

INTELLECTUAL PROPERTY, NATIONALITY, AND NON-DISCRIMINATION

by

Dr. Silke von Lewinski
Head of Department, Max Planck Institute
(Munich, Germany)

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1. Introduction

The principle of non-discrimination is one of the most important human rights. It is rooted in the natural law philosophy. In particular, Pufendorf and Wolff combined the principle of the natural equality with the principle of natural freedom of human beings, both based on human dignity, to form the principle of equal freedom of all human beings. Wolff went on to establish a catalogue of innate human rights, beginning with the phrase “All human beings are equal by nature.”¹ This principle was then first legally recognized in the Bill of Rights of the Northern American colonial states and in the French Declarations of Human Rights and Civil Rights of 1789 and 1793. The principles of equality and non-discrimination since then have been incorporated in most national laws and in regional and international law, including in particular the Universal Declaration of Human Rights (the UDHR).

In the field of international intellectual property law, particular rules have been developed to deal with the issue of non-discrimination, known as the principle of “national treatment.” Non-discrimination in intellectual property shows a number of differences as compared to non-discrimination under human rights, in particular regarding its justification, historical background and scope. The differences lead to the question of how the two sets of non-discrimination rules relate to each other. This paper will first examine the relevance of the natural law philosophy and the international and regional law on human rights in the area of intellectual property law (Part 2). A presentation of the existing rules on national treatment in a number of international treaties relating to intellectual property rights will follow, completed by a mainly historical analysis of the origins and justifications for national treatment in intellectual property law (Part 3). In Part 4, the relationship between rules on non-discrimination in human rights law and in intellectual property law will be examined. Eventually, new developments and practices regarding national treatment which have provoked, mainly in the 1980’s, a discussion on a so-called crisis of national treatment will be mentioned in Part 5, including the respective arguments which may be brought forward in this context. Part 6 will conclude the paper.

2. Natural Law, the Human Right of Non-Discrimination and Intellectual Property Law

¹ See Wassermann (Ed.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Reihe Alternativkommentare, AK-GG-Stein, Luchterhand, 1984) Article 3 note 1.

(i) Natural Law and Intellectual Property Rights

Although the concept of natural law is not discussed in context with all kinds of intellectual property rights, the natural law quality is argued to be one of the distinctive features of the continental author's rights system (as opposed to the Anglo-American copyright system).

In the context of non-discrimination, the qualification of author's rights (*droit d'auteur*) as a natural law leads to the question why particular rules on non-discrimination, as they exist today in international copyright law, are at all necessary: the qualification as natural law implies that every human being who creates a work shall, by nature, enjoy an author's right in his work, "no matter what the nationality of the author may be nor the place where . . ." he publishes his work.² However, this does not correspond to positive law. It seems that in most national laws, the logical consequence of the natural law concept, which would be not to discriminate foreign authors, for example by the requirement of first publication in the respective country, has not been taken into account.³ As has been shown in much detail, national laws on author's rights reveal even more issues in which they are in contradiction to the thesis of a natural right.⁴ The only valid conclusion in this respect is that natural law is only one element explaining the recognition of author's rights and that both natural law and a positivist approach have influenced legislation on author's rights.⁵

(ii) Human Rights and Intellectual Property Rights

At first sight, the international recognition of the human right of non-discrimination leads to the same question as discussed in the context of the natural law quality of author's rights, namely why would there be a need to have particular rules on non-discrimination in the field of intellectual property rights, where such rights are covered by specific human rights, such as by Article 27.2 of the UDHR? What is their relation to rules on human rights? The latter question will be addressed in Part III, whereas this sub-part presents the relevant provisions of the law on human rights.

² Montagnon, *Principes de la législation des droits d'auteur* (Lyon, 1883) pp. 17-18, referring to author's rights as a "natural right." He compares the natural law situation to a positive law situation, where the legislator may restrict protection for foreigners to those who publish their works in the country governed by the respective law.

³ As an exception, Article 47 of the Luxembourg Copyright Act granting unconditional protection for foreign authors, except for the term of protection, may be mentioned. Another exception is § 121(6) of the German Copyright Act, granting unconditional moral rights protection for foreign authors.

⁴ Strowel, "Droit d'auteur and Copyright: Between History and Nature" in Sherman and Strowel, *Of Authors and Origins* (Oxford, 1994) pp. 246-247, and Strowel, *Droit d'auteur et Copyright - Divergences et Convergences* (Brussels, 1993) nos. 107 *et seq.*

⁵ Strowel in Sherman and Strowel, *op. cit.* pp. 247-248, in relation to French law. In the context of the discussion of "author's rights v. copyright" he states that American legislation, which adheres to the copyright system, has also been marked by a natural law and a positivist logic.

- (a) International Law⁶
- (aa) Non-discrimination

Nearly all international law treaties on human rights (except the European Social Charter) include special provisions on non-discrimination and add different grounds on which discrimination may not be made, such as race, color, religion, national or social origin, and the like. In addition to the provision on non-discrimination, the right of equality before the law has been granted in most treaties on human rights.

For example, some of the most important provisions on non-discrimination are Article 2 of the UDHR,⁷ Article 2.2 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), Article 2.1 of the International Covenant on Civil and Political Rights (the ICCPR), Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁸ Article 2 of the American Declaration of the Rights and Duties of Man, Article 1.1 of the American Convention on Human Rights and Article 2 of the African Charter on Human and Peoples' Rights.⁹ Equality before the law has been laid down as a human right in Article 7 of the UDHR, Articles 14.1 and 26 of the ICCPR, Article 24 of the American Convention on Human Rights, Article 2 of the American Declaration of the Rights and Duties of Man, and Article 3 of the African Charter on Human and Peoples' Rights. The provisions on non-discrimination apply to the rights recognized in the respective treaties and declarations.

- (bb) Property rights

Intellectual property rights as such are not explicitly mentioned in these treaties and declarations. However, they may be covered by provisions on the human right of property.¹⁰ Yet, the human right of property has been restricted in these provisions more than other human rights.

⁶ Although most national constitutions also contain provisions on human rights regarding non-discrimination and property, it would go beyond the scope of this paper to include the question - however interesting - of the relationship between human rights based on national law and the status of aliens under national law or under the intellectual property conventions. See, as an example, the decision of the German Constitutional Court of Jan. 23, 1990, GRUR 1990, 438 *et seq.* - "Bob Dylan", stating the compliance of the requirement of material reciprocity with the rights of property and of non-discrimination recognized under the German Constitution.

⁷ See on the UDHR, for example, Eide, Alfredsson, Melander, Rehof and Rosas (Eds.), *The Universal Declaration of Human Rights: A Commentary* (Dordrecht, 1992).

⁸ See, for example: Jacobs and White, *The European Convention on Human Right*, 2nd ed., (Oxford, 1996) and Frowein and Peukert, *Europäische Menschenrechtskonvention*, 2nd ed., (Kehl *et al.* 1996).

⁹ It is also called the "Banjul Charter on Human and Peoples' Rights". See, for example, Ankumah, *The African Commission on Human and Peoples' Rights* (Dordrecht, 1996); Shaw, *International Law* 4th ed. (Cambridge, 1997) pp. 293 *et seq.*

¹⁰ See in particular Article 17 of the UDHR, Article 1 of the first Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see Frowein and Peukert *op. cit.*, Article 1 additional protocol note 6, on the fact that also intellectual property rights are covered), Article 23 of the American Declaration on the Rights and Duties of Man, Article 21 of the American Convention on Human Rights and Article 14 of the African Charter on Human and Peoples' Rights.

