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Copyright in Foreign Works: Canada's International Obligations

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COPYRIGHT IN FOREIGN WORKS: CANADA'S INTERNATIONAL OBLIGATIONS

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Toronto

It is anticipated that proposals for a complete overhaul of the copyright laws will be presented to the Canadian Parliament in the very near future. The new legislation will likely extend protection to works and grant rights beyond those existing under the current Copyright Act of 1924.

This study examines the extent to which any new legislation must grant national treatment to foreign works, particularly technologies that have developed and rights that have been proposed since the 1924 Act. The focus is on Canada's obligations under the Berne Convention for the Protection of Literary and Artistic Works and under the Universal Copyright Convention in the light of their history and purposes and in the light of the various conflicting interpretations of the treaties that have been offered.

The study concludes that current proposals not to extend national treatment in respect of certain new categories of works and rights are for the most part consistent with Canada's international obligations.

On s'attend à la présentation très prochaine au Parlement canadien du projet de refonte totale des lois régissant le droit d'auteur. La nouvelle législation protégera probablement des œuvres nouvelles et accordera des droits qui n'existaient pas dans la loi de 1924 sur le droit d'auteur qui est actuellement en vigueur.

L'auteur examine dans cet article jusqu'à quel point la nouvelle législation devrait appliquer aux œuvres étrangères le traitement qu'elle accorde aux œuvres nationales en ce qui concerne en particulier les technologies qui se sont

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The views expressed here are of course mine and do not necessarily reflect those of any of the above persons.
Reform of Canada's antiquated Copyright Act of 1924\(^1\) is now on the horizon. Some two decades of rumination, reporting and studying culminated in a series of hearings before a Parliamentary Subcommittee, which issued a report in October 1985 bearing the catchy title, A Charter of Rights for Creators (henceforth "the 1985 Report").\(^2\)

The recommendations, most of which the current Government has accepted as the policy it proposes to implement in a new Copyright Bill,\(^3\) are extremely wide-ranging. New classes of works and new sorts of rights are proposed in an attempt to ensure that media creators and entrepreneurs will benefit economically from the many ways in which works may now be created and used. Hardly any commercial or cultural endeavour will be untouched by these changes.

The 1985 Report recognized that Canada was under certain international law constraints when enacting a new copyright law and sought to tailor its recommendations accordingly. Canada is a member of the two major international Copyright Conventions, the 1886 Berne Convention on Literary and Artistic Property ("BC") and the 1952 Universal Copyright Convention ("UCC"). While not an adherent to the latest 1971 texts of either of these Conventions, Canada has ratified the 1928 Rome text of the Revised Berne Convention ("RBC") and the original 1952 text of the UCC. The purpose of both Conventions is to make it easier for the subjects of member states to assert their copyrights internationally. Member states must comply with two basic obligations. First, they must grant copyright protection and certain minimum rights in respect of certain classes of works in favour of nationals of other Convention states.

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\(^1\) R.S.C. 1970, c. C-30 (henceforth "Copyright Act" or "the Act"). The 1921 Act, as amended in 1923, is based on the Copyright Act 1911 (U.K.). It came into force on January 1, 1924 and has been subject to only minor amendment since.


\(^3\) Government of Canada, Government Response to the Report of the Sub-Committee on the Revision of Copyright (February, 1986).
Secondly, in light of the difficulty of reaching international agreement on these minima, states must observe the principle of national treatment, "the complete assimilation of foreigners to nationals, without condition of reciprocity".4

The principle of assimilation is potentially extremely valuable for Canadian copyright owners. A Canadian national who creates or publishes a work in Canada or any other Convention state is assured of the same copyright protection in every other Convention state as that state affords to its own nationals for that sort of work. Apart from minor exceptions, no state will enquire what protection the work enjoys in Canada or will require any formalities other than those imposed on its own nationals; indeed under the RBC no formalities of any kind are permitted as a condition of copyright protection. This situation is probably the least burdensome form of international copyright protection short of the impossible goal of a uniform world-wide copyright law.

At the same time, the principle of assimilation is potentially extremely onerous for a net importer of copyright material such as Canada. Foreign nationals of Convention states may create and publish their works first in another Convention state and will automatically have copyright protection in Canada just as if they were Canadian nationals creating or first publishing their work here.5 It may be in Canada's interest to benefit its authors and media entrepreneurs by providing a high level of protection to a wide range of works, but the greatest dollar beneficiaries will end up being foreigners if Canada is bound internationally to embrace the same range of works within its copyright law and to extend the same high level of protection to foreign works. It was no coincidence that a large proportion of the submissions made to the Parliamentary Subcommittee that eventually issued the 1985 Report came from organizations that, however much they sought to wrap themselves in the Canadian flag, ultimately represented the interests of multinational and other foreign copyright interests. It was equally no coincidence that the majority of submissions favoured increasing the range of works entitled to protection and the level and number of rights accorded to existing and proposed works.

5 Copyright Act, s. 4(1), (2). The works of UCC adherents and recent RBC adherents are assimilated to Canadian works by certificate granted under s. 4(2): see now Certification of Countries Granting Copyright Protection Notice, C.R.C. 1978, c. 421. The wording of s. 4(1), extending protection to RBC states bound by RBC (Berlin 1908), may be insufficient to admit later RBC adherents (including those adhering to Rome 1928) to national treatment: see A.A. Keyes and C. Brunet, Copyright in Canada: Proposals for a Revision of the Law (1977), p. 44. The latter adherents, unless made the subject of a certificate under s. 4(2), may be unprotected in Canada, contrary to Canada's obligations under RBC (Rome 1928), art. 4(1).
A state considering creating new sorts of rights or protecting new sorts of works in its copyright law may of course adopt a strategy of voluntarily extending national treatment to all foreigners in respect of reforms, or at least to all foreigners who are nationals of states party to common Conventions such as the RBC or UCC. The state may take this course for any number of reasons: it may harbour a traditionally strong belief in the notion of private property or authors' rights; it may take an expansive (or perhaps mistaken) view of its international obligations; it may wish to hold itself out as an international cultural haven or a responsible international citizen intent on respecting the rights of others; it may prefer the simplicity and efficiency of formal reciprocity, using the standard of national treatment, to other solutions such as material reciprocity; or, as appears recently to be the position of a net copyright exporting country such as the United States, it may wish to put itself in a position of moral superiority so that it may pressure other states to adopt high levels of copyright protection designed to protect works originating in the United States.

As a net importer of copyright material, Canada might be expected to be reluctant to adopt a policy of voluntarily extending national treatment to all foreigners. An alternative policy of providing material reciprocity to states that provide similar treatment to Canadian works may also be of little advantage except where the balance of copyright trade between the two countries is roughly equal or favours Canada. Even a policy of extending benefits to all Canadian nationals or residents, though

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6 "Formal reciprocity" means that state A will protect state B's nationals and vice versa; the standard of protection is not stated, but the RBC and the UCC are both predicated on national treatment. "Material reciprocity" means that state A grants nationals of state B the same protection as state B grants to state A's nationals; this principle is disfavoured in copyright treaties, inter alia, because of the costs and difficulties of establishing foreign law.

7 Copyright Act of 1976, 17 U.S.C., s. 104(b)(1), (2). The Semiconductor Chip Protection Act of 1984, incorporated as Chapter 9 of the U.S. Copyright Act of 1976, however, rejects the principle of national treatment in favour of material reciprocity: 17 U.S.C., s. 902(a)(1). One reason for rejecting national treatment was the fear that U.S. works would not be protected in other countries, and "the interest of the United States in establishing a reasonable system of domestic protection for mask works is paramount": House Report No. 98-781 (98th Cong., 2d Sess., 1984), p. 7.

8 Thus, the United States is presently placing pressure on a number of countries (principally the Caribbean, the Far East and Canada) by threats of economic and trade retaliation, in an attempt to force these states to adopt U.S.-like copyright laws preventing practices ranging from counterfeiting to picking up television signals from U.S. satellites. A presidential policy statement issued in April 1986 stated: "The United States provides strong protection for intellectual property rights within our borders for domestic and foreign citizens and businesses. We expect other nations to do the same in the interest of stimulating increased innovation and improving living standards throughout the world." (New York Times, April 7, 1986, p. 21). The second sentence may provide the disinterested reader with a mild chuckle.
practically unavoidable, may be dubious to the extent that resident multinational corporations may avail themselves of the law for the ultimate financial advantage of their foreign parents. These factors would naturally incline a country such as Canada not to extend national treatment unless international obligations compelled it to. The 1985 Report's approach to these issues was partly principled and partly pragmatic. Wavering between ultimately irreconcilable desires simultaneously to foster Canadian creativity, to treat all copyright producers equally regardless of national origin, but not to export massive capital payments in the form of copyright fees, the Report has sometimes gone beyond Canada's international obligations—presumably, in its view, not too often and not too far.

The object of this study is not to comment on a policy of voluntary extension of national treatment. Rather, it is to examine the legal question of what "works" and what "rights" Canada must subject to national treatment under the RBC and UCC. We shall consider this matter in the context of the recommendations made by the 1985 Report to see how far those recommendations are consistent with the RBC and UCC. Anticipating our conclusion, we shall find that the Report's largely implicit understanding of Canada's obligations under the two treaties is generally correct, except on one or two points. Since neither the Report nor the available literature deals adequately with the fundamental bases upon which certain works and rights are withdrawn from the national treatment requirements of the Conventions, this study will seek to remedy this gap in the literature. The political and strategic consequences of the issues will not be further discussed: Canada's obligations will be treated as a legal question.

