One Hundred Years of International Copyright

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Abstract

The Berne Convention (BC or Convention) celebrates its one hundred and thirty-sixth birthday this year, but for Hungary, 2022 marks a milestone anniversary, as the country joined the BC exactly a hundred years ago. Considerations taken into account at the time of becoming a party to the Convention, and the circumstances now, a century later, are in many ways different. An important question is whether the Convention still conforms to our sense of justice. For Hungary in the early 1900s, this dilemma was effectively a matter of weighing up the principle of formality-free protection. Originally required as a corrective rule in BC, automatic protection has grown into a fundamental principle since then. It was to be expected from the outset that the principle would not only have its benefits, but also its side effects. One hundred years of international copyright has taught us to insist on what BC has earned for right holders, but to strive for BC-compatible, efficient and modern solutions. How far we can go in doing so will be one of the most important questions of the near future.

Keywords: Berne Convention, revision, copyright, formalities, legal certainty.

"It is only to be wished that the Berne Convention continues to flourish and further expand as a most efficient basis of up-to-date implementation of the protection of authors' rights on a worldwide scale." (György Boytha)[1]

1. Introduction

International treaties are of paramount importance in narrowing the gap between countries' different speeds of development. This is a very complex task since different countries face different problems, they have divergent goals and efforts, therefore, the Berne Convention (BC or Convention), dealing with the protection of literary and artistic works and the rights of their authors,[2] could only attempt

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1 György Boytha, 'The Berne Convention and the Socialist Countries with Particular Reference to Hungary', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, pp. 57-72.

2 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886.

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to define common principles and set minimum standards. But these principles have been of great value to copyright law and therefore, to the entire creative sector.

> "What is the reason for which governments give rights to authors that allow them to derive material benefits from the use of their works by others and make any unauthorized distribution of their works illegal? And, what is the reason for which countries are ready to undertake the obligation, as they do under the Berne Convention, to give such rights to foreigners?"[3]

As the Hungarian-born Árpád Bogsch,[4] former Director General of World Intellectual Property Organization (WIPO) stated in response to his own questions above, it is believed that the underlying reason is *a sense of justice*.[5] The Berne Convention celebrates its one hundred and thirty-sixth birthday this year, but for Hungary, 2022 marks a milestone anniversary, as it joined the BC exactly a hundred years ago. Considerations taken into account at the time of becoming a party to the Convention, and the circumstances now, a century later, are in many ways different. A valid question is whether Berne Convention still conforms to our sense of justice.

2. Pros and Pressures

2.1. International Difficulties

It is well-known that it has been a bumpy road towards the Berne Convention's worldwide acceptance. As Sam Ricketson pointed out in 1986, the birth of the BC can be seen as a manifestation of a period when human society was attempting, in a *high-minded but practical* spirit, to bring about change and development across a whole range of matters through international cooperation.[6] The whole Berne Union, of course, served as the *focal point* "for the comparison, confrontation and, if possible, reconciliation of the official policies of the various countries in matters of international copyright relations."[7]

One of the biggest dichotomies was on the question of formalities. Under the original text of the Berne Convention, authors who are subjects or citizens of any of the countries of the Union shall enjoy in the other countries for their works the rights which the respective laws do grant to their own nationals. And the enjoyment of these rights shall be subject to the accomplishment of the

3 Árpád Bogsch, *The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works*, International Bureau of Intellectual Property, Geneva, 1986, p. 5.

4 Árpád Bogsch was born in Hungary in 1919, and was the Director General of WIPO from 1973 to 1997. The WIPO main building in Geneva was named after him (Árpád Bogsch Building) out of respect for him.

5 Bogsch 1986, p. 5.

6 Sam Ricketson, 'The Birth of the Berne Union', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, pp. 9-32.

7 Árpád Bogsch, 'Opening Speech of Arpad Bogsch at the Conference Celebrating the Centenary of the Berne Covention', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, p. 5.