(cc) Author's moral and material interests

In addition to the protection by the right of property, even more specific provisions regarding the interests of authors have been included in some of the treaties and declarations. In particular, Article 27.2 of the UDHR states: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This provision is part of a group of articles introduced by one of the cornerstones of the Declaration, namely Article 22, which reads: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."¹¹ This provision is particularly important since it is not limited, as opposed to a mere property rights protection, to the economic rights of authors and their works, but covers also their moral rights. The same is true for Article 15.1(c) of the ICESCR and Article 13.2 of the American Declaration on the Rights and Duties of Man, which lay down the right to the protection of the moral and material interests not only regarding the literary, scientific or artistic works of authors but also regarding inventions made by inventors. As opposed to authors and inventors, other rightholders of intellectual property rights, such as performing artists, are not covered by comparable, specific human rights provisions.

(dd) Minimum standard of human rights under customary international law

Apart from the international recognition of human rights in treaties, a number of human rights are also part of customary international law or general principles of international law.

However, only a certain minimum standard of human rights is thereby covered, as for example, the recognition of human beings as persons before the law, prohibition of torture, genocide and slavery and prohibition of discrimination on religious grounds or on the grounds of race. However, the human rights of property or of protection of moral and material interests in the author's work are not covered.¹²

(b) Supranational Law

The situation under supranational law - the paper will deal here only with Article 6 of the Treaty Establishing the European Community, 1992 (the EC Treaty) - is different from that of international law on human rights. First of all, the EC Treaty is not a human

¹¹ See on the relationship between Articles 22 and 27, *The International Bill of Human Rights* (United Nations, Factsheet No. 2) p. 7.

¹² See, for a number of rights considered to be covered by the minimum standard under customary international law or the general principles of international law, Klein, *Menschenrechte: Stille Revolution des Völkerrechts und Auswirkungen auf die innerstaatliche Rechtsanwendung* (Baden-Baden 1997) p. 15, with a reference to: The American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States*, Vol. 2 (1987), § 702. See also Shaw, *op. cit.* pp. 204, 213, with further references, and Kewenig, *Der Grundsatz der Nichtdiskriminierung im Völkerrecht der internationalen Handelsbeziehungen* (Frankfurt, 1972) p. 43.

rights treaty,¹³ but the basis for the European Community (the EC), which aims not only at the achievement of the internal market - the free movement of goods, persons, services and capital (Article 7(a) of the EC Treaty) - but also at an ever increasing integration within the EC. The European Union may be realized only if the discrimination on the basis of nationality within the EC is abolished.¹⁴ The position of Article 6 of the EC Treaty amongst other fundamental articles, for example those on the aims of the European Community, shows that it is of fundamental importance within the EC Treaty. It is directly applicable. It is considered as part of the general principle of non-discrimination and therefore as a fundamental right.¹⁵ While it is limited to the prohibition of discrimination on grounds of nationality, the general principle of non-discrimination has been recognized several times by the European Court of Justice; it covers the prohibition of non-discrimination on any ground.¹⁶

In 1993, the European Court of Justice had to respond, under Article 177 of the Treaty Establishing the European Economic Community, 1957 (the EEC Treaty), to questions regarding the possible discrimination of a British singer, Phil Collins, under German law regarding the status of foreign performers, on the basis of Article 7.1 of the EEC Treaty.¹⁷ The defendant had distributed in Germany a recording of a performance by Collins which had been made in the United States of America (the U.S.A.) without the consent of the singer. Collins claimed protection against the distribution of the compact discs in Germany. Under the relevant German provisions regarding foreign performers, he was, however, not eligible for protection, since the relevant international convention, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (the Rome Convention), was not applicable to the particular circumstances of the case, and since the requirements under German law regarding foreign performers (performance within Germany) were not fulfilled. However, had Collins been a German performer, he would have been eligible for protection in Germany.

The main question to be dealt with by the European Court of Justice related to the scope of application of Article 7.1 of the EEC Treaty. More precisely, the question was whether the protection of performing artists by neighboring rights was covered by the field of application of the EEC Treaty. The European Court of Justice answered this

¹³ See Shaw, *op. cit.*, p. 280 *et seq.* At the same time, fundamental rights have been recognized as general principles of Community law, both by the ECJ and Article F(2) of the Title I of the Treaty on European Union (Maastricht Treaty) 1992, see Shaw, *op. cit.* p. 280 *et seq.*

¹⁴ See von Bogdandy in Grabitz and Hilf, *Kommentar zur Europäischen Union* (Looseleaf, July 1997), Article 6 of the EC Treaty, note 1, in particular with reference to the submission of Advocate General Jacobs regarding *Phil Collins v. Imtrat Handelsgesellschaft mbH* (Case C-92/92) and *Patricia Im- und Export Verwaltungsgesellschaft mbH and Another v. EMI Electrola GmbH* (Case C-326/92), [1993] 3 C.M.L.R. 773.

¹⁵ See von Bogdandy, *op. cit.*, Article 6 of the EC Treaty note 2.

¹⁶ See, for example, ECJ case 245/81, *Edeka*, R. 1982, 2745, 2754; see also von Bogdandy, *op. cit.*, Article 6 of the EC Treaty note 6 with further references, and note 7 underlining in particular the restrictions of the application of the general principle of non-discrimination as opposed to the rule under Article 6 of the EC Treaty.

¹⁷ Article 7 of the EEC Treaty became, upon the revision by the Treaty of Maastricht, Article 6 of the EC Treaty. See the cases of *Phil Collins*, *op. cit.* and *Patricia Im- und Export*, *op. cit.*

question positively and pointed at the relevance of neighboring rights for the free movement of goods and services as well as for the competition within the EC, as it had already been established by the jurisprudence of the Court. The Court mentioned in particular Articles 30/36, 59/66 of the EEC Treaty and the provisions on competition law (Articles 85/86 of the EEC Treaty). It mentioned also the harmonization of performers' rights on the basis of Articles 57.2, 66 and 100(a) of the EEC Treaty by the EC Directive 92/100/EEC of November 19, 1992 and concluded in general that author's rights and neighboring rights, which are covered by the scope of application of the EEC Treaty mainly because of their effects on the internal market are, by necessity, also covered by the rule of non-discrimination under Article 7 of the EEC Treaty.¹⁸ There is every reason to assume that the arguments and the final result regarding industrial property rights would be the same.

The Court then stated that the discrimination on the basis of the nationality of Collins was not justified on the grounds of differences of national rules of Member States governing the matter, nor on the ground that not yet all Member States have adhered to the Rome Convention.¹⁹ The Court did not even react to the argument brought forward by the defendant, according to which the discrimination of foreign authors and neighboring rights owners has been well accepted from the beginning of history of author's rights and neighboring rights and even well justified, where the international conventions in the field of intellectual property do not apply.²⁰ Eventually, the Court decided that Collins could base his claim directly on Article 7.1 of the EEC Treaty, in order to obtain the same protection as is granted to national performers.²¹

Accordingly, the European rule on non-discrimination has overridden the long standing, well-accepted provisions of national laws of the EC Member States regarding the status of foreign rightholders in the area of intellectual property rights. This means, for example, that even those cases of discrimination, which are allowed under the existing Conventions (for example under reciprocity rules of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) may no longer be applied to the extent to which this would represent a discrimination under Article 6 of the EC Treaty. This result shows that the European Court of Justice has considered Article 6 of the EC Treaty, together with primary and secondary European law, as a means to realize an ever growing integration within the European Union.