The broad issues to be studied are:

(1) What "works" qualify for national treatment? In particular, do sound

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9 What consequences would face Canada if it chose to ignore its international obligations will not be considered; it will be assumed, realistically one trusts, that Canada would not knowingly wish to breach its international obligations. Both the UCC (1952, article XV) and the RBC (Paris 1971 text, article 33) provide for disputes to be referred to the International Court of Justice. Though bound only by the substantive parts of RBC Rome 1928, Canada has acceded to the administrative provisions of RBC (Stockholm 1967), repeated in RBC (Paris 1971), which include submission to the court: World Intellectual Property Organization ("WIPO"), Berne Convention for the Protection of Literary and Artistic Works (Texts) (updated to May 1, 1983), s. G2. p. 2. n. 7. No case dealing with the Conventions has ever been brought before the court.

10 The literature does, as we shall see, deal piecemeal with various classes of works and rights but does not for the most part subject them to the sort of comprehensive theory that this study seeks to formulate.

11 Both Conventions lay down certain substantive rights that all participating states must extend to foreigners. States failing to provide for these rights will obviously be in breach of the Conventions. This comment deals only with rights not specifically required to be granted by the Conventions, which a state chooses to extend to its nationals.
and video recordings, published editions, performances, broadcasts, and computer programs qualify?

(2) What "rights" must be given national treatment? In particular, do rights such as the droit de suite, home taping and public lending rights qualify?

Before these questions are examined, it is necessary to say something about the RBC and UCC and the bases upon which they proceed. The impetus for the BC started in Europe in the mid-nineteenth century and was designed to replace the prevailing patchwork of bilateral arrangements that continental European countries had entered into amongst themselves and with Britain to recognize copyright in foreign authors' works. The first BC was signed by these countries for themselves and for their colonies. As the Convention was periodically revised, it was signed by those colonies gaining independence in their own right and by an increasing number of countries including eastern European and Nordic states, Japan and eventually African nations. Despite internal and external pressures, the United States never joined the RBC; neither, for some time, did a number of Pan-American and Far Eastern states. The copyright law of the United States, as it developed, was incompatible with the principles of the RBC which recognized copyright automatically upon a work being created. The United States, on the other hand, required goods to be marked with a copyright notice and to be registered as a condition of enforcing rights; moreover, any large-scale distribution of English language books had to be printed in the United States. To obtain international copyright protection, the United States came to rely on bilateral and Pan-American arrangements, and on "backdoor" use of the RBC by its nationals simultaneously publishing their works in a BC country such as Canada and thus obtaining protection in other BC states. The unsatisfactory nature of these procedures, a general desire to include the United States in an international copyright treaty and the realization that this could not occur within the context of the RBC led to the signing in 1952 of the Universal Copyright Convention. Participated in by most RBC members, as well as the United States, Pan-American and Far Eastern nations, the UCC was a less coercive and more open-textured treaty than the RBC: necessarily so, if the needs principally of the United States were to be accommodated. Its central principle was, like the RBC, that of national treatment, accompanied by a reduction of the formalities necessary to acquire copyright in states where formalities were part of

their domestic law. The hope, yet to be realized, was that UCC states would gradually revise their copyright laws so as eventually to be in a position to accede to the RBC or to some consolidated UCC/RBC.

An important common feature requires to be noticed about the RBC and the UCC. Both Conventions sought to accommodate two quite different theories and methods of dealing with the protection of creative works, the Anglo-American concept of copyright and the Continental European concept of author’s rights. It is equally important to appreciate that, on many points of divergence, the European concept was reflected in the texts rather than the Anglo-American concept.

European notions of authors’ rights emphasize the need for authors, artists and composers to have continuing control over their works. They also require the sort of intellectual creativity commonly associated with those classes of works and workers as a precondition to granting protection. The European edifice of authors’ rights rests on two pillars: the author’s economic rights and moral rights. Economic rights allow the author to assign or license to others the right to use the work in particular ways; they are the principal means by which an author reaps profit from the work. Moral rights grant the author continuing control over the work despite its exploitation: the author alone decides when the work is ready for release and the manner of its exploitation; the work must be properly credited; it must not be modified in a manner prejudicial to the author’s original intent; the author may even be entitled to recall the work if it now no longer reflects his or her views. In this scheme of things, the author is front and centre stage; later exploiters and users of the work are secondary players and stand in the wings.13

Anglo-American law takes a more pragmatic approach to copyright. Copyright is essentially a vehicle to help propel works into the market: it is more an instrument of commerce than of culture. It is geared more to the media entrepreneur than the author.14 It is ready to

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13 Attempts to erode this pure concept of author’s rights were made at a number of RBC Conferences, particularly RBC (Stockholm 1967), but met with only modest success. What could not be achieved at the Conferences has sometimes been sought through the medium of commentary purportedly interpreting RBC provisions.


14 Indeed, the great battle to have the first English copyright statute (the Statute of Anne in 1709) enacted was waged less by authors than by the stationers, the publishers of the day, complaining of piracy by other publishers. Authors fighting for the law were mobilized by publishers, who "saw the tactical advantage of putting forward authors’ interests together with their own": B. Kaplan, An Unhurried View of Copyright (1967), p. 9. The stationers “came up to parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite
grant copyrights not only to authors but to secondary users who add value to the work: record companies, broadcasters, movie studios, and even printers. The creativity displayed by authors is not a philosophical essential: time, labour or capital investment is enough to warrant the grant of rights. Unfair competition rather than authors' rights seems to be the guiding force behind copyright. Whether rights should be extended to a work is more a question of political pragmatism depending upon the strength of a particular interest group than a question depending upon the type of creativity involved in the work's production. In such a scheme, economic rights are emphasized; moral rights are unheard of, save insofar as particular complaints can be slotted into some common law theory or statute designed to prevent unfair competition. Unless an author has retained some moral right by contract, the assignment or licensing of the work pro tanto terminates his or her involvement with it.

With its common law and civil law heritage, Canada might theoretically be expected to recognize both economic and moral rights and thereby effect a marriage between the Anglo-American and European systems. There has been some judicial and legislative disposition to this effect16 but its impact has been only marginal. Legislating one subsection comprising eight lines of dispositive text on moral rights into a thirty-four page statute of fifty-one sections, taken largely from the United Kingdom Copyright Act of 1911, hardly places Canada into the category of a nation committed to a European theory of author's rights. While the Government of Quebec has recently displayed a keen interest in the subject,17 Quebec courts have not proved any more protective of moral rights than their common law counterparts; indeed, the contrary may arguably be true.18 The 1985 Report, while claiming to strengthen compassion, and induce parliament to grant them a statutory [sic] security": Donaldson v. Beckett (1774, H.L.), per Lord Camden, reprinted in The Literary Property Debates: Six Tracts 1764-1774 (1975), part F, p. 30.

15 The relative importance of moral rights can be gleaned by comparing the leading English text on copyright with its French counterpart. In the French text, over 40% of the discussion of economic and moral rights centres on the latter: H. Desbois, Le droit d'auteur en France (3rd ed., 1978). In the English text, moral rights are not discussed as such; the matters that would be thus categorized under French law constitute, generously, perhaps 10% of the discussion: E.P. Skone James et al. (eds.), Copinger & Skone James on Copyright (12th ed., 1980).

16 Thus, Fitzpatrick C.J.C. dealt with a question of Ontario law by importing French doctrines of moral rights: Morang & Co. v. Le Sueur (1911), 45 S.C.R. 95, at pp. 97-98 (his fellow judges, however, did not follow this path). Moreover, in 1931 what is now s. 12(7) of the Copyright Act was enacted to safeguard moral rights.

17 Gouvernement du Quebec, To Give Talent its Due: Improving the Socio-Economic Status of Quebec's Creative Artists (1980), c. iv, passim.

18 Thus, the Quebec Court of Appeal refused to apply the moral rights provision, s. 12(7), of the Copyright Act, to a case where sculptures had been deliberately destroyed by their owner by being tossed into a river: Gnass v. La Cité d'Alma (1977, unreported),
moral rights, displayed a fundamental misunderstanding of their nature and purpose by assimilating them to economic rights and allowing them to be freely assignable and waivable.\(^\text{19}\) In truth, respect for the institution of moral rights cannot be legislated into the consciousness of a culture which is propelled more by Anglo-American concepts of copyright as an instrument of commerce than by the recognition of any central societal role for authors, artists and composers.\(^\text{20}\)

It is nonetheless critical to an appreciation of the RBC and the UCC to be aware of the fundamental differences existing between European concepts of author's rights and the Anglo-American concept of copyright, because we shall find that the former has dominated the texts of both Conventions. This is hardly surprising given the fact that the large majority of the participants at both Conventions were "author's rights" countries, intent on ensuring that any compromises necessary to achieve agreement with the "copyright" countries did not undercut the basic philosophical underpinnings of their cherished notion of author's rights. It is equally unsurprising that the requirements of good diplomacy, intent on inducing more nations to join the Conventions and on ensuring the smooth operation of the instruments, have tended to minimize the differences while emphasizing the essential similarities of the two systems. The evidence of the texts and their history cannot however be rebutted by smooth talk alone.

We can now proceed to the subject of this study. We shall first analyze in some detail the relevant language in the Conventions to which


\(^{20}\) Indeed, once anything more elaborate than a straight line qualifies as an "artistic work" (British Northrop Ltd v. Texteam Blackburn Ltd. [1974] R.P.C. 57 (Ch. D.)) and a ruled form with a few headings can be protected as a copyright literary work (Bulman Group Ltd v. "One Write" Accounting Systems Ltd (1982), 62 C.P.R. (2d) 149 Fed. T.D.), copyright law is exposed as protecting something other than creative cultural endeavour and becomes simply a device to protect commercial investment. This is especially so when typically, as in these two cases, the work is created by an employee and its copyright automatically vests in the employer (Copyright Act. s. 12(3)).
Canada is bound, RBC (Rome 1928)\textsuperscript{21} and UCC 1952. Secondly, we shall consider the more important categories of works and rights dealt with in the 1985 Report's recommendations and analyze whether the recommendations comply with obligations imposed by the Conventions. Thirdly, we shall notice a possible difficulty posed by Article 19 of RBC (Rome 1928) to see whether it requires the analysis to be modified in any way.