conditions and formalities prescribed by law in the country of origin of the work.[8] This meant that among the countries of the Union, foreign authors were treated equally to domestic authors, moreover, they could even be in a better position than domestic authors if their national laws do not prescribe any formalities. Later on, *automatic protection* was worded differently, namely that the extent of protection shall be governed exclusively by the laws of the country where protection is claimed.[9] This rule was clearly directed against the Anglo-American registration system, but this restriction was not an end in itself. The BC established a system of equal treatment of foreign right holders with own nationals, which is maybe the most important rule of the Convention, yet under this rule, the level of protection depends on the law of the country affording the protection. This formal equality can conceal a profound inequality: a country that applies formal reciprocity with the US protects the works of a US citizen author free of any formalities (as a matter of fact of creation) under its own rules, while its own authors can only obtain protection in the US if they have complied with the costly and burdensome formalities required there.[10] For this reason, beside the principle of equal treatment with own nationals the principle of informality is a kind of *corrective rule*, similarly to the minimum standards for the substance of the protection to be granted by the countries of the Union.[11]

The BC has steadily developed and strengthened international copyright law, but the Universal Copyright Convention (UCC), established under the auspices of the UN, caused some initial confusion and stalling. The different needs of developing countries and the resistance of the US, including on the issue of formalities,[12] led to the launch of this competing international cooperation.[13] The UCC offered a kind of compromise between the high level of automatic protection typical of the European *droit d'auteur* system and those Anglo-American countries where "where copyright is viewed as a privilege obtainable only upon compliance with certain statutory formalities."[14] However, it later became clear that the UCC

8 BC (1886), Article 2.

9 BC (1908), Article 4(2).

10 István Tímár, 'Nemzetközi egyezmény-rendszerek', *in* Aurél Benárd & István Tímár (eds.), *A szerzői jog kézikönyve*, Budapest, 1973, pp. 382-383.

11 Id.

12 This topic has been widely discussed in scientific literature, and remains so today. As Michael L. Lovitz summed up in 1989, there were five major and nine minor areas in US copyright that were in conflict with the BC (differences in notice requirements and other formalities, recognition of moral rights, retroactivity, duration, jukebox license and other points of concern). *See* Michael L. Lovitz, 'Copyright Protection in the United States: It's All Berned Up', *Temple International and Comparative Law Journal*, Vol. 3, Issue 1, 1989, pp. 38-43.

13 Tímár 1973, p. 389.

14 Hamish R. Sandison, 'The Berne Convention and the Universal Copyright Convention: The American Experience', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, pp. 89-90.

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was more of a stepping stone for US law in the direction of the Berne Convention,[15] a 'bridge', rather than an alternative to it.[16]

Despite the detour, the BC ended up having a major impact on US copyright law.[17] Eliminating copyright formalities prescribed by the Berne Convention represented the most significant barrier to adherence to the Convention.[18] In 1989, after the US also become a signatory, some authors stated that the price of Berne membership was relatively low.[19] However, its copyright system is often criticized for not fully complying with the principle of protection without formalities. As David R. Carducci emphasizes, "unfortunately, though the relaxation of formalities was a goal of the current Copyright Act, certain formalities remain."[20] Although registration is not a condition of copyright protection,[21] copyrights are not self-enforcing, copyright owners must act to guarantee their exclusive rights. In cases where this rule affects foreign right holders, under the BC's rules on formality, a pre-suit obligation on foreign copyrighted works is precluded.[22] A recent court decision has also made it clear that this rule is also applicable if a work is published on a foreign website accessible also in the US,[23] since this kind of 'simultaneous publication' does not make the work a 'United States work', therefore it is not subject to the US registration formality. As Jane Ginsburg put it, this was an – albeit unsuccessful – attempt to extend the pre-suit registration requirement to foreign works first published on a non-US website.[24] In this case the US District Court, D. Delaware emphasized that

> "[If] such publication transformed the work into a United States work, plaintiff would be subjected to the very formalities that the Berne

15 Eric Stenshoel, 'From Berne to Madrid and Beyond: The road to international copyright and trademark protection in the United States', *Entertainment, Arts and Sports Law Journal*, Vol. 24, Issue 1, 2013, p. 2.

16 Carol A. Motyka, 'Effects of U.S. Adherence to the Berne Convention', *Rutgers Computer & Technology Law Journal*, Vol. 16, Issue 1, 1990, p. 201.

17 David M. Spector, 'Implications of United States Adherence to the Berne Convention', *AIPLA Quarterly Journal*, Vol. 17, 1989, pp. 100-121.

18 Richard J. Inglis, 'The United States Legislates Its Way into Berne', *Suffolk Transnational Law Journal*, Vol. 13, Issue 1, 1989, p. 282.