3. The System of Non-Discrimination in International Intellectual Property Law

(i) Analysis of the System

¹⁸ See in particular §§ 22-28 of the Decision in *Phil Collins, op. cit.*

¹⁹ See § 31 of the Decision in *Phil Collins, op. cit.*

²⁰ See the development of this argument, Loewenheim, "Der Schutz ausübender Künstler aus anderen Mitgliedstaaten der Europäischen Gemeinschaft im deutschen Urheberrecht", (1993) *GRUR Int.*, p. 114 *et seq.* See the arguments in favor of the application of Article 7.1 of the EEC Treaty, Mestmäcker, "Schutz der ausübenden Künstler und EG-Diskriminierungsverbot", (1993) *GRUR Int.* p. 532 *et seq.*

²¹ See §§ 34, 35 of the Decision in *Phil Collins, op. cit.*

- (a) The Classical Treaties: Paris Convention, Berne Convention, Rome Convention²²
- (aa) The principle

As international treaties in general, the above mentioned treaties are based on the principle of formal reciprocity: Every contracting party agrees to assume the treaty obligations because the other contracting parties do the same.²³ At the same time, these treaties, such as most treaties in international intellectual property law, incorporate the principle of national treatment as opposed to the principle of material reciprocity.²⁴ Differences as regards certain aspects of the scope of application, the extent of protection granted and exceptions to national treatment under the three treaties mentioned will be analyzed.

²² Although the Rome Convention is not relevant in the context of human rights, it is included here in order to underline the importance of national treatment and the differences in its scope of application and extent in various areas of intellectual property.

²³ See on the fundamental role of reciprocity in international treaty making Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Berlin, 1972), and Verdross/Simma, *Universelles Völkerrecht* 3rd ed. (Berlin, 1984), §§ 63-67.

²⁴ See an in-depth-analysis of national treatment and its exceptions in Drexl, *Entwicklungsmöglichkeiten des Urheberrechts im Rahmen des GATT* (Munich, 1990), in particular p. 44 *et seq* regarding the Berne Convention.

(bb) Scope of application

(aaa) Paris Convention

Article 2.1 of the Paris Convention for the Protection of Industrial Property (the Paris Convention) determines the personal scope of application on the basis of nationality: Beneficiaries of protection under the Convention are nationals of any other country of the Union.²⁵ In respect of nationals of other Union countries, no requirement as to domicile or establishment in the country where protection is claimed may be imposed (Article 2.2 of the Paris Convention). Article 3 of the Convention extends national treatment to nationals of countries outside the Union, provided that they are domiciled or have a real and effective industrial establishment in the territory of one of the countries of the Union.²⁶

(bbb) Berne Convention

Under the Berne Convention, the personal scope of application has been laid down in Articles 3 and 4.²⁷ Accordingly, the beneficiaries of national treatment are either nationals of one of the countries of the Berne Union, or those who have their habitual residence in one of these countries, or those who are not nationals of one of these countries, for their works first published in one of those countries (or simultaneously in a country outside the Union and a country of the Union).²⁸ In respect of cinematographic works and works of architecture, additional possibilities to become eligible for protection are provided for under Article 4 of the Berne Convention: authors of cinematographic works are eligible if the maker of the work has his headquarters or habitual residence in one of the countries of the Union. Eligibility is also stated in respect of authors of works of architecture which are erected in a country of the Union, and for authors of other artistic works which are incorporated in a building or other structure located in a country of the Union.

In sum, the criteria of eligibility are nationality or habitual residence of the author, or different points of attachment regarding the work, namely first publication, nationality of the maker of the cinematographic work and place of a building or other structure. The possibility to obtain the protection by the Berne Convention by first publication of a work in a country of the Union represents a remarkable extension of such possibilities for authors who are not nationals of a country of the Union nor have their habitual residence

²⁵ See on the question how to determine nationality in case of legal persons, to which the Paris Convention applies, Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (Geneva, 1968), Article 2.1, note (b).

²⁶ See for an explanation of the notions “domicile” and “real and effective industrial or commercial establishment”, Bodenhausen, *op.cit.* Article 3, notes (c) and (d). Beyond national treatment, the right of priority granted to foreigners constitutes an important pillar of the Paris Convention.

²⁷ See on the criteria for eligibility for protection, for example, Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Oxford, 1987) notes 5.3 *et seq.*

²⁸ Article 3.1 and 3.2 of the Berne Convention. According to Article 3.4 of the Berne Convention, the requirement of simultaneous publication is fulfilled if publication in two or more countries occurs within 30 days of its first publication.

in such a country. This solution in particular goes far beyond that of the Paris Convention, where nationals from countries outside the Union may obtain protection only if they are domiciled or have their real and effective industrial establishment in the territory of one of the countries of the Union.

Just as the Paris Convention provides protection regarding the international context only,²⁹ national treatment (as well as minimum rights) under Article 5.1 in connection with Article 5.4 of the Berne Convention may be claimed only in countries of the Union other than the “country of origin.” The “country of origin” is defined, for published works, by first publication.³⁰ In case of unpublished works or those works first published in a country outside the Union without simultaneous publication in a country of the Union, the country of origin is determined by reference to the nationality of the author; for cinematographic works, works of architecture and other artistic works incorporated in a building or other structure, the same criteria as those which are relevant for the eligibility for protection under Article 4 of the Berne Convention have to be fulfilled in addition to nationality in order to determine the country of origin (Article 5.4(c)(i) and (ii) of the Berne Convention).

In countries other than the country of origin, full protection under the Berne Convention may be claimed, whereas in the country of origin, domestic law governs. However, an author who is not a national of the country of origin must not be discriminated against under such domestic law (Article 5.3 of the Berne Convention). Accordingly, he is entitled to the same protection as nationals, but may not benefit from the minimum rights. In fact, however, the minimum rights are usually provided for under national law anyway.³¹

(ccc) Rome Convention

Under the Rome Convention, different points of attachment for the protection of performers, phonogram producers and broadcasting organizations are provided for in Articles 4, 5 and 6 of the Rome Convention.³² For performers, nationality has not been chosen for practical reasons: very often, performing ensembles such as orchestras, bands or choirs include performers of different nationalities, which would render the application of the point of attachment of nationality too difficult.³³ Instead of the nationality, the place of the performance is a point of attachment, as are the incorporation in a phonogram which is protected under Article 5 of the Rome Convention, and the

²⁹ For example, a national of one country of the Union may claim protection only in the other countries of the Union under the Paris Convention; the same is applicable to the other criteria, such as the domicile.

³⁰ Article 5.4(a) and (b) of the Berne Convention specifies, in the case of simultaneous publication in several countries of the Union, that the country of origin is that providing for the shortest term of protection (a), and for the case of simultaneous publication in a country outside and a country of the Union, the country of the Union to be the country of origin (b).

³¹ See on the application of national treatment, for example, Ricketson, *op.cit.* notes 5.64 *et seq.*, in particular note 5.65.

³² See a commentary on these articles in Masouyé, *Guide to the Rome Convention and to the Phonograms Convention* (WIPO Publ. No. 617E, Geneva, 1981) p. 26 *et seq.*

³³ Ulmer, “Das Rom-Abkommen über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen”, (1961) *GRUR Int.*, pp. 569, 578.

broadcast of a performance which is not fixed on a phonogram if the broadcast is protected by Article 6 of the Rome Convention (Article 4 of the Rome Convention). Article 5 of the Rome Convention establishes, in respect of phonogram producers, the points of attachment of nationality,³⁴ of first fixation and first publication; publication in a Contracting State within 30 days of first publication in a non-contracting State fulfills the requirement of first publication (Article 5.2 of the Rome Convention). In respect of broadcasting organizations, the points of attachment are either the headquarters of the organization or the transmission of the broadcast from a transmitter situated in another Contracting State.³⁵

Accordingly, also the Rome Convention covers only international situations: the relevant criterium must be related to another Contracting State than that in which protection is claimed.

(cc) Extent of protection

Once a person is eligible for national treatment under one of the Conventions, the extent of protection has to be determined. Both under Article 2.1 of the Paris Convention and under Article 5.1 of the Berne Convention, national treatment covers the protection³⁶ that the respective laws - meaning those governing the relevant subject matter, such as patents - now grant or may hereafter grant to nationals. Accordingly, any future legislative amendment increasing national patent protection, author's rights protection and so on, will be covered automatically by the principle of national treatment. Consequently, the respective protection will have to be granted to those who are eligible under the Conventions.