I. Berne and Universal Conventions

A. RBC Rome 1928 Text: An Overview

Article 4(1) and (2) of RBC (Rome 1928)\textsuperscript{22} states:

(1) Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives, as well as the rights specially granted by the present Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

Article 1 states the object of the RBC: to constitute signatory states into a Union "for the protection of the rights of authors over their literary and artistic works". Various articles then go on to state what rights authors have but, before they do so, article 2(1) gives a definition of the term "literary and artistic works". This includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression" and is followed by a long non-exclusive list of examples of items that flesh out the ordinary meaning of the general definition.\textsuperscript{23} Article 2(2) provides that derivative works such as translations, adaptations, and other altered forms of literary and artistic works, as well as collective works, are protected as original works, without

\textsuperscript{21} The 1928 Rome Text is appended as Schedule III to the Copyright Act but is not formally enacted into law. The Rome text may however be used to resolve ambiguities in the Act: Composers, Authors and Publishers Assoc. v. CTV Television Network Ltd., [1968] S.C.R. 676.

\textsuperscript{22} The unofficial English version of the Convention is used here throughout for convenience, unless the official French version differs critically, in which case the latter prevails: Composers, Authors and Publishers Assoc. v. CTV Television Network Ltd., ibid.

\textsuperscript{23} For the most part, these are repeated in the definition of "every original literary, artistic, musical and dramatic work" appearing in the Copyright Act, s. 2, introduced in 1931 purportedly to ensure compliance with RBC (Rome).
prejudice to the original work's author. Article 2(3) compels members "to make provision for the protection of the above-mentioned works". Article 3 protects photographs and analogous works and repeats the formula of article 2(3). Article 14(1) initially deals with the author's right to authorize the work to be reproduced, adapted and publicly presented by cinematography, but then goes on in article 14(2) to deal with rights to be granted in the film itself: it assimilates cinematographic productions to "literary or artistic works" if the author has given the work an original character; absent this condition, the work is protected as a photographic work. Article 14(3) protects cinematographic works as "original works" without prejudice to the original work's author, thus in effect repeating the formula of article 2(2) relating to derivative works. Article 2(4) allows states to decide in their discretion how far to treat works of art applied to industrial purposes as protected works; article 2 bis does the same for political speeches and speeches delivered in legal proceedings.

The scheme thus established is clear enough. The RBC is a treaty covering primarily literary and artistic works, a term that is defined with a list of non-exhaustive examples. Photographs and cinematographs are not considered, except where specifically mentioned as in the case of "original" cinematographic productions, to fall within the term "literary and artistic": derivative works are treated separately, probably not because of any lack of literary or artistic character but rather because of the need to protect the underlying author's right. In any event, the RBC is extended to cover photographs, cinematographs and derivative works (henceforth compendiously referred to as "related works"). States are entitled to exclude from protection certain speeches and works of applied art, which would otherwise fall within the general definition of article 2(1) and be the subject of mandatory protection.

B. UCC 1952 Articles I and II

Article I of the UCC reads:

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

Articles II.1 and II.2 endorse the principle of assimilation: UCC nationals "shall enjoy the same protection" for their published and unpublished "works" in another UCC state as do nationals of the latter.25

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24 This might suggest that such works would not otherwise be classified as literary or artistic. Perhaps more plausibly, they could be so classified, but it was necessary to stress that an additional act of authorship was required (hence the emphasis on "original" work) and that the underlying author's right must in any event be respected.

25 Apart from a requirement to protect certain minimum rights first introduced in
It will immediately be seen that the UCC is a less coercive treaty than the RBC. It imposes two basic obligations. First, it requires states to "provide for the adequate and effective protection" of authors' rights. In the remainder of the UCC, the specific rights requiring protection are much fewer than in the RBC. Secondly, like the RBC, the rights must be those of "authors...in literary, scientific and artistic works". On the other hand, the list of specific examples requiring protection is quite modest compared with that in the RBC—deliberately so, since the long list contained in the RBC was one reason preventing some states, which had less comprehensive copyright laws, joining it. Thus, oral works and architecture were deliberately excluded because the United States claimed its constitutional inability to protect such works. This does not mean that such works are not "literary, scientific and artistic"; rather, the travaux préparatoires reveal that states were given a discretion to exclude such works from protection. In light of the less comprehensive and more discretionary nature of the UCC, it would thus be surprising if a state bound by both Conventions were obliged by the UCC to do something not required by the RBC. In other words, compliance with the RBC is, at least so far as national treatment is concerned, likely equally to be compliance with the UCC.

C. National Treatment Requirements of RBC and UCC: A Preliminary View

A preliminary analysis of these provisions thus indicates that they place the following obligations on Canada:

(1) Canada must grant foreign RBC and UCC "authors" for their "works" those "rights" which Canada grants now or in the future to its own

the 1971 text of the UCC, the provisions of articles I and II in the 1952 and 1971 texts of the UCC are identical.


27 Ibid., p. 132: "It would be best...to allow each country to follow its own general doctrine on the basis of good faith without which no international instrument could be effective." (Mr. Farmer, U.S. delegate). See also ibid., p. 131 (Mr. Lokur, Indian delegate).

Domestic law permits recourse to the travaux when a statute based on a treaty is being interpreted, if the travaux are publicly accessible and point to a definite legislative intention: Fothergill v. Monarch Airlines Ltd., [1981] A.C. 251, at p. 278 (H.L.). Travaux are regularly assessed and relied on by international tribunals as a supplementary aid to construction, at least where initial interpretation leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable": Vienna Convention on the Law of Treaties 1969, art. 31; I.R. Sinclair, The Vienna Convention on the Law of Treaties (2nd ed., 1984), pp. 116, 141 ff.

28 "[Prima facie] where no deviation was intended, the UCC is to be interpreted in the same manner as the Berne Convention": E. Steup, The Rule of National Treatment
authors. We shall shortly examine what these "works" are but, at first sight, it seems that they are those works that RBC Article 2(3) and UCC Article I oblige states to protect and such other works that states are given a discretion to include within their copyright law.

(2) A foreign author seeking protection in Canada for his or her work will have his or her rights determined according to Canadian copyright law, whatever protection the work enjoys in its country of origin. This proposition and the previous one elaborate the principle of assimilation that has been the hallmark of the BC and the UCC: foreign works are assimilated to local works. Courts enforcing copyrights will apply the lex fori, not some other law that might otherwise be mandated by the domestic court's principles of conflicts of law.\(^2^9\)

(3) Under the RBC Canada must provide those "rights specially granted by the present Convention" to foreign authors. Under the 1952 UCC text, the only right mentioned is the right of translation.\(^3^0\) Apart from such provisions imposing minimum standards of protection that all states must extend, the precise nature of the works protected and the rights granted is by and large left to Canada's legislative discretion. The works included within the RBC and the rights attaching to them, which Canada is obliged to protect, have been progressively enlarged since the original BC. Theoretically, neither the RBC nor the UCC is supposed to compromise Canada's internal affairs, since they do not oblige Canada to extend protection for such works to its nationals. As the framers of the Conventions well understood, however, in practice the RBC and UCC do oblige a state to extend protection to such works, since it is unthinkable that foreign authors should obtain a larger protection in Canada than do Canada's own authors.\(^3^1\)

D. What "Works" Require National Treatment?

The principal question that will now be considered is: what does the word "works" in RBC article 4(1) and UCC article II mean?


\(^3^0\) Art. V.1. Under UCC 1971, the rights have been extended to include "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting": art. IV bis (1).

Four different views have been expressed on this point, both in Canada and elsewhere. The first and broadest view is that the word "works" in RBC article 4(1) and UCC article II is unqualified. It does not matter whether the work is literary or artistic. If a state determines that an item is a "work" and that work is given a copyright, it is subject to national treatment. Thus, if a sound recording is called a "work" under a state's copyright law, whether or not the Convention or a particular state classes it as a literary or artistic work is irrelevant: it falls under the Convention and must be given national treatment.

A second view, which leads to much the same conclusion, is that a state is free to expand the meaning of the term "literary and artistic works" as it thinks fit. Those words have a core meaning but a state is free to add works to the list if it decides by its own law that such works can fall within the term "literary and artistic". Thus, a state that includes sound recordings in this class must extend national treatment to them.

A third view, expressed most forcefully in respect of the UCC by Arpad Bogsch, the current Director-General of the World Intellectual Property Organization ("WIPO") which administers the UCC and RBC, is that "literary, scientific and artistic works" is a composite term having an ambulatory meaning of "works susceptible of copyright protection"; as "additional categories are recognized as works by the custom of civilized countries" they become subject to mandatory protection. This view differs from the second one in that, rejecting the idea that a state can interpret the term "literary, scientific and artistic" as it thinks fit, it would allow the term to expand as a sufficient number of states accept that meaning under their domestic law. Perhaps unsurprisingly, WIPO may have also expressed a similar view in respect of the RBC in claiming that literary and artistic works include "all works capable of being protected" by copyright. Neither this nor the second view neces-

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32 Submission by Patent and Trademark Institute of Canada anent Copyright in Canada: Proposals for a Revision of the Law (1977), p. 6: the obligation to provide national treatment under both the UCC and RBC (Rome 1928) "goes beyond the works clearly required to be protected, to 'works in general'" (emphasis in text). Similarly, H. Dawid, Basic Principles of International Copyright (1973), 21 Bull Copr. Soc. 1, at p. 7.


sarily concedes that the word “works” in RBC article 4(1) or UCC article 1 is limited to “literary and artistic works”, although this may be implicit in both their reasoning.