19 Id. p. 315. "Congress introduced a two tier approach to the provision governing registration as a prerequisite to an infringement suit which maintained previous law as applied to United States citizens and eased requirements for foreign nationals."

20 David R. Carducci, 'Copyright Registration: Why the U.S. Should Berne the Registration Requirement', *Georgia State University Law Review*, Vol. 36, Issue 3, 2020, p. 873.

21 17 US Code § 408 – Copyright registration in general. *(a)* Registration Permissive "[…] the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection."

22 17 US Code § 101, § 411

23 *Moberg v 33T LLC et al.*, Civil No. 08-625(NLH)(JS) (D. Del. 6 October 2009).

24 Jane C. Ginsburg, 'The US Experience with Copyright Formalities: A Love/Hate Relationship', *Columbia Journal of Law & the Arts*, Vol. 33, Issue 4, 2010, p. 311.

> Convention eschews. To hold otherwise would require an artist to survey all the copyright laws throughout the world, determine what requirements exist as preconditions to suits in those countries should one of its citizens infringe on the artist's rights, and comply with those formalities, all prior to posting any copyrighted image on the Internet. The Berne Convention was formed, in part, to prevent exactly this result."[25]

Stepping back in time again to the beginning of the Convention's history, some of the countries, not unlike Hungary, faced exactly the same problem when considering accession to the BC.

2.2. Hungarian Dilemmas

For Hungary, accession to BC was a long process, mainly because of historical circumstances and adversities, analyzed and discussed in detail by Péter Munkácsi in his recent essay.[26] As Jose Bellido recalls, there was no common framework – neither on the global level, nor in Europe – legally or philosophically, therefore each country had specific political and legal ambitions.[27]

In this paper, however, I would like to focus on the impact of the principle of automatic protection for foreigners, and one particular aspect of that was significant for Hungarians, among many other countries, in terms of accession to the BC.

It is the fourth copyright act that is currently in force in Hungary.[28] The first Hungarian copyright act came into force on 1 July 1884, which is a particularly important date because the first diplomatic conference of the BC began shortly afterwards, on 8 September 1884. No wonder the Hungarian position was quite clear:

> "the Hungarian government has come to the realization, on the basis of its completely new legislation, that the country's cultural characteristics do not allow foreigners' works, especially their translations, to enjoy more extensive protection in general than that granted to its citizens by Hungarian law, and has therefore refused to participate in the conference."[29]

25 *Moberg v 33T LLC et al.*, p. 14. The court notes in a footnote to this statement that "[a]ll informed intellectual property regimes recognize that unduly complicated protection prerequisites are likely to chill artistic expression."

26 Péter Munkácsi, 'Stuck in a Waltz: The Austro-Hungarian Monarchy and Its Imperial Approach to the Berne Convention', *in* P. Sean Morris (ed.), *Intellectual Property and the Law of Nations, 1860-1920*, Brill, Nijhoff, 2022.

27 Jose Bellido, 'Colonial Copyright Extensions: Spain at the Berne Convention (1883-1899)', *Journal of the Copyright Society of the USA*, Vol. 58, Issue 2, 2010-2011, p. 264.

28 Act LXXVI of 1999 on Copyright.

29 The words of Emil Steinbach, who was one of the Austro-Hungarian ministerial advisers with voting rights at the conference. Cited by Péter Munkácsi, 'Osztrák-Magyar Monarchia, Ausztria, Magyarország: csatlakozás a Berni Egyezményhez?', *in* Anett Pogácsás (ed.), "*Intellectual Creations in the Service of Mankind": Study Volume of the Memorial Conference in Honor of Professor Dr. Levente Tattay*, Pázmány Press, Budapest, 2022, p. 176.

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This completely new legislation stipulated that the translation of an original work without the author's consent shall be considered an infringement of copyright, if the author has retained the right of translation on the title page or at the beginning of the original work, provided that the publication of the translation had begun within one year of the publication of the original and completed within three years. Protection shall cease in respect of languages for which translation had not begun within the first year.[30] At the diplomatic conference it became clear that one of the main aims of the proposed convention is to ensure that the enjoyment of the rights should be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work.[31] The problem was similar to the US one mentioned above, namely that foreign authors shall not simply be treated equally, but they may have been in a more favorable position than their own national authors.