On the contrary, the extent of protection under the principle of national treatment under the Rome Convention is rather limited. First of all, Article 2.1 of the Rome Convention defines national treatment as the treatment granted to the own nationals, if further conditions are fulfilled, such as the performance, broadcast or first fixation on the territory regarding a performance, or the first fixation or first publication on the territory regarding phonograms. Secondly, under Article 2.2 of the Rome Convention, "national treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention". This paragraph is generally understood as covering only the minimum standards of the Rome Convention, as laid down in Articles 7 (for performers), 10 (for producers of phonograms), 12 (for performers and phonogram producers), 13 (for broadcasting organizations) and 14 (term of protection regarding the three protected categories).

³⁴ For a definition of nationality in this context see Nordemann, Vinck, Hertin and Meyer, *International Copyright* (Weinheim, 1990) Article 5 of the Rome Convention, note 3.

³⁵ Article 6(1) of the Rome Convention. A Contracting State may notify that it will protect broadcasts only if both criteria are fulfilled, Article 6(2) of the Rome Convention.

³⁶ "Advantages" in the Paris Convention, meaning the non-discriminatory application of the national law as applied to nationals of the country itself, see Bodenhausen, *op. cit.*, Article 2.1, note (d), and the "rights" under the Berne Convention.

The principle of national treatment under the Paris and Berne Conventions are broader insofar as they include the entire national law (and not only the national law up to the limit of minimum rights) existing at the time of accession to the Convention and being introduced thereafter.

(dd) Exceptions to national treatment (material reciprocity)

A number of exceptions to national treatment have been provided for under the Berne Convention: The most important one is the so-called comparison of terms regarding the terms of protection (Article 7.8 of the Berne Convention). The other cases relate to the protection of models and designs under Article 2.7, phrase 2 of the Berne Convention, the resale right (Article 14^{ter}.2 of the Berne Convention), the possible retorsion against the so-called backdoor protection (Article 6 of the Berne Convention), the application in time (Article 18 of the Berne Convention) and the reservation of the ten-year-period regarding translations (Article 30.2(b), part 2 of the Berne Convention).³⁷

Under the Rome Convention, given the limited extent of national treatment, the room for exceptions to national treatment is much more limited from the outset than under the Berne Convention. Only three cases, which are connected with the application of reservations, exist: Article 16.1(a)(iii) of the Rome Convention, Article 16.1(a)(iv) of the Rome Convention and Article 16.1(b), second half phrase of the Rome Convention. The first two of them relate to the right of remuneration for secondary uses of phonograms for broadcasting and communication to the public under Article 12 of the Rome Convention and the third provision to the communication right for broadcasting organizations under Article 13(d) of the Rome Convention.³⁸

(b) Recent Treaties: TRIPS, NAFTA and the WIPO Treaties, 1996

(aa) The TRIPS-Agreement

The inclusion of intellectual property into the system of the General Agreement on Tariffs and Trade, 1947 (the GATT), which became later the World Trade Organization (the WTO), brought about the application of the general principles of GATT, i.e. in particular national treatment and most-favored-nation treatment (Article III and Article I of the GATT). However, the GATT form of national treatment was different in many ways from the national treatment under the intellectual property conventions.³⁹ In order to avoid any conflicts between different rules of national treatment, the approach of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) was to follow and integrate the national treatment rules of the relevant

³⁷ See for a detailed analysis of these cases, for example, Drexl, *op. cit.*, p. 124 *et seq.* The reasons for the rule on reciprocity will be discussed later in context with the background and intentions behind the whole system of non-discrimination in intellectual property.

³⁸ Drexl, *op. cit.*, p. 236 *et seq.*

³⁹ See for the differences Fikentscher, "GATT Principles and Intellectual Property Protection" in: Beier/Schricker (Eds.), *GATT or WIPO? - New Ways in the International Protection of Intellectual Property* (Weinheim, 1989) pp. 99, 119 *et seq.* and, on possible conflicts of GATT and the classical Conventions and their avoidance, p. 124 *et seq.*

intellectual property conventions.⁴⁰ The national treatment rules including the exceptions to them as provided under the relevant intellectual property conventions remained in the end untouched even by the most-favored nation clause in Article 4 of the TRIPS Agreement.⁴¹

The legal technique used is the following: Article 3.1, phrase 1 of the Agreement states the general principle that “each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals ...”. In order to take account of the fact that nationality is not the only criterium, or even not at all a criterium for eligibility used in the conventions in order to determine the beneficiaries of protection, Article 1.3, phrase 2 of the TRIPS Agreement defines the term “nationals” by reference to “those natural or legal persons that would meet the criteria for eligibility for protection provided for in . . .” the relevant Conventions, “. . . were all Members of the WTO members of those Conventions.” This legal technique made it not necessary to spell out the relevant rules of the Conventions (Articles 2, 3 of the Paris Convention, Articles 3, 4 of the Berne Convention and Articles 4, 5 and 6 of the Rome Convention). In addition, TRIPS took over the exceptions to national treatment already provided in the relevant Conventions, such as the cases of reciprocity under the Berne Convention.⁴²

In respect of the neighboring rights covered by the Rome Convention, the TRIPS Agreement chose the same approach of a narrow scope of national treatment, which is limited to the rights provided under the TRIPS Agreement (which are, at the same time, minimum rights).⁴³

In addition, the national treatment provisions of the Berne Convention have been included in the compliance clause of Article 9.1, phrase 1 of the TRIPS Agreement. In sum, the TRIPS Agreement has followed the national treatment provisions of the relevant intellectual property conventions.

(bb) NAFTA

The intellectual property provisions in Chapter 17 of the North American Free Trade Agreement (NAFTA) were based on a so-called “TRIPS-Plus-Approach”; hence, in principle, NAFTA followed the TRIPS Agreement in many respects and provided more protective elements. Regarding national treatment, Article 1703 of NAFTA lays down in words similar to those of Article 3.1, phrase 1 of the TRIPS Agreement, the obligation of each Party to accord “to nationals of another Party treatment no less

⁴⁰ See on this approach and on national treatment under Article 3 of the TRIPS Agreement, Gervais, *The TRIPS Agreement - Drafting History and Analysis* (London, 1998) notes 2.23 *et seq.*

⁴¹ See in particular Articles 4(b) and (c) of the TRIPS Agreement and the comments thereon in Gervais, *op. cit.*, note 2.30 *et seq.*, in particular note 2.31.

⁴² Article 3.1, phrase 1, second half sentence of the TRIPS Agreement. For the cases of reciprocity see above II.1.a)dd).

⁴³ See Article 3.1, phrase 2 of the TRIPS Agreement, by which the rule of Article 2.2 of the Rome Convention is laid down in respect of the TRIPS Agreement in even clearer terms.

favorable than that it accords to its own nationals . . . ”⁴⁴ Again, the term “nationals” has been defined by a reference to the persons “who would meet the criteria for eligibility for protection provided for in . . . ” the Paris Convention, Berne Convention, Rome Convention, Geneva Convention for the Protection of Producers of Phonograms, 1971, the UPOV Convention, 1978 and 1991 and the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989, as if each Party were a party to those Conventions, . . . “In respect of intellectual property rights which are not subject of these Conventions, a further definition of “nationals” referring mainly to citizenship or permanent residence has been given (Article 1721.2 of the NAFTA).