The fourth and narrowest view has been advanced by Fritz Ostertag,\(^{36}\) the director of the predecessor of WIPO at the time of RBC (Rome), in respect of the RBC and is supported by this study in respect of both Conventions. It is that “works” means those “literary and artistic works” and other works of “authors” that the RBC and UCC oblige or entitle states to protect. None of these terms can be given whatever meaning a state chooses: they all bear a Convention meaning that states must observe.\(^{37}\) To the extent that states place a different or more extensive meaning in their domestic law on those terms, they act voluntarily outside the protection of the Conventions. No Convention state can demand that such works be protected under the Conventions. For example, if on a proper interpretation of the Conventions sound recordings are not classified as “literary and artistic works” of an “author”, a state that includes them as such in its copyright law would not be bound to give local protection to a sound recording made or published by a foreign national in another RBC or UCC state. It could protect sound recordings made only locally; it could protect foreign recordings on the basis of material reciprocity or on whatever basis it chose; it could grant an extensive range of rights to local recordings and a lesser range of rights to foreign records. If, by its domestic law, it did extend full protection to such items, this would be a voluntary and reversible act.

The validity of the last view, and the invalidity of the other three, will be demonstrated through the following argument:

(1) “Works” in RBC article 4(1) and UCC article II means, broadly, only those works respectively covered by RBC article 2(1) and UCC article I.

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\(^{37}\) Keyes and Brunet, op. cit., footnote 5, p. 83, partly support this view: only “works” of an “author” need be protected under art. 4(1). I go further: the word “works” is also limited.

Presumably tracking Keyes and Brunet’s views, although with no elaborate discussion, are (a) From Gutenberg to Telidon: A White Paper on Copyright (1984, Consumer & Corporate Affairs Canada/Department of Communications) (henceforth “the White Paper”), pp. 4, 10 and 12-13, which recommended denying national treatment to broadcasts, performances and published editions, while maintaining its intention that “Canada’s international obligations be met in the spirit as well as the letter of the law”; and (b) the 1985 Report, op. cit., footnote 2, recommending that published editions, sound recordings, performers’ rights, broadcasts and computer programs be subject to material reciprocity (pp. 104, 106-110 (summaries)) (note that Brunet was one of the counsel to the Subcommittee producing the 1985 Report).
(2) The term "literary, [scientific] and artistic works" appearing in RBC article 2(1) and UCC article I must be given a Convention meaning and not such meaning as each state thinks fit. The term has a well-established meaning that is designed to encompass new developments and technologies, but cannot be extended by the custom of states.

(3) Since the Conventions protect only the rights of "authors" in such works, only those "literary and artistic works" created by an "author" fall subject to national treatment.

(4) A state is entitled to a reasonable time to embrace new technologies that fall within the meaning of the term "literary and artistic".

(1) "Works"

The word "works" in both Conventions should be given a good faith interpretation in accordance with its ordinary meaning in context and in the light of the object and purpose of the Conventions. The general object and purpose of both Conventions, to ensure that foreign authors are placed on the same footing as local authors in being able to assert rights in their literary and artistic works, has already been indicated above.

One further contextual matter should be noticed. The first BC was concluded just three years after the Paris Union for the International Protection of Industrial Property had been established in 1883. When the UCC was concluded in 1952, many states were not only members of the RBC but also of the Paris Union. Both Copyright Conventions were considered to be dealing with different subject-matter from that of the Paris Union, a distinction sought to be maintained throughout revisions of the texts of all three. Literally, a "work" in the BC or UCC could refer to matters that fell properly under the heading of "industrial property". Since the obligations imposed on Paris Union members are different, given the subject-matter, from those on BC and UCC states, members obviously sought to avoid or minimize the possibility that a "work" might fall under both the Copyright and the Industrial Property Conventions. The protection of authors' rights was and still is consid-

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38 The additional word "scientific" qualifying "works" in the UCC but not in the RBC will henceforth be generally omitted in the discussion for the sake of neatness. Any "scientific work" qualifying under the UCC equally qualifies as a "literary and artistic work" under the RBC's broad definition.

39 Vienna Convention, supra, footnote 27, art. 31.1; Sinclair, op. cit., footnote 27, pp. 117-119. Note however that literalism should bow to an interpretation that effects the treaty's purpose: Re Regina and Palacios (1984), 7 D.L.R. (4th) 112, at pp. 120-121 (Qnt. C.A.).

40 Text, supra, accompanying footnotes 4 ff.

41 The possibility that works of applied art could fall under either Convention caused
ered distinguishable both phenomenologically and sociologically from other areas of law. As Dietz has pointed out, a phenomenological definition is necessary to hive copyright off vertically from cognate legal areas such as industrial property (patents, trade marks and, perhaps, designs); the former is concerned with creativity, the latter more with knowledge and protecting investment. Sociologically, copyright can be promoted on the rationale of protecting writers, musicians and artists in relation to their work. This basis is implausible for industrial property; indeed, the different classes of industrial property may each require different rationales for their justification. These considerations would support some limit on the concept of "works" under the Copyright Conventions, as well as under the Paris Union, to minimize overlap.

(a) Berne Convention

If one turns first to consider the text of the RBC, after articles 1, 2 and 3 and article 14, creating protected works, are read, the ordinary meaning one would expect "work" to bear in article 4(1) is those literary, artistic and related works that states are obliged to protect, plus those works referred to in articles 2(4) and 2 bis (1) that a state chooses to include within the protection of its domestic law.

The major argument against this view and in favour of the proposition that "work" is unqualified involves a literal interpretation of the text. The word has no preceding adjectives; if "literary and artistic work" and related works were meant, why did not the drafters say so? Their silence on this point must be deliberate; they intended any "work", whether or not it fell within the category of works the RBC required to be protected.

This argument however proves too much. The context may require sweeping words such as the word "work" to be limited in some way; otherwise, a roast beef meal made by an author would arguably be internationally protected, since it is a "work". The response might be to say that the immediate context of article 4(1) imposes the limitation that the "work" must be one produced by an "author" qua author, that is, exercising the faculties of an "author"; or that "work" itself implies difficulties at most revision Conferences, leading to compromises such as that reflected in RBC (Paris 1971), art. 2(7); see generally, J.H. Reichman, Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976, [1983] Duke L.J. 1143, at pp. 1153 ff. In RBC (Rome 1928), states have a complete discretion whether or not to include works of applied art within their copyright law: art. 2(4).


some intellectual creativity. This would therefore exclude the roast beef meal but still include works that did not necessarily fall within the definition of “literary and artistic” or related works.

However, the words must be read neither in grammatical isolation nor merely in their immediate context, but in the context of the RBC as a whole.\footnote{Sinclair, op. cit., footnote 27, pp. 116, 141 ff.} Once this occurs, a plausible alternative explanation why the phrase “literary and artistic works” was omitted in article 4(1) is readily apparent. As has been noted, article 3 requires photographs to be protected but does not categorize them as either literary or artistic works, because BC members before and at Rome disagreed upon whether they could properly be classed as “artistic works” at all. Furthermore, by article 14 cinematographic works were assimilated to photographs, rather than literary and artistic works, if “the author has [not] given the work an original character”. Thus, had article 4(1) referred to “literary and artistic works”, related works such as photographs and some cinematographs would have been excluded from national treatment. The unqualified word “work” thus ensured that both literary and artistic works and those related works that did not fall within this phrase but which the RBC nevertheless required to be protected were in fact protected under article 4(1).\footnote{The argument based on the layout of the text of RBC (Rome 1928) is reinforced by the layout of the original BC 1886. Art. 2, corresponding to RBC Rome art. 4, was followed by art. 4 defining literary and artistic works, and then by art. 6 which protected translations merely as “original works” without classifying them as literary or artistic. When photographs and cinematographs were no longer treated as related works and were shifted into the definition of literary and artistic works in art. 2(1) of RBC (Brussels 1948), the reason for using the unqualified word “work” in art. 4(1) ceased but no one apparently thought that a consequential change in drafting was necessary.}

It should also be noted that the word “work” appears in an unqualified form in a number of other provisions in the RBC. These include provisions entitling a state to retaliate against non-RBC states whose nationals publish in an RBC state but who do not adequately protect an RBC national,\footnote{Art. 6(2).} as well as provisions prescribing minimum rights such as moral rights,\footnote{Art. 6 bis.} the term of protection,\footnote{Arts. 7 and 7 bis.} the seizure of infringing works,\footnote{Art. 16.} and the period of commencement of the RBC.\footnote{Art. 18.} Nothing in these provisions suggests that any wider meaning than literary, artistic and related works as defined in the RBC is meant. The domestic principle of interpretation that the same word should prima facie bear the same meaning
wherever it appears in a text should prevail here equally, reinforcing the view suggested above for article 4(1). 51

(b) Universal Convention

A similar analysis holds true for the UCC. Having referred to “literary, scientific and artistic works” and given some specific examples in article I, the UCC in article II then extends national treatment to “works”, meaning naturally “such works” as are covered by article I. 52 Repetition of the whole phrase each time “works” is mentioned throughout the UCC would have been ungainly. One would moreover expect that the basic structure of the UCC would track the RBC in this respect. The majority of participants at the UCC Conference were RBC states, who were familiar with the RBC and would likely have wished to retain the basic model that had served them well. Moreover, the UCC was widely heralded as a first step towards an ultimately integrated UCC/RBC, something that would be easier if the two Conventions were kept stylistically and structurally similar.