According to Article 2(2) BC, to enjoy the exclusive right of translation, authors had to comply with the conditions and formalities laid down for the original work, however, they were exempted from any special formalities which related to exercising the translation right, such as that contained in German law, for example.[32]

Nevertheless, for the sake of completeness, it is also necessary to mention that even contemporaries themselves reported that the Hungarian provisions, inspired by the German model, required "excessive and unjustified formalities" for the validity of copyright.[33] Viktor Ranschburg, for example, was of the opinion that it will therefore be in our own interest, in the event of accession to the Berne Convention, to free our law of those formalities, which were introduced in order to reduce the protection afforded to foreign authors.

> "Indeed, our law, modelled on the now obsolete German law, requires excessive and unjustified formalities for the validity of copyright, formalities which make the protection given by the law almost illusory, especially with regard to the right of translation."[34]

While some authors argued that it would be in our own interest to abolish domestic formalities in the event of accession to the Convention, others thought that accession could be risky for Hungarian authors. As Eva Hemmungs Wirtén put it, referring to Sweden, the rationales of so-called user-nations and the strategies and responses deployed by 'minor' languages[35] have put the issue of

30 Act XVI of 1884 on Copyright, Section 7(3).

31 Article 2 BC (1886).

32 Louis Renault, 'Report Presented on Behalf of the Committee by the French Delegation', *in* Árpád Bogsch (ed.), *The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works*, International Bureau of Intellectual Property, Geneva, 1986, p. 139.

33 Viktor Ranschburg, *A szerzői jog nemzetközi védelmére alkotott Berni Egyezmény, vonatkozással Magyarországra*, Eggenberger-féle Könyvkereskedés, Budapest, 1901, p. 44.

34 Id.

35 Eva Hemmungs Wirtén 'A Diplomatic Salto Mortale: Translation Trouble in Berne, 1884-1886', *Book History*, Vol. 14, Issue 1, 2011, p. 90.

translation and formalities in a different light. Also in the Hungarian scientific literature, some authors made a precise attempt to weigh up the economic consequences of making translation more expensive, particularly in the light of the fact that domestic literature was less important in terms of exports.[36] Based on our position in international literature, they did not hope to benefit from accession, but feared its impact on Hungarian culture and cultural economy. In order to ensure not only formal reciprocity, but also a situation corresponding to material reciprocity, *i.e.* where countries concerned apply the same substantive law in relation to each other,[37] Hungary had no interest in maintaining its rules on formality. Finally, the issue was decided for Hungary on rather pressing grounds. The Treaty of Trianon, which concluded World War I, signed by representatives of Hungary on the one side and the Allied Powers on the other, also contained obligations for accession to the Berne Convention.[38] However, as Péter Munkácsi recalled the statements made in the National Assembly in 1921, although we were obliged to join this Union within twelve months of the entry into force of the Treaty of Trianon, our accession was not based on the peace treaty. Because there was an intention to join long before the world war, it was not real pressure, but it rather happened under the influence of the fact that we had a great deal of interest to do so. Take, for example, the enthusiastic words of Viktor Ranschburg from 1901:

> "We do not believe that the Hungarian government and legislature can permanently refrain from imposing the principles of equity and justice of the Berne Convention, even if it were to be shown that its adoption would entail cultural and economic sacrifices."[39]

It was strongly emphasized by contemporaries that we were entering the Union of our own free will.[40] Although there were opponents to accession, it was a more

36 Péter Munkácsi & Zoltán Kiss, 'Magyarország 1922-es csatlakozása a Berni Egyezményhez', *in* Anett Pogácsás (ed.), *Quaerendo et Creando, Ünnepi kötet Tattay Levente 70. születésnapja alkalmából*, Szent István Társulat, Budapest, 2014, pp. 285-308.

37 György Boytha, 'Reciprocity in International Copyright Law', *in* György Haraszti (ed.), *Questions of International Law,* Hungarian Branch of the International Law Association, Budapest, 1968, p. 42.