(cc) The WIPO Treaties, 1996

Also the WIPO Copyright Treaty, 1996 (the WCT) took over the rules on national treatment of the Berne Convention. A special reason to do so was the fact that the WCT has been qualified as a special agreement within the meaning of Article 20 of the Berne Convention, which requires that the special agreement does not contain any provision contrary to the Berne Convention. Accordingly, Article 3 of the WCT obliges Contracting Parties to apply *mutatis mutandis* the relevant provisions of the Berne Convention dealing with national treatment (Articles 2 - 6 of the Berne Convention). An Agreed Statement explains how to understand certain notions of Articles 2 - 6 of the Berne Convention in applying them to the WCT.

Article 4 of the WIPO Performances and Phonograms Treaty, 1996 (the WPPT) again follows the basic approaches of the Rome Convention and the TRIPS Agreement. Regarding the eligibility for protection, it also, like TRIPS, uses the word “nationals” (of other Contracting Parties) and defines this word by a reference to the criteria for eligibility for protection provided under the Rome Convention, “. . . were all the Contracting Parties to this Treaty Contracting States of that Convention” (Article 3.2, phrase 1 of the WPPT). Accordingly, Articles 4 and 5 of the Rome Convention have to be applied as criteria for eligibility for protection under the WPPT.

Regarding the scope of national treatment, Article 4.1 of the WPPT follows in principle the narrow approach of the Rome Convention and the TRIPS Agreement. It is even clearer than the Rome Convention, since it is limited explicitly to the “exclusive rights specifically granted in this Treaty” (as opposed to the “protection specifically guaranteed and their limitations specifically provided for” in the Rome Convention) and covers, as the only remuneration right, the right for secondary uses under Article 15 of the WPPT. Accordingly, any other remuneration rights, such as those for private copying, are clearly not covered by the national treatment provision of Article 4 of the WPPT. The only provision of material reciprocity is Article 4.2 of the WPPT which corresponds largely to Article 16.1(a)(iv) of the Rome Convention. It allows the application of material reciprocity in a case where another Contracting Party makes use

⁴⁴ Although no explicit exceptions to national treatment have been laid down, it has been recognized that exceptions under the WIPO Conventions will be allowed also in the framework of NAFTA. See Government of Canada (Ed.), *NAFTA, What's it all about* (Ottawa, 1993.)

of the reservations permitted by Article 15.3 of the WPPT in relation to the remuneration right for secondary uses of phonograms.

In sum, the more recent treaties dealing with intellectual property rights - and even those which are larger trade treaties - have continued to not only make national treatment one of their main principles, but also to rely on the provisions of the Conventions as far as they relate to the criteria for eligibility for protection, to the scope of national treatment and the exceptions thereto.

(ii) Justifications For, and Intentions Behind, National Treatment in Intellectual Property law⁴⁵

(a) Protection of Foreign Works

One of the best ways to explore the justifications for, and intentions behind, national treatment is to look at its origins, at a time when there was not even any international intellectual property law. The national law provisions, which existed in the 19th century irrespective of any bilateral or even multilateral conventions, had developed on a territorial basis. Therefore, intellectual property rights could come into being and be protected in a particular country only within the territory of the country. As a rule, beneficiaries of the national laws were only nationals and/or sometimes also those who first published their works in this country. The arguments brought forward in favor or against national treatment were, at a first stage, related to the question whether foreigners should be protected at all rather than to the question whether they should be protected on the basis of national treatment versus material reciprocity.

(aa) Philosophical and ethical justifications

This situation was not satisfying for those authors whose works were exploited beyond the national borders. One of the reasons which led to the principle of national treatment was the idea, derived from natural law or at least from general feelings of unfairness, that authors by nature should be able to benefit everywhere from their natural property and therefore should be recognized an author's right also in foreign countries.⁴⁶ Indeed, the natural law philosophy was at the basis of the school of thought in favor of a universal codification of copyright law rather than a system of different national laws combined with national treatment. The idea of adopting uniform, general laws which would apply to both foreigners and nationals alike showed, however, to be an unrealistic ideal. The only solution which proved to be possible, namely to keep different national laws and to assimilate foreigners to nationals on the basis of national treatment, therefore

⁴⁵ Examples in this sub-part will be taken only from the area of authors' rights.

⁴⁶ See, for example, already Pütter, *Der Büchernachdruck nach ächten Grundsätzen des Rechts* (Göttingen, 1747) p. 3, note 7, stating that, from a point of view of ethics ('morals') it would not matter whether a work of a domestic or a foreign author is exploited (translation by the author). See also Ricketson, *op. cit.*, note 1.22 and note 2.7, referring to the resolutions made by the Founding Congress of ALAI in 1878, according to which in particular: "The right of the author in his work constitutes, not a concession by the law, but one of the forms of property which the legislature must protect"; this makes allusion to the natural law philosophy. Another resolution expressed the principle of national treatment.

was considered by the “universalists” as a necessary compromise, only a transitional solution towards the uniform laws.⁴⁷ In other words, the ultimate aim was not national treatment, but a uniform protection in all participating countries applicable to foreigners and nationals alike.

(bb) Cultural justifications

Apart from these philosophical or ethical justifications, also cultural and economic reasons were given. The cultural argument was that an author who could not benefit from the exploitation of his work abroad would have less incentives to create new works so that the cultural diversity both in his country and abroad would decline.⁴⁸

Often, economic reasons were behind cultural arguments, as in the following case: in a conflict of interests between England and the U.S.A., the American reprinters argued against the protection of English authors and publishers in the U.S.A. by pointing at the readers’ interests: if the English-American Copyright Agreement would come into force, American readers would have to pay more than double the price for the reprinted English books. However, the supply of broad ranges of consumers with cheap books would be endangered.⁴⁹ This is an argument, which today would be used in many developing countries.⁵⁰ However, a different argument, namely in favor of the protection of English works in the U.S.A. was brought forward by American authors. The free reprints of English books would make the publication of American works more difficult. Only the protection of foreign works in the U.S.A. would be able to give more room to American works and thereby to promote national literature.⁵¹ Again, such arguments may be applied today towards developing countries. In the U.S.A., it took nevertheless about another 50 years to conclude a bilateral copyright agreement with England. It was subject to reciprocity and to the “manufacturing clause” protecting the interests of the American printing industry.⁵²

(cc) Economic reasons

However, it seems that economic reasons, particularly the prevention of international piracy in the 19th century, were the main reasons for the development of international copyright protection. The different arguments depended on the situation of the national industry. One should take into account that publishers and printers often had a more important role to play than authors, when political decisions had to be taken. For example, Saxony, which had a strong printing industry dealing with original prints rather than reprints, wanted to protect and reinforce its printing industry by offering protection against unauthorized reprints even for foreign publishers, provided that those would have

⁴⁷ Röthlisberger, *Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst* (Bern, 1906) p.

4. On the universalist approach, see also Ricketson, *op. cit.*, notes 2.2-2.4.

⁴⁸ Ricketson, *op. cit.* note 1.22.

⁴⁹ See Boytha, *Fragen der Entstehung des internationalen Urheberrechts*, in: Dittrich (ed.), *Woher kommt das Urheberrecht und wohin geht es?* (Vienna, 1988) p. 189 *et seq.*

⁵⁰ See also Ricketson, *op. cit.* note 1.22.

⁵¹ See Boytha, *op. cit.* p. 190.

⁵² See Boytha, *op. cit.* p. 191.

their books printed in Saxony and that their country would provide reciprocal protection for printed products from Saxony. This decision to grant protection to foreigners at all (even if yet on a reciprocal basis and under the supplementary condition mentioned above) had the intended effect of strengthening the printing industry in the whole book market in Saxony, which in fact resulted even in the fading of the Frankfurt Book Fair, after the Leipzig Book Fair had developed into the leading marketplace for books.⁵³ Nevertheless, many countries rather had a strong interest in developing their reprinting industry which produced cheap reprints of works from abroad. They had an immediate interest in a blossoming “piracy industry” (as we would call it today, although the reprinting was legal).