It is however a little surprising to see Ulmer, who accepts the above analysis of the RBC, apparently taking a different view for the UCC. 53 His premise is that a “work” can fall under article II even though it is excluded from the obligation of article I. Ulmer instances architecture and sound recordings. According to Ulmer, the former is outside the obligation of article I but is a “work” under article II; sound recordings, also outside article I, are not “works” under article II because they are internationally classified as “neighbouring rights” rather than “copyrights”. 54 Relying on the same premise as Ulmer, Dawid reaches the opposite conclusion: records are “works” under article II. 55

That two commentators can reach a diametrically opposite result while starting from the same premise suggests that the premise is wrong.

51 This conclusion is not weakened because the RBC sometimes uses the phrase “literary and artistic works” in full. This occurs especially when a contrast is sought with provisions applicable to particular works in that category (e.g., dramatic and musical works (art. 11), musical works (art. 13)). That total consistency has not been attained is in any event not unusual in a text that has evolved over a long period of time and been subject to successive drafts and revisions.


53 Loc. cit., footnote 36, at pp. 21-22.

54 For the distinction between “neighbouring rights” and “literary and artistic works”, see text infra, accompanying footnotes 93 ff.

55 Loc. cit., footnote 32.
Ulmer is right in saying that records do not fall under the UCC, but this is not simply because they are not "works": as we shall see, they are neither "literary, scientific and artistic works" nor the works of an "author". They do not fall under article I; therefore they do not fall under article II. Ulmer's architecture example is similarly right for the wrong reason. Architecture has from RBC (Berlin 1908) been considered an "artistic work", being listed as a specific example in RBC article 2(1). However, at the 1952 UCC Conference, it was omitted as a specific example because the United States claimed its constitutional inability to protect architecture under its copyright law. The effect of its exclusion as an example from the list in UCC article I was not to remove it from consideration as an "artistic work". Rather, it became one of those artistic works that states were given a discretion not to include in their copyright law; once they did include it, it became subject to national treatment. In short, architecture is an "artistic work" but outside the mandatory protection of article I; as an artistic work, if a domestic law grants it protection, it is covered by article II.

Conclusion

It may therefore be concluded that a proper interpretation of "works", as it appears in RBC article 4(1), would limit that term to "literary and artistic works" and the related works that by article 2 are subject to mandatory or optional protection throughout the Union. Similarly, "works" in article II of the UCC embraces only those "literary, scientific and artistic works" subject to mandatory or optional protection, plus the specific examples listed in article I. Formal reciprocity is the logic of the Conventions: a state protects foreign works precisely because it expects that same class of works by its nationals to be protected by other Convention states. It cannot reasonably expect works outside the ambit of the Conventions to be granted foreign protection: that is outside the *quid pro quo* of the compact.

56 Text, *infra*, accompanying footnotes 98 ff.
58 Photographs and works of applied art were similarly not listed because some states did not grant them copyright protection, but there is no doubt that they qualify as artistic works under the UCC and, if domestically protected, fall subject to national treatment: see UCC, art. IV.3; Bogsch, *op. cit.*, footnote 34, p. 10.
59 The position seems to be the same for other versions of the RBC. Indeed, the position is even clearer under the most recent text, RBC (Paris 1971), which in art. 5(1) (corresponding to Rome art. 4(1)) extends national treatment to authors "in respect of works for which they are protected under this Convention". This phraseology obviously refers back to Paris art. 2(6), the equivalent of Rome art. 2(3). Given the historical trend of increasing levels of protection with each revision of the RBC, it would be surprising if Rome art. 4(1) bore a broader meaning than Paris art. 5(1).
60 This is true for the RBC: Ostertag, *loc. cit.*, footnote 36, at p. 42; Cuisenaire v. South West Imports Ltd., [1968] 2 Ex. C.R. 493, at p. 511 (aff'd without reference to
(2) Convention Meanings

Suppose a state chooses to grant copyright protection to an object it calls a literary, artistic or related work: does that work fall under the national treatment requirement of RBC article 4(1) or UCC article I? In other words, do the definitions of the RBC and UCC have their own Convention meaning or may a state define them broadly or narrowly according to its own law?

Older and more modern authorities have taken opposing views on this question. Thus, a Swiss court in 1936 held that sound recordings, which were by Swiss law equated with adaptations (a protected category of related works from RBC (Berlin 1908)), should be given national treatment under the RBC. That adaptations in the RBC sense did not include records was apparently thought irrelevant. Similarly, Ricketson has recently claimed in respect of the RBC (Paris 1971) text:

... there is no reason why such things as sound recordings and broadcasts could not be considered 'literary and artistic works' under art. 2(1) because they are just as much 'intellectual creations' and 'productions in the literary, scientific and artistic domain' as are cinematograph films which are also expressly referred to as 'original works' under art. 14 bis (1). The protection of these further types of work however is left to each country to do at its discretion.

The contrary view has been taken by Ostertag in relation to RBC (Rome) and accepted by Ulmer for both the RBC and UCC: "The general rule [is] that the concept of those works for which national treatment is demanded, is defined by the Convention." A state that

\[\text{this point [1969] S.C.R. 208} \text{ on the definition section in the Copyright Act, as amended to implement RBC (Rome 1928) art. 2(1): "It is still necessary to find that the work in which copyright is claimed is an 'original literary, dramatic, musical or artistic work' in the normal meaning of those words and in the light of the definitions in section 2 of the Act." Cf. Ladas, op. cit., footnote 4, p. 213.} \]

\[\text{61 Ladas, ibid., p. 266, reaches the same conclusion, relying partly on the Swiss decision. The decision is referred to and criticized in Ostertag, loc. cit., footnote 36. Ladas's work appeared before Ostertag's article and does not assess the latter's argument.} \]

\[\text{62 Ricketson, op. cit., footnote 33, para. 14.22. (Emphasis added).} \]

\[\text{At first sight, Stewart, op. cit., footnote 52, para. 5.30, seems to hold the same view. After pointing out that one reason why the list of works under art. 2(1) is non-exhaustive is so that new objects should fall under the general definition as technology progresses, he adds that a second reason "is that in many countries the list of works includes things like recordings or broadcasts, which are not works in other countries". The implication is that such countries would be bound to grant national treatment to such works once they are included within their list of literary and artistic works. However, an earlier piece suggests that Stewart may not have intended this implication: S. Stewart, Recent Developments and Future Prospects on the International Level in the Field of Phonograms and Videocassettes, in WIPO, Current Trends in the Field of Intellectual Property (Montreux 1971 Conference), p. 266, at p. 271.} \]

\[\text{63 Loc. cit., footnote 36, at pp. 42-43.} \]

\[\text{64 Ulmer, loc. cit., footnote 36, at p. 21, agreeing with Ostertag, ibid.; Briggs, op. cit., footnote 31, p. 335. Steup, loc. cit., footnote 28, at pp. 281-282 so concludes} \]
defines works more broadly than required under the Conventions is neither obliged nor entitled by them to extend national treatment for those works, nor is it obliged or entitled to claim national treatment for them in another Convention state.

The view held by Ostertag and Ulmer seems preferable. Both the RBC and UCC are now subject to the jurisdiction of the International Court of Justice on questions "concerning the interpretation or application" of the Conventions; the plain inference is that the court would interpret the Convention in accordance with its international law meaning, not the meaning placed upon it by states' domestic laws or customs. The same inference can be drawn in respect of RBC (Rome 1928) where there was a strong movement to endow the Permanent Court of Justice with jurisdiction over the interpretation of the RBC, even though the proposal was eventually not adopted.

RBC article 2(1) and UCC article I give a non-exhaustive list of "literary and artistic works" that members are bound to protect. The meaning of "literary and artistic works" and the examples given must be considered as they were understood in 1928 for the RBC (Rome) and 1952 for the UCC, but it must also be recalled that the language was kept deliberately open-ended so as to encompass new forms of literary and artistic works as they arose. It does not however follow that anything a state chooses to classify as "literary" or "artistic" falls under the RBC. Both Conventions could have been drafted to say that states shall protect authors' rights "in such works as each state in its own unfettered discretion decides to be literary, scientific and artistic works". But they were not so drafted, nor was any suggestion of the kind made at any Conference, nor is there any reason to interpret the provisions in this way. If this view were right, it would be theoretically open to states not only to expand but to contract the categories of works they proposed when considering the question of "rights" under RBC art. 5(1) and UCC art. 1; her conclusion applies equally to "works".

65 RBC (Paris 1971), art. 33, first introduced as art. 27 bis, RBC (Brussels 1948); UCC art. XV.
66 International Union for the Protection of Literary and Artistic Works, Proceedings of the Conference held at Rome from May 7 to June 2, 1928 (English translation by Pierre Tisseyre), vol. 2, pp. 205a ff. (henceforth "Rome Travaux").
to protect. Thus, under the UCC, a state might decide to return to a pristine view of copyright by protecting the specific examples listed in article I plus only books, logarithm tables, and paintings. It could claim in good faith that the latter were the only "literary, scientific, and artistic works" that it considered worthy of protection. This result, one certainly not contemplated by the UCC framers, can be avoided only by recognizing that the term "literary, scientific, and artistic works" has a Convention meaning embracing works fairly categorized as such in 1952 plus such other works that may fairly be so categorized in the future.