38 Treaty of Trianon (Treaty of Peace between the Allied and Associated Powers and Hungary), Versailles on 4 June 1920, Article 222: "Hungary undertakes, within twelve months of the coming into force of the present Treaty, to adhere in the prescribed form to the International Convention of Berne of September 9, 1886, for the protection of literary and artistic works, revised at Berlin on November 13, 1908, and completed by the Additional Protocol signed at Berne on March 20, 1914, relating to the protection of literary and artistic works. Until her adherence, Hungary undertakes to recognize and protect by effective measures and in accordance with the principles of the said Convention the literary and artistic works of nationals of the Allied and Associated Powers. In addition, and irrespective of the above-mentioned adherence, Hungary undertakes to continue to assure such recognition and such protection to all literary and artistic works of the nationals of each of the Allied and Associated Powers to an extent at least as great as upon July 28, 19l4, and upon the same conditions."

39 Ranschburg 1901, p. 22.

40 Munkácsi & Kiss 2014, p. 305.

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pronounced position that we can "safely accept this agreement based on mutual equity, without any fear that our statehood or our culture will be harmed in any way."[41] A hundred years on, it is worth wondering whether we could still make this statement with the same confidence and calm.

3. 'Resilient Character'

The inherent stability of a hard-achieved international treaty is a success in itself. It has been repeatedly pointed out that the BC has remained intact through all the political and economic upheavals that had taken place since its creation.[42] As Peter Burger put it very aptly,

> "the Berne Union has developed its own resilient character – a character that has helped it overcome conflicts caused by different copyright philosophies and different levels of economic development. This resilience has given the Union the strength to survive two world wars, the development of new technologies, and the pressures of decolonization. Through all of these changes, the Union has continued to further its goal of increasing international copyright protection."[43]

On the one hand, therefore, its resilience is a huge advantage. It attempted to serve both the authors and the interests of the public by resisting "the occasional temptation to adopt opportunistic solutions"[44] for more than a hundred years. The main question, however, is which of the proposed solutions would be opportunistic, which would be harmful in the long term, and which are the situations where change is needed to meet the original purpose of the convention. The BC has undergone a number of substantial revisions and modernizations since its birth, and this is why most of the authors evaluated its first hundred years as a success story, in which it served both the authors and the interests of the public. Even Árpád Bogsch emphasized that from its rudimentary provisions at the very beginning (the original text from 1886), the BC has become, "through its several revisions during the century, a detailed and refined legal instrument that obliges the Member States to provide for a protection of a high level."[45] Between 1886 and 1967[46] there were several topics that did not prove to be too opportunistic reasons for amendment. Then, more than half of our Berne Union membership has passed without the BC changing. Yet these last fifty-plus years have not exactly been uneventful, especially as far as the

41 Ranschburg 1901, p. 44.

42 *See e.g.* Jack Black & Gerald Dworkin, 'Foreword', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, pp. 1-2.

43 Peter Burger, 'The Berne Convention: Its History and Its Key Role in the Future', *Journal of Law and Technology*, Vol. 3, Issue 1, 1988, p. 1.

44 Bogsch 1986, p. 5.

45 Id.

46 Revised at Stockholm on 14 July 1967, and concluded at Paris on 24 July 1971.

technological background of the copyright industry and the creator-user relationship are concerned.

The original text of the BC itself provided that the Convention may be submitted to revisions for the purpose of introducing amendments therein intended *to perfect* the system of the Union.[47] The current text also provides that the Convention shall be submitted to revision with a view to introduce amendments designed *to improve* the system of the Union.[48] It seems that while there is a strong need for continuous improvement in international copyright, the BC has indeed proven to be resilient – mostly to time and change. Some authors argue that this *unchangeability* must be seen as the true merit of the Convention, since if a revision of the Berne Convention was to take place in our day, it is clear from the current political and economic pressures that the interests of the authors would be sacrificed.[49]

The question is whether this advantage outweighs the drawbacks of immutability, or, ultimately, the authors themselves will be adversely affected.

4. The Next Hundred Years

As Peter Burger underlined in his paper from 1988, the BC must remain true to its original goal, which means that it must continue to focus on the protection of authors.[50] This protection can be best achieved through the principle of national treatment, at least "until a common substantive law will have been created."[51] As we pointed out earlier, the principle of automatic protection, *i.e.* that protection does not require any formalities or notifications, was created precisely 'to correct' the principle of national treatment. In his opening speech at the centenary celebrations[52] of the Convention, Numa Droz also raised the question of formalities to be complied with for the recognition of rights. As he emphasized, writers and artists are demanding the utmost simplification in this connection, because if an author has to comply with the formalities of registration and deposit in each country in order to obtain protection, the whole operation becomes overly intricate and costly. However, he also expressed the belief that if a work is once duly secured in the country of origin, it can without any difficulty be

47 Article 17 BC (1886), which also stated that questions of this kind, as well as those which are of interest to the Union in other respects, shall be considered in Conferences to be held successively in the countries of the Union by delegates of the said countries.