The conflict between a country which had a strong interest in the protection of its own works abroad (France) and an adjacent country in which the printing industry had specialized in reprinting French works and in printing those French original works which had been forbidden by censorship (Belgium), was solved in the following way: France employed its general economic superiority by arranging the following package deal: France was ready to sign a general trade agreement, which would bring about advantages for Belgium in other areas of trade than in intellectual property only under the condition that Belgium would agree to reciprocal protection of French literary property. The interests of other Belgian industries prevailed over those of the Belgian reprinting industry. The agreement was signed.⁵⁴ Comparable bilateral agreements were concluded with other countries such as Austria, which was not interested in any copyright agreement with France, since Austrian authors were hardly printed in France, whereas French works were distributed broadly in Austria. Amongst other countries which were forced by the economic power of France to conclude an agreement about authors’ rights was Switzerland which did not even have a Federal Copyright Act until 1883. The agreement contained 34 articles on the protection of French works in Switzerland and 16 articles on the protection of Swiss works in France, while Swiss authors did not enjoy any protection for their works in Switzerland.⁵⁵ In these cases, accordingly, the protection of foreigners was imposed by a country which had an economic interest in the protection of its own authors and publishers abroad, upon those countries which had, from an economic point of view, no interest therein because their industries would have had to pay licensing fees for the exploitation of French works.⁵⁶

(b) National Treatment versus Material Reciprocity

Regarding more specifically the background of national treatment versus material reciprocity, one may state from the very the beginning of the bilateral agreements on, which were not without any influence on the later development of the Berne Convention, that material reciprocity was accepted in many instances, in particular regarding the

⁵³ See on this example of Saxony Boytha, *op. cit.* p. 181, 183 *et seq.*

⁵⁴ See Boytha, *op. cit.* p. 186 *et seq.*

⁵⁵ See Boytha, *op. cit.* p. 187.

⁵⁶ See for a comparable situation of today von Lewinski, “Copyright in modern international trade law”, (1994) 161 *RIDA*, pp. 5, 48 *et seq.*

duration of protection.⁵⁷ However, the Berne Union adopted a broad principle of national treatment combined with a number of minimum standards to be granted irrespectively of national law provisions. Material reciprocity was only admitted in cases where the legal situation in the Member States was quite diverse and the application of national treatment would have resulted in strong imbalances between countries. This is particularly true for the comparison of terms under Article 7.8 of the Berne Convention; the German proposal at the Berlin Conference of 1908, which would have brought about the application of national treatment instead of reciprocity, was strongly criticized as being intolerable.⁵⁸ The same is true for the reciprocity regarding works of applied art,⁵⁹ the resale right⁶⁰ and, in a similar way, Article 30.2(b), part 2⁶¹ and Article 6.1 of the Berne Convention.⁶²

Material reciprocity has always been looked upon as a means to incite countries, which do not provide for a certain, higher level of protection, to increase their level of protection⁶³ in cases where the diversity of national laws is considerably high. This positive function of reciprocity has been employed also more recently, in the cases of the Semi-Conductor Chip Protection Act in the U.S.A.⁶⁴ and the EC Database Directive, 1996,⁶⁵ both with concrete consequences: other countries have adopted protection for semi-conductor chips in order to fulfill the reciprocity requirement; in the case of the *sui generis* database protection, in particular the U.S.A. intends to create a database protection which would fulfill the EC reciprocity requirement. Even the harmonization of the general term of protection of author's rights in the European Union at 70 years *p.m.a.* in 1993⁶⁶ and the decision to apply the comparison of terms under Article 7.8 of the Berne Convention throughout the European Union has resulted in the U.S.A. in several bills and finally in a Copyright Amendment Act which prolongs the duration under the Copyright Act of the U.S.A. as a rule to 70 years *p.m.a.*⁶⁷

⁵⁷ See Boytha, *op. cit.* p. 193 *et seq.*, pointing in particular at the cases of differences in the level of protection in several countries.

⁵⁸ See Ricketson, *op. cit.* note 7.9 and, on the aspect of imbalances between different laws, note 7.8.

⁵⁹ See Ricketson, *op. cit.* in particular notes 6.45 *et seq.*, 6.51.

⁶⁰ See in particular, Ricketson, *op. cit.* note 8.54.

⁶¹ Reciprocity as an answer to the possible imbalance caused by the use of a reservation.

⁶² In this case, the imbalance would consist in the unilateral enjoyment of protection in the Berne Union through backdoor protection by a country which itself does not protect Berne Union works.

⁶³ See for example Loewenheim, *op. cit.* p. 114 *et seq.*; German Constitutional Court in the case *Bob Dylan*, *op. cit.* p. 442; see in general on the positive function of reciprocity also Verdross/Simma, *op. cit.* §§ 63, 65.

⁶⁴ See Dreier, "National Treatment, Reciprocity and Retorsion - The Case of Computer Programs and Integrated Circuits", in: Beier and Schricker (Eds.), *op. cit.* p. 63, 70 *et seq.* and Joos and Moufang, "Report on the Second Ringberg-Symposium", in Beier and Schricker (Eds.), *op. cit.* p. 1, 16 *et seq.*, 20.

⁶⁵ See Article 11 of the EC Directive 96/6, O.J. EC no. L 77/20 of March 27, 1996, and von Lewinski, "Kommentar zur Datenbank-Richtlinie, Article 11", in Walter and von Lewinski, Dreier, Blocher and Dillenz, *Europäisches Urheberrecht* (Wien and New York, 1999.)

⁶⁶ Council Directive 93/98/EEC of October 29, 1993 harmonizing the term of protection of copyright and certain related rights, O.J. EC no. L 290/9 of November 24, 1993, Article 1(1) and, regarding the obligatory application of reciprocity according to Article 7(8) of the Berne Convention, Article 7(1) of the Directive.

⁶⁷ See Pub.L. Nr. 105-298, Title I of S. 505, amending in particular Secs. 302(a), (b) of the Copyright Act of the United States of America. Most copyright terms of protection have been prolonged for an additional 20 years.

4. Relationship Between Rules on Non-Discrimination under Human Rights and under Intellectual Property Law

Since intellectual property rights are covered by human rights treaties and declarations, the relationship between the non-discrimination rules under international law of human rights, on the one hand, and under international law regarding intellectual property rights, on the other hand, will be analyzed. In particular, the following question arises: where two countries are both members of a relevant human rights treaty and a relevant intellectual property law treaty, would they be obliged, on the basis of the human rights treaty, to grant non-discriminatory intellectual property protection, even if such obligation does not exist, in a particular case, under the intellectual property treaty? For example, would the non-discrimination rule under the law of human rights prevent a Member Country of the Berne Convention from relying on the permitted exceptions from national treatment, such as the comparison of terms under Article 7.8 of the Berne Convention? Would it prevent such country from restricting the protection to those authors who fulfill the criteria of eligibility under the Berne Convention?⁶⁸

It is remarkable that such questions have hardly been dealt with in legal literature or by courts. Extensive writing exists, on the one hand, on non-discrimination under human rights and, on the other hand, on national treatment under intellectual property treaties; as far as experts in authors' rights have written about the human rights context of authors' rights, they usually refer only to the protection of authors' rights as such, for example under Article 27 of the UDHR, rather than to non-discrimination in this context.⁶⁹ An exception to this lack of writings is a treatise by Mastroianni which, in part, deals with the relationship of authors' rights and human rights.⁷⁰

Given this situation, particular thanks should be expressed to the World Intellectual Property Organization (WIPO) for drawing attention to this interesting problem, even if the full discussion of this problem might take much more space than that of this paper.