The RBC clearly recognizes this. The joint report of Italy and the International Bureau to the participants of RBC (Rome) stated explicitly, without any dissent registered in the course of the Conference:

It is indisputable that the Convention can neither be modified nor interpreted in an authentic way by a provision of an internal legislation, and that the Convention is the only rule which binds all the States of the Union.68

The history of the texts is consistent with this view. For example, in RBC (Rome) and previous texts, photographs and works produced by a process analogous to photography were dealt with separately from literary and artistic works, obviously because they might not otherwise fall within the definition;69 similarly, special protection was made for cinematograph productions. True, at Brussels 1948 photographs and cinematographs were added to the non-exhaustive list of examples of "literary and artistic works"; this simply signifies that, in light of the evolution of those media and an overwhelming international consensus, some BC members finally suppressed their objections or sufficiently overcame their doctrinal difficulties to recognize the creative, rather than merely mechanical or industrial, character of much of those works.70 It does not suggest that the meaning of "literary and artistic work" has somehow consequentially changed, apart from the inclusion of these two classes of work. If one amends a definition section that says "dogs include cats


69 Ibid., vol. 2, pp. 173a and 174a, where the French delegate made a formal declaration, regretting that photographic works had not been assimilated to artistic works and wishing that "one day it be recognised that a work of art executed with a camera remains a work of art".

70 Germany, one of the states traditionally favouring total exclusion of cinematographs and photographs from the category of literary and artistic works, did not press this point at Brussels 1948, since it had merely observer status and was represented by a member of the British delegation: Union internationale pour la protection des œuvres littéraires et artistiques, Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948 (Berne 1951), pp. 54n., 60 (henceforth "Documents"); the latter did not share German doctrinal concerns on this score, States nonetheless remain free to exclude from protection cinematographs and photographs that lack the personal or intellectual creativity inherent in the concept of an "artistic work": ibid., pp. 140, 155-156: 94 (Rapport général).
and mice” by adding “sheep” to the list, this provides no warrant for arguing that cattle or any other quadruped is also included because, though not a dog, it shares many of the characteristics of the examples.

Thus, a state may choose to call a tree planted by a gardener an “artistic” work under its copyright law, but it does not follow that this qualifies as an “artistic” or any other form of “work” under article 2(1); nor that the gardener is an “author” in terms of article 4(1), a term that connotes intellectual creativity of a particular kind; nor, accordingly, that the state is bound to extend national treatment under article 4(1). A state might, for its own reasons, voluntarily extend national treatment in such a case, but this is another matter.

Klaver’s comment that states “are entirely free to interpret at their discretion” the term “literary and artistic work” cannot therefore be accepted literally. A state cannot include in the term something that does not belong there, any more than it can exclude something that obviously does. The language of the Conventions must have a shared common core of meaning that every member would in good faith recognize as placing an obligation on it. Material falling outside that shared common core cannot be part of the Convention obligations. In short, the language of RBC article 2(1) and UCC article I is broad but bounded. No state, either individually or in concert with others, can change the Convention meaning, except by successfully persuading the members at a Conference held for that purpose to accept an amendment to the Convention text.

As has been noticed above, Bogsch accepts that the term “literary, scientific and artistic works” in UCC article I has a Convention meaning, but claims that it encompasses all works “susceptible of copyright protection” as they become “recognized as works by the custom of civilized countries”. A similar, more cryptic, suggestion appears also to have been made for the RBC.

Bogsch’s reasoning seems based on the fact that the phrase “literary, scientific and artistic works” contains overlapping categories: a

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72 True, the word “work” is undefined, so “the law of the state where protection is claimed decides what is a ‘work’”, e.g., fixation or some degree of intellectual creation may be required before an object can qualify as a “work”: Stewart, op. cit., footnote 52, para. 5.30. But the same reasons that dictate “literary and artistic works” to be terms bounded by the Conventions apply equally to “work”. This point is not of central significance since, as has been argued above, “work” in RBC art. 4(1) and UCC art. I means those “literary and artistic works” and related works mentioned in the Conventions as enjoying mandatory or optional protection.
film on nuclear physics may, depending on how one approaches its classification, be either literary or scientific because of the subject-matter, or it may be artistic because of the technique involved in reducing it to visual form. Therefore the phrase must have some "meta-meaning": "works susceptible of copyright protection". Bogsch’s premises may be true, but the conclusion should not be accepted on either logical or other grounds.

First, as a matter of logic, just because an object may qualify as either A, B or C does not mean that A, B and C are meaningless, that they have some "meta-meaning", or that they should be discarded as categories. Rather, in an international treaty, the inference may possibly be drawn that states have some discretion 

*bona fide* to categorize the object as either A, B or C according to their domestic cultural and legal concepts.

Secondly, if the states participating at the UCC Conference had intended to be bound by Bogsch’s paraphrase, they would have used it instead of the well-known and internationally long-accepted phrase they deliberately did choose. They would not have bothered to agonize, as RBC members had similarly done at their Conferences, over what examples should or should not be included in article I and over such questions as whether the word "scientific" should or should not be omitted from the phrase "literary, scientific and artistic".

Thirdly, Bogsch’s view is too vague to be workable. When will a work be sufficiently recognized and by how many countries for it to qualify? Which countries will qualify as "civilized"? What if some countries protect works such as broadcasts, performances and sound recordings under a regime of "neighbouring rights" rather than traditional "author’s works": will they be counted amongst the "civilized" countries who include such works within their chapter on traditional copyright works? Since most countries apart from the United States protect utilitarian works of architecture, does this make the United States permanently "uncivilized" in this respect (because it claims to be constitutionally unable to protect such works), permanently in breach of the UCC, or never in breach since, without United States participation, a civilized custom cannot arise?

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75 Bogsch himself recognizes the difficulties of a test based on "some transcendent standards of civilized countries" when discussing what "adequate and effective protection" means under art. 1: *op. cit.*, footnote 34, pp. 6-7. Indeed, at one point he calls this standard "logical though not overly helpful": *ibid.*, p. 5. The "logic" involved seems questionable, but his last comment applies equally to the test if applied to "works".

76 Surely, those countries joining the UCC that favoured a circumscribed view of works eligible for copyright would not become bound to a meaning of copyright works that more "developed" countries, typically net exporters of copyright material, chose to adopt. Yet who is to say that the former countries are less "civilized" than the latter?

77 See text, *infra*, accompanying footnotes 99 ff.
In sum, the objections are similar to those suggested above in relation to the RBC and are as fatal to an acceptance of Bogsch's concept in the latter treaty. It is one thing to say that the phrase "literary, scientific and artistic" works is an open-ended one, and that it is designed to embrace new forms of authors' intellectual endeavours resulting in works that fall within the classically accepted teleological and ontological definition of the phrase, as amplified by the specific examples listed in the Conventions. It is another to say that a tree planted by a gardener will ever qualify for copyright protection, however many countries choose to call it "literary, scientific or artistic" and whatever their degree of "civilization" may be.

(3) Authors

There is a further point sometimes overlooked when consideration is given to what works are protected by the RBC and UCC. Neither Convention protects simply "works". As RBC article 1 and UCC article I state and as is stressed throughout virtually every article, they protect the rights of authors over their literary and artistic works. Like "work", "author" is not defined in the Conventions but, as we shall see, it has always had a well-recognized meaning. The definition of work is necessarily limited by the fact that only authors' literary, artistic and related works are protected. Any such work that is not produced by an "author" is outside the ambit of the Conventions.

Since "author" is not defined in the RBC, Stewart has argued that "the law of the state where protection is claimed decides who is an 'author'." He continues:

The reason for this lack of definition is that the national laws of member states differ greatly on this point. French law and many systems derived from French law or influenced by it recognise only physical persons as authors (writers, composers, painters, sculptors etc). Anglo-Saxon legislations and others influenced by them recognise legal entities, e.g. film producers, record producers, broadcasting organisations as authors or original right owners.

There is however more to the question of "authorship", as Stewart himself later recognizes. First, a state cannot be entirely free to decide

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78 H. Desbois, A. Françon and A. Kerever, Les conventions internationales du droit d'auteur et des droits voisins (1976), p. 73. Cf. Stewart, op. cit., footnote 52, para. 6.04: "The description of works as 'literary, scientific and artistic' must not be taken in a literal sense"; nor, one might add, in a sense that ignores the history and intent of the text.

79 Stewart, ibid., para. 6.04. Similarly, WIPO Guide, op. cit., footnote 35, p. 11. Paradoxically, in the light of Stewart's reference to France in the quotation, it was France which at Rome (RBC) unsuccessfully sought to introduce a term of protection for corporate bodies as original copyright owners: Rome Travaux, op. cit., footnote 66, vol. 2, pp. 56a ff.

80 Stewart, ibid., para. 7.04 ff., dealing with neighbouring rights.
who is an author. For one thing, both Conventions deal with people, not animals: no state can claim that a monkey that daubs is the "author" of a painting. Secondly, authorship implies some relevant causal link between a work and a person involved in it: a state cannot claim to be the author of any work its nationals produce, simply because its nationals are its subjects. Logically, therefore, the meaning of the term "author" must be derived from and regulated by the Conventions, not by the meaning an individual state chooses to place on the term; nothing in the Conventions suggests otherwise. A state may have some liberty of action in deciding who or what constitutes an "author", but cannot compel another Convention state to accept its idiosyncratic meaning to the extent that it departs from the international law significance of the term in the Conventions.  

(a) *Berne Convention*

From the BC's inception, "author" has meant a natural person, not a juristic person such as a corporation. Only natural persons, not corporations, can have a nationality and can create works; only natural persons can exercise moral rights over their works. These doctrinal difficulties caused vigorous discussions at a number of RBC conferences about whether a photograph could be "authored", or who could properly be called the "author" of a cinematograph film, the various creative people who contributed to the final product or the producer who organized the enterprise.  