48 Article 27 BC (1979).

49 Georges Koumantos, 'The Future of Berne Convention', *Columbia-VLA Journal of Law & the Arts*, Vol. 11, Issue 1, 1986, p. 236.

50 Burger 1988, p. 1.

51 György Boytha, *Selected Essays of György Boytha*, Gondolat, Budapest, 2014, p. 316.

52 This ceremony took place in *Stationers' Hall*, which was the very place in which Registry of published books was established. The Statute of Anne made the register book at the Stationers' Company the official record of book authors' ownership, and it also created a right for anyone to search the register book and obtain a certificate of entry, or proof of copyright registration. *See* in details Edward L. Carter, '"Entered at Stationers' Hall": The British Copyright Registrations for the Book of Mormon in 1841 and the Doctrine and Covenants in 1845', *Brigham Young University Studies,* Vol. 50, Issue 2, 2011, p. 79.

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accepted as being valid in all the other countries. "You will determine, Gentlemen, whether it is possible to accede to this desire which, for my part, I consider to be a legitimate one."[53]

During its first hundred years, automatic protection has been cemented into a *fundamental principle*, backed by important considerations such as the need for uncensored protection, artistic freedom and the personal nature of the relationship between authors and their works.[54] The natural law concept of copyright has let us forget the pragmatic roots of the prohibition on formalities, prioritizing other benefits. It is therefore no longer sufficient, when examining whether the prohibition is still necessary, to look at whether a change in the circumstances existing at the time of the Convention's conclusion still justifies this legal instrument. Today, the question is more about how to make the copyright system effective in the framework of the existing international rules, which have not changed for a long time.

4.1. And What About Efficiency?

Although the rules laid down in the BC are almost 'untouchable', international copyright law is very much alive. The principles of the Convention have been 'carried forward' by other legal instruments (*e.g.* TRIPS Agreement[55] or WCT,[56] and the legal sources of the EU[57]) over the last century.

According to its preface, the countries of the Berne Union, "being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."[58] The vast majority of the world accordingly considers it to be a starting point, a governing convention. Only in 2022 two new member states joined this Union – Cambodia in March, and Uganda in April –, bringing the total number of contracting parties

53 Bogsch 1986, p. 88.

54 Stef van Gompel, *Formalities in Copyright Law. An Analysis of their History, Rationales and Possible Future*, Wolters Kluwer, Amsterdam, 2011, p. 283.

55 Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

Article 9 [Relation to the Berne Convention] "1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom."

56 WIPO Copyright Treaty (WCT) adopted in Geneva on 20 December 1996, Article 1 [Relation to the Berne Convention]: "(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties. (2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works."

57 The EU is not a party to the Berne Convention, nevertheless obliged under Article 1(4) of the WIPO Copyright Treaty, to which it is a party, to comply with Articles 1 to 21 of the Berne Convention.

58 BC (1979), Preface.

to 181. Their reasons for joining are obviously different from the reasons Hungary had, one hundred years ago. Since then, the factors to be taken into account have changed, and the stakeholder structure has become very complex. Nevertheless, it is still a fact that Hungarian authors (and other right holders) are working (creating works) in a relatively small country, using a unique language. These factors are still decisive for their role in the international cultural market. It can be a major challenge to help authors effectively in today's context in the framework of a convention that has been 'entrenched' for a hundred – or at least fifty – years.

The stability and universality of the Convention is in itself a value that is indispensable for the protection of authors' rights, and its importance is stressed in the literature even if the protection could be more effective under today's circumstances. "The advent of digital technology has rejuvenated the formalities debate, which has been rather well settled in the international community following the United States' accession to the Berne Convention."[59] But this debate is not all about whether to eliminate the principle of automatic protection, other options have also been raised.