Before the relationship between non-discrimination rules under human rights and under intellectual property law will be looked upon, one will first have to address the question of whether there is an obligation under international law of human rights to grant existing domestic protection also to foreign authors without discrimination, and if so, what would be the contents of such obligation.

⁶⁸ The same questions arise in respect of a country which is not bound by an intellectual property treaty and which grants, under its domestic law, protection to foreign authors only under specified conditions, such as material reciprocity or the fulfillment of certain criteria of eligibility.

⁶⁹ See, as one of the latest collections, the articles in UNESCO *Copyright Bulletin* Vol. XXXII, No. 3 (1998) on the Fiftieth Anniversary of the UDHR, by Brulé, Dietz and Françon, Correa, Bécourt, Blokh and Kéréver; Vivant, "Droit d'auteur - droit de l'homme?" (1997) 174 *RIDA* p. 61.

⁷⁰ Mastroianni, *Diritto internazionale e diritto d'autore* (Milano, 1997), in particular pp. 21 *et seq*, arguing in favor of the prevailing of human rights.

To begin with, under most human rights treaties, the provisions on non-discrimination apply only to the rights recognized in the respective treaties. They are considered to be accessory rights. Only Article 26 of the ICCPR has been considered to lay down an independent right against discrimination, which therefore might apply to intellectual property.⁷¹ Apart from this provision, the accessory non-discrimination rules in particular of Article 2 of the UDHR and Article 2.2 of the ICESCR, in connection with Article 27.2 of the UDHR and Article 15.1(c) of the ICESCR respectively, may have an effect on non-discrimination in the field of intellectual property.

However, a particular question arises in respect of the UDHR. It has been pointed out that, under international law, it does not represent a binding instrument, because the General Assembly, which adopted the Declaration, was not the competent body to adopt legal norms for its members; what it adopted was rather a Resolution (No. 217 III). In addition, the Declaration itself, in the last paragraph of the Preamble, considers itself only “a common standard of achievement representing a program rather than binding law.”⁷² However, given a number of developments, in particular the adoption of the Final Act of the International Conference on Human Rights of May 13, 1968 (Teheran), confirmed by the resolution of the General Assembly 2442 (XXIII) of December 19, 1968, and the adoption of the Final Act of the Vienna Conference on Human Rights of 1993, the basic human rights laid down in the UDHR may be considered to be legally binding under international law, irrespective of treaty obligations.⁷³ Nevertheless, the legal quality of the Declaration remains controversial. Non-discrimination in respect of authors' rights so far has not been understood to constitute binding international law.⁷⁴

Even the human rights laid down in the ICESCR in the beginning were considered only expressions of a program rather than concrete claims; in particular, reference was made to Article 2.1 of the Covenant which lays down the obligation of parties to the Covenant merely “to take steps, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . . ”⁷⁵ However, to date, it is generally recognized that the two Covenants contain legal rights and impose on the parties legal obligations. Problems are discussed not in respect of their validity but rather of their applicability.⁷⁶

⁷¹ This remains controversial. See Nowak, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll* (Kehl *et al.*, 1989), notes 12 and 13 to Article 26. See, however, Tomuschat, “Equality and Non-Discrimination under the International Covenant on Civil and Political Rights” in von Münch (Ed.), *Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981*, (Berlin and New York, 1983) p. 691 *et seq.*, 710, who considers Article 26 of the International Covenant on Civil and Political Rights as a procedural safeguard rather than as a general non-discrimination clause.

⁷² See, for example, Verdross and Simma, *op. cit.* § 1234 and § 634; Klein, *op. cit.* p. 14; Tretter, “Urheberrecht und Grundrechte”, in Dittrich (Ed.), *Die Notwendigkeit des Urheberrechtsschutzes im Lichte seiner Geschichte* (Vienna, 1991) p. 105. See on this question also Shaw, *International Law*, 4th ed., (Cambridge, 1997) p. 207 *et seq.*

⁷³ See in particular Verdross and Simma, *op. cit.* § 1234, with further references.

⁷⁴ See above, I.2.(a)(dd).

⁷⁵ See also Verdross and Simma, *op. cit.* § 1247.

⁷⁶ See Simma, “Die Internationale Kontrolle des UN-Paktes über wirtschaftliche, soziale und kulturelle Rechte: Neue Entwicklungen”, in Beyerlin, Bothe, Hoffman and Petersmann (Eds.), *Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt* (Berlin *et al.*, 1995) p. 579 *et seq.*, in particular p.

Since the above provisions lay down obligations under international law, their contents should be ascertained. The protection under these provisions is limited to natural persons, who are authors of works or inventors⁷⁷ and, accordingly, does not cover any owners of neighboring rights, such as performing artists, phonogram producers, film producers, broadcasting organizations and the like.

These provisions on non-discrimination explicitly only mention “national origin” as a relevant ground for which discrimination must not occur. Although different opinions exist on the meaning of the notion “national origin”, the majority of commentators, partly based on an interpretation expressed by countries which are parties to the relevant treaties, exclude “nationality” from the notion “national origin”, stating that the non-discrimination rule did not envisage to oblige countries to automatically grant to foreigners the same rights as to their own nationals. Rather, “national origin” relates to ethnic or racial origin of an individual person.⁷⁸ Accordingly, the “discrimination” permitted under the Paris and Berne Conventions towards non-Member Countries, or under domestic law on the grounds of nationality is compatible with the non-discrimination rules under the above human rights provisions.⁷⁹

The relevant human rights provisions also prohibit discrimination on the grounds of “other status”. The “status” refers to a given position of a person mainly on a social scale; this term was introduced in the context of a discussion on the criteria “birth” and “property.”⁸⁰ The habitual residence and the first publication in a relevant country, both being additional criteria for eligibility under the Berne Convention and, irrespective of treaty law, under many domestic copyright laws, may not be considered to represent such “status.” Therefore, also the “discrimination” permitted under the Berne Convention on the grounds of habitual residence and first publication is compatible with the relevant non-discrimination rules under human rights law.

However, even if nationality were considered to be such status for which discrimination must not occur, the non-discrimination rules are construed as prohibiting

589, referring to statements of the Committee on Treaty Violations. See also Scheinin, “Economic and Social Rights as Legal Rights”, in Eide, Krause and Rosas (Eds.), *Economic, Social and Cultural Rights* (Dordrecht *et al.*, 1995) p. 41.

⁷⁷ There is a controversy regarding inventors, see Béguin, “La Déclaration Universelle des Droits de l'Homme (du 10 décembre 1948) et la protection de la propriété intellectuelle” (1963) *Le Droit d'Auteur*, pp. 317, 319.

⁷⁸ See, e.g., regarding Article 2.2 of the International Covenant on Economic, Social and Cultural Rights, Craven, *The International Covenant on Economic, Social and Cultural Rights* (Oxford, 1995), p. 172 *et seq*; on Article 26 of the International Covenant on Civil and Political Rights, Nowak, *op. cit.* note 33 on Article 26; see, however, also Mastroianni, *op. cit.* p. 42 *et seq* who does not consider this narrow interpretation to be convincing.

⁷⁹ See however note 83 for a further specification.