In the passage cited above, Stewart elides the issue of authorship and ownership of copyright and has consequently suggested that a legal entity can be an author. Nothing in the RBC warrants this conclusion.


82 F.A. Mann, *International Corporations and National Law* (1967). 42 B.Y.I.L. 145, at p. 151; Dawid, *loc. cit.*, footnote 32, at p. 8. The purity of this position was reinforced when a British proposal at RBC Brussels to define "author" as including "assignee or other rights owner" was rejected in favour of a proposal to extend Convention rights to an author "and his successors in title" (RBC 1948, art. 2(4)): Documents, *op. cit.*, footnote 70, p. 164-165. On the position under RBC (Rome 1928), see Raestad, *op. cit.*, footnote 31, pp. 173-174; Ladas, *op. cit.*, footnote 4, para. 91.

83 It was not until RBC Stockholm 1967 that a compromise was reached on the latter issue. This distinguished between the creative people who were termed "authors" and the producer of the film who was considered a "maker": see, e.g., RBC (Paris 1971), arts. 4(a), 5(c)(i), 14(1), 15(2). For the debate, see WIPO, Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 (1971, Geneva), vol. 2, pp. 887 ff., 931 ff. The matter was extensively discussed by E. Ulmer. *Opinion on Cinematography and Copyright* given at the request of the Office of the International Union for the Protection of Literary and Artistic Works (Berne 1953), pp. 4 ff.

84 Text, *supra*, accompanying footnote 79.
Authorship and ownership of rights in a work must be distinguished. Normally, authorship implies ownership of rights in the work. This theory must however be accommodated with the case of pseudonymous, anonymous or unknown authors, where a practical need exists for someone, typically the work’s publisher, to vindicate rights on the author's behalf. The RBC expressly permits this. More difficult problems arise where an entity employs or commissions an author: states often allocate ownership to the employer, using legal techniques varying from vesting the copyright initially in the employer to creating an automatic assignment of rights from the author to the employer. Pressures from industry and reasons of expediency occasionally have caused states to go further and fictionally to define the author’s employer, normally a corporation, not merely as owner of the copyright but also as author of the work. Although functionally equivalent to theories of automatic assignment or initial vesting of copyright in the employer, the latter technique seems inconsistent with RBC’s basic principles and spirit, especially if heed is not paid to the author’s moral rights. Moreover, it obscures the centrality of the author in the scheme of the RBC and the implications to be drawn from this concept.

“Author” in the RBC implies a person who applies his or her personal creativity to produce a literary or artistic work. As will be shown below, performers, sound recorders, broadcasters and the like are neither “authors” nor do they create “literary and artistic works”. Performers, however creative, only present a performance of a work; broadcasters do no better. Sound recorders at best record the performance of a

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85 RBC (Paris 1971) allows (1) a named publisher prima facie to be “deemed to represent” the pseudonymous or anonymous author (art. 15(3), a provision traceable to BC 1886, art. 11 and later texts); (2) a competent state authority to represent the “unknown author”, e.g., in the case of folklore (art. 15(4)(a)). These are evidentiary presumptions and do not affect the true incidence of authorship or ownership: WIPO Guide, op. cit., footnote 35, pp. 93-95; Hogg v. Toye & Co. Ltd., [1935] Ch. 497 (C.A.); Circle Film Enterprises Inc. v. C.B.C. (1959), 20 D.L.R. (2d) 211 (S.C.C.).


An author’s assignee or successor may claim protection under RBC (Rome), even though this was first made explicit in RBC (Brussels 1948) art. 2(4): Documents, op. cit., footnote 70, at p. 95 (Rapport Général); Ladas, op. cit., footnote 4, pp. 203, 207.

87 See authorities in previous footnote. This had led to the assertion that the U.S. “work for hire” doctrine, under which the hirer is considered the author, is compatible with the RBC: Preliminary Report, op. cit., footnote 12, c. 14, pp. 4 ff.; sed quaere: see Limperg, loc. cit., footnote 86, at pp. 298-299.
work, or at worst record an event in nature. In either case, their work, however skilled, is essentially mechanical rather than creative.\(^{88}\)

(b) **Universal Convention**

It might be argued that the same analysis does not apply to the UCC because article I protects the rights of authors "and other copyright proprietors" in "literary, scientific and artistic works".\(^{89}\) However, this appears implausible for two reasons. First, the principle of "authorship" had been reaffirmed as recently as RBC (Brussels 1948) and it seems unlikely that the RBC participants at the UCC would have jettisoned so firmly entrenched a principle only four years later.\(^{90}\) The RBC concept of authorship was well known to other UCC participants, including the United States whose delegation included two members (Messrs. Fisher and Schulman) who had also been observers at RBC Brussels.

Secondly, the language "or other copyright proprietor" does not appear to have been intended to derogate from the concept of author's rights. This formula, as well as other references to "copyright" throughout the text, was included principally to accommodate the United States, a "copyright" rather than "author's rights" jurisdiction. A Nordic proposal to excise the phrase from article I on grounds of tautology was withdrawn after the United States delegate explained that the words were necessary, not merely to ensure that the author's successors were enti-

\(^{88}\) See text, infra, accompanying footnotes 121 ff. The doctrinal arguments are of course overdrawn. Performers and sound and film technicians are often as creative in their metier as authors. Doctrinal fundamentalism expresses a different reality. The political and economic reasons why individual authors need rights over their works differ from those that organizations, typically the entities producing movies, broadcasts and records, can proffer for protection. Modigliani and Van Gogh present more pressing cases for kindly solicitude than does the British Broadcasting Corporation or Twentieth Century Fox. Composers also feared that the grant of authors' status to performers would result in the formers' income being diminished: a pie can only be divided a finite number of times. These truths can conveniently be obscured so long as resort to high principle is successful. See generally G.H.C. Bodenhausen, Protection of "Neighboring Rights" (1954), 19 Law & Contemp. Probs. 156; WIPO, Guide to the Rome Convention and to the Phonograms Convention (1981), pp. 7-18; A. Mille, Performers' Rights: A New Independent Institution of Intellectual Property Law, [1984] Copyright 289.

\(^{89}\) An isolated reference to "copyright" protection in the UCC preamble is balanced off by other references there to respecting the "rights of the individual" and disseminating "works of the human mind".

\(^{90}\) Supra, footnote 83. Indeed, at the time Clause 1 of Protocol 2, protecting U.N. and O.A.S. publications was agreed to, the Director of the Berne Bureau (Mr. Mentha) read a statement, in response to queries by some delegates, that the provision "in no wise conflicts with the rule that only natural persons can create intellectual works and, in that capacity, have their copyright as original authors recognized": he reaffirmed "a principle which is in conformity with human laws and with a sound interpretation of the notion of copyright": UNESCO, op. cit., footnote 26. p. 169.
tled to assert Convention rights, but also to deal with a peculiarity of United States law whereby the author of a "work for hire" is the worker's employer rather than the worker.\textsuperscript{91}

It may therefore be concluded that, subject to this last qualification, the concept of "authorship" is as valid under the UCC as it is under the RBC.

(4) \textit{New Technologies}

There is of course a difficulty with an admittedly dynamic definition of "literary, scientific and artistic work" designed to encompass new developments as they arise: how does one know when and if a new type of work falls under RBC article 2(1) and UCC article 1?

Computer software, to be discussed below, is a case in point. Software has been around for some years, yet it is unclear whether, on the present assumption that it is a literary work under the Conventions, the law of some states protects it as such. The jurisprudence may be unsettled or a final decision of the state's highest court may be lacking. States may be reluctant to amend their copyright law to include software until their tribunals have spoken and until the practice of other states has crystallized. If a state's jurisprudence finally holds software to be outside the copyright law, will the state have broken its Convention obligations from the time the new work appeared, since \textit{ex hypothesi} it was unprotected from that moment?

The Conventions do not address this issue. It would however be absurd and unreasonable, and thus contrary to their object, if a state were treated as breaking its obligation to protect a new class of literary or artistic work from the moment that new class arose. In practice there is always a period of uncertainty as the various participants in a state's legal system—lawyers, courts, bureaucrats, interested parties, and the public—become aware of and start wrestling with the problem. The period may be long or short, depending on a country's state of development and the accidents of litigation. Legal and judicial opinions may initially conflict and some time may elapse before a final solution is reached.

If the work is eventually held to fall outside the state's copyright law, the state should have some time to reach a good faith conclusion on

\textsuperscript{91} UNESCO, \textit{ibid.}, p. 135 (Mr. Farmer, U.S. delegate). As to the Nordic proposal, see \textit{ibid.}, pp. 132-133, 136. Since the proprietor may be a juristic person, the problem of who is the author of a film may be more easily overcome under the UCC than the RBC: Desbois, Françon and Kerever, \textit{op. cit.}, footnote 78, pp. 73-74; Stewart, \textit{op. cit.}, footnote 52, para. 6.07. Equally, states may also treat corporations as "nationals": UNESCO, \textit{op. cit.}, footnote 26, p. 76 (Rapporteur-Général's Report); cf. under the RBC, \textit{supra}, accompanying footnotes 83 ff.

There is no moral rights consequence to this extension since, unlike the RBC, the UCC does not compel recognition of authors' moral rights.
whether its tribunal's decision is correct in terms of the Conventions. If it concludes the decision is incorrect, it should be permitted a further reasonable time, measured by the exigencies of its political system, to try in good faith to rectify the position by amending its law. Only if a state acts in bad faith or delays beyond a reasonable time in aligning its law with the Conventions, should it then be held to have broken its international obligations.