Although BC contracting states are allowed to impose formalities on domestic works,[60] as Stef van Gompel stressed, from an international point of view, reintroducing copyright formalities limited to domestic works would have a "fairly marginal impact."[61] He argues however, that in the digital era the no-formalities rule no longer appears to be necessary to guarantee an efficient protection of copyright at the international level.[62] Instead, he considers a uniform formality rule to be effective. But considering the possibilities for change from the perspective of international law, it is not surprising that many scholars and experts have tended to focus on developing BC-compatible solutions. These ideas seek to increase the effectiveness of regulation by leaving the hard-won common ground intact.

Some authors argue that recordation of transfers (back to the original author) can be desirable and a Berne-permissible solution,[63] others assert that any formality that focuses on varying available remedies can also be defended as Berne-compliant.[64] We also find authors who argue that 'new-style formalities' could be the solution, providing the filtering and information-creation benefits of traditional formalities, but leaving behind the bureaucratic difficulties of 'old-

59 Peter K. Yu, 'Tales of the Unintended in Copyright Law', *Studies in Law, Politics, and Society*, Vol. 67, Issue 1, 2015, p. 14.

60 Rebecca Giblin, 'A Future of International Copyright? Berne and the Front Door Out', *in* Graeme Austin *et al.* (eds.), *Across Intellectual Property: Essays in Honour of Sam Ricketson*, Cambridge University Press, Cambridge, 2020, p. 127.

61 Gompel 2011, p. 291.

62 Id. p. 292.

63 Daniel Gervais & Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It', *Berkeley Technology Law Journal*, Vol. 28, Issue 3, 2013, p. 1496; Daniel J. Gervais, *(Re)structuring Copyright: A Comprehensive Path to International Copyright Reform*, Edward Elgar Publishing, Cheltenham-Northampton, 2019.

64 Christopher Jon Sprigman, 'Berne's Vanishing Ban on Formalities', *Berkeley Technology Law Journal*, Vol. 28, Issue 3, 2013, p. 1581.

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style formalities'.[65] The voluntary use of the benefits of formality is also considered by some authors as a viable option.[66]

According to scientific literature, there is a growing conviction that, although there is little chance of revising the BC in the near future, we may not need to, as its rules are flexible enough to allow us to find *alternative solutions compatible with the BC*.[67]

4.2. The Future of Formality-free Protection

The future of formality-free protection is also a good indicator of the future of international copyright law and copyright harmonization. There are also less optimistic views on the latter issue. Clark D. Asay is of the opinion that although copyright harmonization had been the norm between Europe and the US for decades, currently this process is stalled, because "copyright's once predictable international political economy has splintered with new technological entrants."[68] But he takes the view that the EU Copyright Directive can be a good example of one of the possible ways forward, namely, as covert harmonization efforts disguised as go-it-alone copyright law and policy-making. Which means that these kind of significant legal sources may have a harmonization effect, as other countries apply similar rules and adapt to them without being bound by international law.[69]

But the CJEU also seems to consider the no-formality rule of the BC in a 'flexible' way. In *VG Bild-Kunst* the CJEU emphasized, referring to *Soulier and Doke,*[70] that in a situation where an author gives *prior, explicit and unqualified* authorization regarding the publication of their articles on the website of a newspaper, *without* making use of technological measures restricting access to that work from other websites, that author may be regarded, in essence, as having authorized the communication of that work to all Internet users. Therefore, by adopting, or by obliging licensees to employ, technological measures limiting access to their works from websites other than that on which they had authorized communication to the public of such works, the copyright holder is *to be deemed to have expressed their intention* to attach qualifications to their authorization to communicate those works to the public by means of the Internet, in order to confine the public in respect those works solely to the users of one particular website.[71] This kind of 'opt-in' solution is necessary "in order to ensure legal

65 Christopher Sprigman, 'Reform(aliz)ing Copyright', *Stanford Law Review*, Vol. 57, Issue 2, 2004, pp. 485-568.

66 Yu 2015, p. 8.

67 Sam Ricketson, 'The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles', *Columbia Journal of Law & the Arts*, Vol. 41, Issue 2, 2018, p.

