1. Introduction

National copyright protection has been around since the late fifteenth century, when the first privileges to print specific books were issued, and not long ago those interested in copyright were able to celebrate the 300th anniversary of the world’s first copyright statute, the 1710 Statute of Anne. With few exceptions, national legislation in the field protected only national works, and for many years most countries left foreign works unprotected, unless they had acquired a particular local affinity, for example by being first published in the country. This was a troublesome and unsatisfactory situation for the authors and their publishers, because by then music, fine arts, drama and texts already frequently crossed borders and were used abroad, whether in the original form or in translation, or otherwise in adapted versions.

In the nineteenth century some governments started to react to this situation, first by making bilateral agreements and later by adopting multilateral conventions for the purpose of securing mutual international protection of works from other contracting countries. As from the 1960s, the related (or neighbouring) rights of performers, producers of phonograms and broadcasting organizations were also included in this system of international protection through international conventions of their own. The historical development is further discussed in Chapter 2, but let it already here be noted that it has resulted in a complex situation with a large number of mutually supplementing, but also overlapping and sometimes inconsistent international agreements, treaties and conventions (in the following referred to as instruments, for lack of a better generic term). In this book regional and obsolete instruments are not discussed, but it still leaves ten different instruments for perusal and analysis.

Most commonly, the international instruments were built on, and to some extent codified, the preceding developments in the national law of the contracting states, but some instruments were taken a step further to show the way for future national law in their respective fields. An example is the 1961 Rome Convention, which at a time when only few countries had national protection of related rights, laid a foundation of such protection that still stands and carries an elaborate construction, continuously developed over the years.
Another example, which also negates the almost axiomatic assumption that law is always lagging way behind technology, is the WIPO Internet Treaties, the WCT and WPPT. In 1996 they established the basic norms for copyright and related rights on the internet, only a couple of years after the development of the World Wide Web kick-started the use of the internet outside narrow university and research circles. Obviously these norms have not solved all the problems linked to the internet, but neither were they supposed to. Finding the appropriate business models has given daunting challenges to the right owners, and implementing the general and flexible rules of the Treaties has also been difficult for national legislators.

It is a fundamental element in international instruments, outside the field of regional and in particular European law, that they provide norms for relations among sovereign states only, and cover neither relations between private individuals nor those between such individuals and states. Accordingly, when the international instruments on copyright and related rights, for example, require national treatment or certain minimum rights, such provisions create no rights for the nationals of the contracting states. They are only binding on the national legislators whose task it is to transfer them into national law.

As discussed in Chapter 3, one way of doing this is by letting national law refer to the law under the international instruments, thereby making them a part of national law. This may be done at the level of the relevant specialized legislation on copyright and related right, but in some countries it is part of the constitutional system that international treaties, accepted by the country in accordance with the applicable constitutional procedures, automatically assume the character of national law. Sometimes they even take a higher rank than national statutes, so in case of incompatibility the international norm will prevail. When this happens, though, it is a national norm that subordinates national law to international norms; it is not imposed by any rule under international law.

Another way of incorporating international law into nationally applicable law is to re-write, in a more or less circumscribed form, the international norms in the relevant national legislation. In countries using this system, foreign nationals may only claim protection under national law. This does not exclude, though, that international law may be of significance when interpreting possibly unclear provision in national law.

Where a private individual feels that his or her internationally secured rights are not respected in a foreign country, it is a matter between his or her country of nationality or habitual residence and the country for which protection is claimed. If the former country decides to pursue such a matter, it is to be solved through negotiations at the diplomatic level or,
as far as the TRIPS Agreement is concerned, through the system for resolution of disputes institutionalized in that Agreement. Theoretically dispute resolution under some instruments is also available under the ICJ. These systems are discussed further in Chapter 22.