⁸⁰ See Eide, Alfredsson, Melander, Rehof and Rosas (Eds.), *op.cit.* (note 7) p. 61 *et seq.*

only unjustified differential treatment, as opposed to differential treatment based on objective and reasonable considerations.⁸¹

Regarding the criteria for eligibility under the Berne Convention, a justification for different treatment of those who do not fulfil the criteria for eligibility may be seen in the incitement of other countries to provide for a similarly strong protection of authors. History has shown that the establishment of an “exclusive club” in which protection is granted only to those which fulfil the relevant criteria for eligibility has incited other countries to join their international club, thereby accepting, at the same time, a certain minimum standard of protection which itself promotes authors' rights protection on an international level. Most recently, these dynamics have been experienced again in the application of material reciprocity.⁸²

According to this interpretation, different treatment on the basis of the criteria laid down in the Paris and Berne Conventions, as well as the cases of material reciprocity permitted therein, do not contravene any obligation under the above-mentioned human rights law. This result is confirmed by the following arguments. First of all, the non-discrimination rules of the UDHR and the ICESCR should be read in context with the rights to protect the moral and material interests of authors (Articles 27.2 and 15.1(c) respectively) and in view of the object and purpose of the latter provisions: if one accepts the aim of these provisions as assuring the best development of authors' and inventors' protection, one will have to take into account the experience of history, which shows that the granting of full national treatment even beyond such “exclusive clubs” as the Paris and Berne Conventions and beyond specified cases of material reciprocity would not lead to the envisaged development and enhancement of authors' and inventors' rights. This is all the more true since the human rights conventions do not include any specific minimum standard of protection which would have to be granted to foreigners or other “discriminated” persons. In other words, the aim of Article 27.2 of the UDHR and Article 15.1 (c) of the ICESCR may be achieved quicker and better by the establishment of the requirements as they are laid down in the Paris and Berne Conventions than by any unrestricted non-differential treatment.

An additional confirmation of this interpretation may be drawn from the state practice exercised after the coming into force of the relevant human rights treaties: for example, the criteria for eligibility and the cases of material reciprocity of the Berne Convention have been confirmed at the Revision Conference of 1971, at the Diplomatic Conference of WIPO in 1996 where the Berne approach has been taken over into the WCT and also regarding the Paris Convention, by the TRIPS Agreement which again took over the traditional systems in this respect. Most lately even, the end of negotiations on a Multilateral Agreement on Investments in the framework of Organization for Economic Cooperation and Development (the OECD), which might have brought about the full application of national treatment in the area of intellectual property even beyond

⁸¹ See, for example, Craven, *op. cit.* p. 172-174 with further references, and Nowak, *op. cit.* notes 23, 24, to Article 26 and notes 33, 34, to Article 2, also mentioning the “comparable situation” and the proportionality as additional requirements for permitted differential treatment.

⁸² See on this above, at part II.2.(b).

the conditions of the existing treaties,⁸³ indicates that countries are not willing to go beyond the established systems in this respect. Even the most-favored-nation clause in Article 4 of the TRIPS Agreement, which might have “endangered” this established system, safeguards the traditional rules (see Article 4(b)-(d) of the TRIPS Agreement).⁸⁴ These examples of relevant state practice reflect the corresponding *opinio iuris* that the established system continues to be relevant law.

Accordingly, one cannot draw the conclusion from international human rights provisions, that foreigners, in respect of intellectual property rights, would have to be treated entirely in the same way as nationals; the special rules which have been developed in the context of international intellectual property treaties some of which allow some kind of differential treatment between foreigners and nationals or on other grounds prevail.

5. The so-called Crisis of National Treatment⁸⁵

In more recent times, particularly in the 1980's, discussions about a crisis of national treatment have emerged. Several developments were at the beginning of such discussions. A number of provisions under national law or activities in context with the exercise of rights seemed to envisage the avoidance of any obligation to pay to foreign right owners a remuneration under the principle of national treatment. Such provisions and activities concerned mainly statutory rights of remuneration, be it for public lending or for private copying. The case of public lending is different from that of private copying since its substantive law provisions in some cases are distinct from main characteristics of author's rights so that, in combination with a number of specific other

⁸³ See on the MAI Project: Ercolani, “The OECD Multilateral Agreement on Investment (MAI) Project: The Possible Consequences of Including Intellectual Property”, (1998) Ent.L.R. p. 125 and, on the end of negotiations, Stern, “L'Accord multilatéral sur les investissements officiellement enterré”, December 6/7, 1998, *Le Monde* p.4.

⁸⁴ Of course, the latter argument can apply only as far as all Member Countries of the relevant human rights treaties are, at the same time, Member Countries of the relevant intellectual property treaties; however, even if this is not the case, the same argument may be supported by the fact that no country seems to have objected to this practice (argument of tacit consent, “acquiescence”). If one does not follow these steps of reasoning and rather assumes that the “discrimination” allowed under the Berne Convention (or under similar domestic law) contradicts the non-discrimination rules under human rights law, one would have to examine whether a conflict of the norms of the relevant human rights treaties and the relevant intellectual property rights treaties exists. This has been denied by Mastroianni, *op. cit.* p. 99, since the Berne Convention leaves open the possibility to grant protection even beyond the criteria of the Berne Convention. If, however, the Berne Convention is considered as a system which aims at securing for Member Countries the possibility to restrict protection to eligible persons and to apply, in specified cases, material reciprocity, a conflict of norms is considered to exist. In this case, further analysis will lead in particular to the hierarchy of such norms, including the rule of *lex specialis* which is likely to apply in favor of the Berne Convention, given in particular the lack of *ius cogens* in this case.

⁸⁵ Given the topic of this contribution and the result of Part 4, the so-called crisis of national treatment will not be dealt with in depth at this place. See, for an aspect of this crisis, for example, Melichar, “Deductions Made by Collecting Societies for Social and Cultural Purposes in the Light of International Copyright Law”, (1991) *IIC* p. 47.

reasons, one may argue that the statutory remuneration right for public lending is not covered by the principle of national treatment under the Berne Convention.⁸⁶

The problems in context with the remuneration right for private copying are related to the introduction, in a number of countries, of legal provisions prescribing the deduction of considerable percentages from the income for private copying for social or cultural purposes in favor of domestic authors only. The economic background in these countries is usually that of net-importers: often much more than 50 % out of the entire remuneration would have to be paid to foreign countries - including in particular to those which themselves do not provide for such a remuneration right. Under international law, it is hardly possible to deny the full coverage of the remuneration right for private copying by national treatment. *De facto*, however, such an economic imbalance may, in the long run, incite the respective country not only to try to avoid, at least in part, the application of national treatment, but also to refrain from the introduction of a new right, such as a remuneration right for private copying, if it has not yet done so. Even the abolition of such a right and, possibly, the introduction of a tax or fund system or any other solution which clearly would not fall under national treatment might be possible, *de facto* consequences of an unrestricted obligation to apply national treatment in such cases.⁸⁷ Other ways to diminish the economic imbalance which have been applied in particular in the field of broadcasting, include the recommendation or even prescription by public authorities of quota referring to the minimum national content of programs. Another way to reduce such imbalances in certain cases, in particular regarding film distribution, might be the application of strict antitrust laws which might result in more choices for cinema theatres and others.

6. Conclusions

The principle of non-discrimination is one of the basic human rights. At the same time, it has become, as the principle of national treatment, the corner stone of the international treaties in the field of intellectual property. The intellectual property treaties are far more specific regarding the beneficiaries of national treatment and its extent; in particular, specific exceptions from national treatment have been provided. This system has contributed to the promotion and development of intellectual property rights in the world. There is evidence from history that such a result could not have been reached on the basis of a broad, international obligation to grant protection for example of authors' rights under domestic law also to any foreign authors.

Regarding the question whether or not the relevant international law of human rights establishes such an obligation, doubts prevail. A number of different reasons have been established to deny such an obligation. Accordingly, the specific provisions on

⁸⁶ See in particular von Lewinski, "National treatment, Reciprocity and Retorsion - The Case of Public Lending Right", in Beier and Schriker (Eds.), *op. cit.* p. 53 and 54. One may see a confirmation thereof in the views expressed by Member States at sessions of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention.

⁸⁷ See above, Part 3 (ii)(b) on the fact that major diversities in the protection of authors' rights lead to specific exceptions from national treatment.

national treatment and exceptions thereto, in particular under the Berne Convention, may not be considered to have been overruled by any broader obligation under human rights law.

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