68 Clark D. Asay, 'Rethinking Copyright Harmonization', *Indiana Law Journal*, Vol. 96, Issue 4, 2021, p. 1058.

69 Id.

70 Judgment of 16 November 2016, *Case C-301/15, Soulier and Doke,* ECLI:EU:C:2016:878, para. 36 and the cited case law.

71 Judgment of 9 March 2021, *Case C-392/19, VG Bild-Kunst,* ECLI:EU:C:2021:181, paras. 38 and 42.

certainty and the smooth functioning of the internet".[72] As Eleonora Rosati draws attention to the fact that the list of prohibited formalities is open-ended. And in this case the CJEU has, not unprecedentedly, chosen the path to consider this kind of 'formality' to be justified by the *objectives to be achieved*.[73]

Mihály Ficsor highlights that Article 10*bis* of the BC[74] itself is a "harmless exception to the principle of formality-free protection."[75] In addition to this particular rule of the BC, it can be concluded that the CJEU also considers certain forms of formality to be compatible with the principle of automatic protection in cases where its application appears not only harmless but also expressly necessary to achieve the objective pursued by the Convention. However, not everyone agrees with this teleological method. Maciaj Szpunar, Advocate General in *VG Bild-Kunst*, warns that

> "the solution of linking the scope of the author's exclusive rights to the application not of technological measures to restrict access but of technological measures to protect against certain practices on the internet would, in my view, push EU copyright in a dangerous direction. Such a solution would in fact mean that the application of technological protection measures would be a prerequisite for the legal protection conferred by copyright and would run counter to the principle that the protection conferred by copyright is unconditional. […] In my view, it is preferable to delimit with certainty the scope of the author's exclusive rights and to permit opt-out solutions, […] rather than to transform the copyright system, as far as online uses are concerned, into an opt-in system subject to the application of technological protection measures."[76]

Nevertheless, we can observe that the Member States of the BC and the EU consider solutions that do not conflict with the objectives of the principle of

72 *Case C-392/19, VG Bild-Kunst,* para. 46.

73 Eleonora Rosati, 'Linking and Copyright in the Shade of VG Bild-Kunst', *Common Market Law Review*, Vol. 58, Issue 6, 2021, p. 1875.

74 BC (1979), Article 10*bis* [Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]: "(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed."

75 Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO, and Glossary of Copyright and Related Rights Terms*, WIPO, Geneva, 2003, pp. 65-66.

76 Opinion of Advocate General Szpunar Delivered on 10 September 2020, *Case C-392/19, VG Bild-Kunst,* ECLI:EU:C:2020:696, paras. 130-131.

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formality-free protection to be acceptable, even if they may formally conflict with Article 2 of the BC.[77]

5. 'Suum cuique tribuere'

'May all get their due'. Hundred years ago it was a huge dilemma for Hungary whether the BC would actually be able to fulfil this wish, *i.e.* whether the often mentioned balance between the stakeholders would actually be properly achieved in the event of our accession to the Convention. Will it bring about effective regulation for the domestic creative community, the users and the public? For Hungary in the early 1900s, this dilemma was effectively a matter of weighing up the principle of formality-free protection. Originally required as a corrective rule in the BC, automatic protection has grown into a fundamental principle since then. It was to be expected from the outset that the principle would not only have its benefits, but also its side effects. But the BC rule on regular revisions provided a guarantee that side effects could be avoided by reviewing the effects from time to time.

But the last fifty years have shown that there must be another way to ensure that the Convention continues to serve its purpose in the context of today's demands. There is a need for the BC to be compatible with modern solutions. The only question is where the limits will be for solutions that are still considered 'compatible'.

Many authors, and it seems the CJEU itself, are increasingly focusing on the purpose of the no-formality protection in today's context. As we have seen, it was originally intended to prevent the use of formality as a tool, or loophole against foreign authors. Hungarian authors argued one hundred years ago that our accession is necessary in order to prevent 'being fish in troubled water'.[78] And today, we hear the same argument in favor of possibly introducing formalities.

György Boytha, in his paper on the protection of computer programs, argues that the advantage of copyright protection is that it is instantaneous and immediately available, but the disadvantage is that its existence cannot be proven *a priori*. Either automatic protection or legal certainty. "Everything is not given."[79]

Or could it be done? One hundred years of international copyright has taught us to insist on what the Berne Convention has earned for right holders, but at the same time to strive for BC-compatible, efficient and modern solutions. How far we can go in doing so will be one of the most important questions of the near future.

77 *See also* ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet, adopted by the Executive Committee on 17 June 2015.

78 Munkácsi & Kiss 2014, p. 285.

79 Boytha 2014, p. 178.