes du Congrès de Berne de 1884, 67.
98 VIP Treaty, supra n 13.
99 See treaty proposals on exceptions and limitations for libraries and archives, discussed in WIPO, ‘Standing Committee on Copyright and Related Rights, Twenty-Third Session’ (21–25, 28 and 29 November and 2 December 2011) SCCR/23/REF/CONCLUSIONS, p 1.
‘to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention’.¹⁰⁰ Agreements among member states therefore must not establish a level of protection inferior to that set by the Convention.

If the new treaty’s mandatory exceptions are compatible with the ‘three-step test’ framework for exceptions to the reproduction right set out in Article 9(2) of the Berne Convention and with other Berne exceptions or limitations on that right or other rights, then, at first blush, there would seem to be no problem with making obligatory those exceptions that are already permissible. For example, under this view, it would not be contrary to the Convention to enter into an agreement requiring member states to subject foreign literary or artistic works to free use ‘by way of illustration in publications, broadcasts or sound or visual recordings for teaching’, under the conditions set out in Berne Article 10(2).

The argument that ‘those exceptions which Berne permits, another instrument may make mandatory’ nonetheless encounters the following objections:

1. The substantive aspects of the Berne Convention (covering subject matter, minimum rights, permissible exceptions and limitations) apply only to foreign works. Article 5(3) provides that ‘[p]rotection in the country of origin is governed by domestic law’. Thus, Berne does not affect the domestic treatment of local works. Any new agreement that purports to make Berne exceptions mandatory will not, without more, impose those exceptions on member states’ own works. Berne’s explicit forbearance from interfering in domestic law gives rise to the first problem: If member states impose the exceptions only on foreign works, member states will violate the Berne Articles 5(2) and 19 principle of national treatment, which forbids member states from according less protection to foreign-member-state works than to local works. Of course, if the exceptions and limitations already applied to local authors, then to apply them to foreign works would create no imbalance between local and foreign works with respect to national treatment. But if a Berne-compatible exception were made mandatory for foreign works, without imposing a corresponding exception on local works,

¹⁰⁰ Berne Convention art 20 (emphasis supplied).
then foreign works would receive worse treatment than local works. This would be inconsistent with the principle of national treatment.

2. Mandatory exceptions unaccompanied by equivalent exceptions for country of origin works are thus contrary to the spirit and structure of the Berne Convention, and therefore are ‘contrary to the Berne Convention’ within the meaning of Article 20. To avoid impermissible disparities in treatment, member states would need to enact equivalent domestic copyright exceptions. (And, indeed the VIP Treaty, in Article 4, directs signatories to enact the requisite limitations as part of their national law.) But in that event, there would be no need for mandatory exceptions at the multilateral level because the principle of national treatment would require member states to apply their Berne-compatible domestic exceptions to foreign works without any additional instrument. The following consequences therefore arise: (1) Without concomitant limitations in domestic law, mandatory exceptions to the protection of foreign works are ineffective under Articles 5(1) and 19; and (2) with concomitant limitations in domestic law, mandatory (Berne-compatible) limitations on the protection of foreign works are unnecessary.

3. Perhaps treaties requiring member states to incorporate mandatory exceptions into their domestic law are, even if unnecessary, desirable nonetheless. Arguably, if member states would not on their own provide such limitations, an international obligation should do the job, although one might wonder why a member state unwilling on its own to implement publicly beneficial domestic exceptions would in fact change its laws if faced with the requisite treaty obligation (which, at least within the Berne model, lacks enforcement measures). Even assuming the factual basis prompting the adoption of mandatory exceptions, their implementation through a treaty ignores a key feature of the Berne structure. As we have seen, by virtue of Article 5(3) Berne declines to intervene in domestic copyright norms as applied to local authors. By leaving domestic protection to the country of origin, Berne preserves the local lawmaking autonomy of its member states. So long as they extend Berne-minimum protection to Union works, member states remain free to determine the scope of their own cultural policies. (Indeed, preservation of local lawmaking authority with respect to domestic rightholders is a hallmark of many other multilateral intellectual property treaties, including, most notably, the TRIPS Agreement.) In the realm of limitations on copyright, member states may gauge
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the level of protection their own authors require in light of countervailing local needs and changing situations in the future.

4. Treaties binding member states to implement internally a supranational, worldwide standard of copyright limitations would thus deprive those states of the autonomy and flexibility (otherwise built into Berne) subsequently to modify or eliminate those exceptions should local experience prove them unwarranted; any change to domestic law would require revising the international agreement, or a withdrawal from the treaty, which is in fact both extremely unlikely and politically difficult. Of course, if the treaty text is sufficiently vague and general it will not impose real constraints on member states’ local flexibility, but such an outcome is problematic for two reasons. First, the instrument will lack the bite some member states claim to require to enact the aspired exceptions, and second, if the standards are in fact meaningless, all that will remain will be the symbolism of treaties dedicated to the diminution of authors’ rights.