Despite these important limitations to their applicability, there is still considerable interest in studying the international instruments on copyright and related rights, because most states endeavour to fulfil their international commitments in good faith and because the instruments set up the framework for international protection. The concepts, wording and overall system of the international instruments may be important sources for the understanding of national law. In many countries it is a general rule of interpretation that absent proof to the contrary the national legislator is presumed to have attempted to correctly implement international obligations in national law. Furthermore the international instruments command important interest in their own right, as norms stipulating the obligations and flexibilities resting on and available to the national legislator when balancing the differing interests and formulating an appropriate national law, adapted to the conditions of its own country.

It is also useful to understand the international instruments when dealing with rights in works or objects of related rights which may be exploited in a multitude of countries because they give a general feel of the level of protection one may expect abroad, even if it frequently may become necessary to investigate foreign law in detail to get the full picture.

Structurally speaking, one may say that most international instruments in the field of copyright and related rights share certain common elements, even if exceptions occur. There is a provision regulating which national law applies when a foreign work or object of related rights is exploited in the territory of a country, or a rule regulating this may be more or less explicitly presupposed. In accordance with the principle of territoriality which is broadly applied in many fields of international law, this applicable law will normally be the national law of the country in which the infringing act takes place, and for which the protection therefore is claimed. This is normally referred to as ‘the law of the country of protection’. This rule is discussed further in Chapter 6.

In addition there is a main rule, which is not without exceptions, that works and objects of related rights from other countries party to the same instruments as the country of protection should enjoy the same protection as the latter country grants its own works or objects of related rights. This is the principle of national treatment. National treatment and its exceptions and variations among the different instruments are discussed in Chapter 7.
In order to obtain a reasonably balanced international system, where levels of protection do not vary too much, national treatment has to be supplemented by certain minimum demands to the level of protection. They are formulated in a more or less specific and detailed way in the various instruments, and constituted as certain rights which under all circumstances must be granted for foreign works or objects of related rights, regardless of whether they have also been granted for national works and objects. One may well say that this ‘exchange’ of national treatment and minimum obligations is the basic quid pro quo, or bargain, on which the international instruments are based. The minimum rights of the various instruments are presented and discussed in Chapters 9 to 19.

It must be kept in mind that the international instruments on copyright and related rights do not deal with the protection granted by countries for their own works and objects of related rights. In practice it is rare, but not unknown, that countries choose to protect foreigners better than their own nationals. National law is also, apart from the specific requirements under the Marrakesh VIP Treaty, free to grant a higher level of protection, exceeding the minimum requirements of the treaties.

The instruments typically also contain provisions regarding who is eligible to benefit from the protection; these so-called ‘points of attachment’ are discussed in Chapter 5.

SUGGESTIONS FOR FURTHER STUDY

There are several books giving a more or less comprehensive coverage of international copyright and related rights, even though most were published before the adoption of ACTA, the BTAP and the Marrakesh VIP Treaty and therefore do not cover those instruments. Among the books giving an overall coverage one might point to Ricketson and Ginsburg 2006, which in two volumes contains a very thorough commentary, starting with the Berne Convention and continuing through the subsequent instruments, even though most comprehensive coverage is given to the Berne Convention. Shorter, but still comprehensive is Stirling 2008. More recent and with a fine referencing of the commentary to both US and EU law is Goldstein and Hugenholtz 2013, which includes some discussion of the ACTA Agreement. Another general presentation coupled with a thorough illumination of the underlying policies, including those which eventually crystalized into the ACTA Agreement, the BTAP and the Marrakesh VIP Treaty, is von Lewinski 2008. A broad coverage of both copyright and related rights and other intellectual property rights is available in the WIPO Intellectual Property Handbook, which can be
accessed and downloaded free of charge at www.wipo.int. Another useful WIPO publication is *Ficsor 2004*, which is a WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, written by the former Assistant Director General of the organization, Mihály Ficsor. It contains article-by-article comments to the substantive provisions of all the WIPO-administered instruments, up to and including the WCT and the WPPT.