In light of these concerns, does the VIP Treaty foretell the eclipse of the Berne era? This chapter is not the occasion for detailed analysis of the VIP Treaty, but a few general remarks are appropriate. In an exceptional departure from Berne and its Paris Appendix (and the WCT and TRIPS Agreement), the treaty mandates enactment of domestic exceptions or limitations: it states that Contracting Parties:

> shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.\(^1\)

But:

> In adopting measures necessary to ensure the application of this Treaty, a Contracting Party may exercise the rights and shall comply with the obligations that that Contracting Party has under the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WCT, including their interpretative agreements.\(^2\)

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\(^1\) VIP Treaty, art 4(1)(a). Articles 2 and 3 define ‘works’, ‘accessible format’ and ‘beneficiary persons’.

\(^2\) Ibid, art 11.
Thus, to the extent that the exceptions or limitations on the rights of reproduction, distribution, making available or public performance apply to the works of foreign authors, contracting parties must ensure that they confine them ‘to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder’. With respect to the cross-border exchange of accessible format copies – a pressing issue in light of less developed countries’ limited capacity to create accessible formats domestically – the treaty enacts a compromise: accessible format copies made pursuant to an exception in Country A may be distributed or made available in Country B, but Country B may not further export those copies unless it adheres to the three-step test.

Perhaps the most reassuring indication that the VIP Treaty should not herald an onslaught of copyright-diminishing international accords derives from comparing the final text with its predecessors. Most tellingly, the penultimate version of the VIP Treaty was titled, ‘Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities’. The final version forgoes proclaiming itself a ‘treaty on exceptions and limitations’ in favor of the more modest ‘treaty to facilitate access’. Of course, it facilitates access through imposing exceptions and limitations, so the difference may primarily be rhetorical. Because, however, the rhetoric of copyright cutbacks long seemed to propel the VIP initiative, the shift

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103 TRIPS Agreement, art 13.
104 ‘Contracting Parties shall provide that if an accessible format copy is made under a limitation or exception or pursuant to operation of law, that accessible format copy may be distributed or made available by an authorized entity to a beneficiary person or an authorized entity in another Contracting Party.’ VIP Treaty, art 5(1). The reference to ‘that copy’ raises the question whether the ‘accessible format’ copies must be hard copies (including fixations of digital formats) given that digital communication entails the creation of new copies rather than the distribution of ‘that copy’. See, for example, Capitol Records, LLC v ReDigi Inc 934 F Supp 2d 640 (SDNY 2013). On the other hand, the reference to ‘made available’ suggests that digital communication of a file of any accessible format is intended to be covered.
105 Ibid, art 5(4).
106 (Drafted 20 April 2013) VIP/DC/3 REV (Draft VIP Treaty).
in tone suggests that further international instruments to shrink the scope of copyright may not loom after all.

Seen in the broader international IP perspective, moreover, the VIP Treaty may be a small but important step in healing some of the rancor that has beset relations between developed and developing countries for over four decades. The latter mounted a strong campaign to revise Berne in order to achieve enhanced access to published works for educational and developmental purposes at Stockholm in 1967. This campaign, however, was unsuccessful – the compromise Appendix achieved in Paris four years later was still tilted in favor of the developed countries.108 Similar efforts to obtain greater access to patented technology through changes to the non-voluntary licensing provisions of the Paris Convention in the early 1980s foundered in the marshes of mutual misunderstanding and distrust.109 The same tensions have continued to resonate within the forums of the WTO and WIPO, particularly with the adoption of the WIPO Development Agenda and the continuing debates occurring within that body about disclosure requirements with respect to access to the genetic resources of developing countries and the protection of traditional knowledge and expressions. Developed and developing countries are locked in contest across the whole range of intellectual property rights, and there has been much bad blood in relation to many of these encounters. Given the significance of the VIP Treaty’s provisions for persons in developing and less developed countries, it may therefore represent a significant achievement in the promotion of cooperation and reduction of tension: a text that can sit comfortably alongside the mother ship of Berne, doing justice to the legitimate concerns of developing countries (and providing real assistance to the visually impaired whatever their countries of residence) while maintaining the respect for authorship that was central to the declaration made in 1986 on the centenary of that Convention.

108 See further Ricketson and Ginsburg (n 7) Ch 14.