Obviously this view contains some uncertainties, but the only alternatives—holding a state to be in breach immediately a new class of work arises or imposing a fixed time schedule for it to embrace the new class within its copyright law—are unacceptable as a matter of treaty interpretation or, for that matter, good sense. The suggested view has the virtues of according with the way in which states actually behave, and of fairly balancing state autonomy with the problems inherent in administering a dynamic international obligation.

II. The Relationship of the Conventions to Particular Works

We are now in a position to examine a number of works to determine how far they fall under the Conventions. The key questions will inevitably be whether the work is that of an author and whether it falls within the language of "literary and artistic works" and related works contemplated by the RBC and UCC.

A. Sound Recordings and Broadcasts

The 1985 Report recommended that sound recordings and broadcasts be protected as separate categories of subject matter; the former should carry the full regime of copyright protection available to other copyright works, the latter a more limited range of rights. However, following long-standing Canadian opinion on the point, the Report treated both sound recordings and broadcasts as "neighbouring rights" rather than "copyrights" under the Conventions. The Report accordingly recommended extending protection to non-Canadians only on the basis of material reciprocity for broadcasts and in respect of performance rights (including transmission and retransmission) for sound recordings. The Report's recommendations seem consistent with Canada's obligations under the Conventions. Indeed, if sound recordings are outside the Conventions, the Report could have gone further and subjected all the rights to the condition of material reciprocity or such other conditions as it thought fit.

92 Op. cit., footnote 2, pp. 49-51 (sound recordings); 57-59 (broadcasts).
94 Op. cit., footnote 2, pp. 50-51 (sound recordings); 58-59 (broadcasts).
The suggestion that sound recordings and broadcasts can qualify as "literary and artistic works" under RBC (Paris 1971) article 2(1) and, presumably, earlier texts including Rome 1928, seems immediately implausible, at least for sound recordings. Many RBC states are also members of the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961. Article 16(a)(iv) of this Convention allows a state to opt out of the national treatment requirement for sound recordings and instead apply a rule of material reciprocity. This would be inconsistent with the RBC requirement of national treatment if records were works protected under the RBC. Since article 1 of the 1961 Convention states that its provisions should not be interpreted as prejudicing protection under the RBC, it follows that records could not in 1961 have been considered protected under RBC (Brussels 1948) and, a fortiori, RBC (Rome 1928).

Quite apart from any inconsistency with the 1961 Rome Convention, both sound recordings and broadcasts seem to be outside the scope of the RBC. Recall that photographs, cinematographs and analogous works historically were excluded from the definition of "literary and artistic works" right up to RBC Rome 1928. Records and broadcasts could have fared no better. It was easier to recognize that recording and broadcasting should be included in the rights granted to a work, as was indeed done at Rome in 1928, than to recognize that the process of recording or broadcasting was itself "literary" or "artistic". True, by RBC Brussels 1948 these doctrinal objections concerning cinematographs and photographs had been sufficiently overcome to allow these works to be included within the definition of "literary and artistic works" in article 2(1) of that text. Similarly, at Stockholm 1967 an amendment assimilating "works expressed by a process analogous to cinematography" to cinematographic works was added to article 2(1) to encompass television broadcasts; article 2(2), giving states a discretion whether or not to require fixation in material form as a condition of protection, permits live telecasts to qualify under article 2(1). Careful changes such as these, adopted only after long debate, emphasize that spurious analogy cannot be used to "bootstrap" other classes of work into Rome article 2(1) or, for that matter, succeeding revisions of the texts.

This conclusion is further supported by the travaux préparatoires of RBC Brussels 1948. At that Conference, L'Association Littéraire et

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95 Ricketson, op. cit., footnote 33. The Preliminary Report, op. cit., footnote 12 (c. 7, p. 3) states that "[t]here is a debate whether sound recordings are covered by separate conventions and therefore not subject to Berne".

96 Moves to include "radiophonic works" in art. 2 and to grant protection to records as "original works" in art. 13 were defeated at Rome: Ladas, op. cit., footnote 4, paras. 110, 198.

Artistique Internationale (ALAI) asked the International Bureau to recommend to the Conference that phonograms and broadcast works be added to the list of matters enumerated in article 2(1). In their joint report to the Conference, the Bureau and Belgium refused to make this recommendation, not because these matters were already within the broad language of the article, but because they were not and should not be. As for phonograms, the Report stated that these items were not produced by human intelligence. that is to say, they do not engage the creative activity that legislation dealing with authors’ rights protects. This was not literary or artistic but industrial work: it certainly deserved protection but under a different regime. As for broadcast works, the danger was that the work would be commissioned by a broadcast organization which would mistakenly be thought to be the author. In short, both a human "author" and also the intellectual creativity implicit in a literary or artistic work were required before items could fall under the RBC.

No participant at Brussels dissented from this view. On this point, the Continental notion of "author’s right", which recognizes the special social and legal position of the author, prevailed over the pragmatic British notion of "copyright". Not until the 1961 Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations did broadcasters and record producers obtain

98 Documents. op. cit., footnote 70, pp. 140-141, 154-155; see also text, supra, accompanying footnotes 82 ff. Similarly, at RBC (Berlin 1908), the protection claimed by sound recording and piano roll manufacturers was considered to be in the realm of "droit industriel" rather than of literary and artistic works: "il ne pouvait dès lors être introduit des dispositions à cet égard dans la présente Convention": Procès-verbaux contained in Correspondence Respecting the Revised Convention of Berne for the Protection of Literary and Artistic Works, signed at Berlin, November 13, 1908, Cd. 4467 (1909, London), p. 106 (declaration of Belgian delegation); see also Minutes of Evidence taken before the Law of Copyright Committee, Cd. 5051 (1909, London), pp. 128, 130-131 (evidence of Georges Maillard. President of ALAI).

99 The position in France is typical: "[n]o doubt, an inexperienced or unknowledgeable sound engineer will reach a quite different result from an expert and highly qualified specialist; but the act of recording itself is a mechanical, automatic operation, whereas the pen, like the [violinist’s] bow, sits lifeless without human hand, or rambles under the control of a child or madman.": Desbois, op. cit., footnote 29, para. 187 (the identical paragraph appears in the 3rd ed., op. cit., footnote 15) (my translation). See also Rosen, loc. cit., footnote 13.

100 See text, supra, preceding and accompanying notes 12 ff. Assertions that no philosophical differences exist between Continental and British notions of copyright (e.g., P. Recht, Le droit d’auteur, une nouvelle forme de propriété (1969), pp. 19-20) conveniently ignore the case of sound recordings. Thus, unlike many Continental countries and despite evidence that such works were not literary or artistic works under RBC (Berlin 1908) (see Minutes of Evidence, op. cit., footnote 98), Britain had no qualms in assimilating sound recordings to musical works: Copyright Act 1911 (U.K.), s. 19(1); a course followed by other British Commonwealth countries, including Canada (Copyright Act. s. 4(3)).
protection, and then only under the guise of "droits voisins" ("neighbouring rights") to authors' rights.\textsuperscript{101}

The position seems no different under the UCC. Once it is accepted that records and broadcasts are neither "literary, scientific and artistic works" nor the product of an "author", they are outside the scope of article I and thus article II. This is further supported by the fact that, of the many items suggested at the UCC Conference for addition to the list of specific examples in article I, no one put forward records or broadcasts: hardly a surprise given the events at RBC (Brussels 1948) and given the fact that United States copyright law at the time did not protect these items. True, a former director-general of the International Federation of the Phonographic Industry has faintly suggested that sound recordings can qualify as "writings", a specific example of protected work set out in article I.\textsuperscript{102} But nothing in the travaux préparatoires of the UCC suggests that "writings" was intended to have this bizarre meaning or indeed any other meaning than the one it bears in the RBC, where it certainly does not include sound recordings.\textsuperscript{103} That the United States regards sound recordings as "writings" for the purposes of its constitutional provision dealing with copyright can be no more relevant to the interpretation of the UCC than would be the domestic law determination of another state that such items are not "writings": the Convention meaning of the word is unaffected by such differences.

British,\textsuperscript{104} Australian,\textsuperscript{105} and New Zealand\textsuperscript{106} copyright revision committees have considered either or both records and broadcasts to be out-
side the RBC and UCC. This view, also supported by most commentators, seems plainly right.

B. Published Editions and Videograms

The White Paper stated, and the 1985 Report implicitly accepted, that the publishing of a new edition of an existing work was not subject to the Conventions. This is correct: producing such an edition, whether of a copyright or public domain work, is not an act of "authorship", any more than is the recording of a piece of music; there is no creativity in arranging or laying out an existing work.

The 1985 Report accepted that the definition of cinematographic works currently existing in the Copyright Act should be extended clearly to cover videotapes, videocassettes and video-discs ("videograms"), as well as images produced by videogames. The Report proposed to modernize the category by relabelling it "audio-visual works" instead of "cinematographic works". The Report did not suggest that anything other than national treatment was required for these works, thereby implicitly recognizing them as subject to at least the RBC. This seems correct.

At first sight, videograms (that is, video-tapes and discs), at least insofar as they merely record an event in nature, might be thought to suffer from an objection similar to that which prevented published edi-

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106 Report of the Copyright Committee (the Dalglish Report) (Govt. Printer, Wellington, 1959), paras. 73, 280.
110 Ladas, op. cit., footnote 4, p. 425; Straschnov, Protection internationale, op. cit., footnote 107, p. 37; Mak, op. cit., footnote 107, p. 148 ("surely, nobody would rank as an author [the printer of a book]!").
Copyright in Foreign Works

1987

It was precisely because the word in prior texts, "obtenu" ("produced" or "effected") was arguably not broad enough to encompass fresh developments such as telefilm, telecasts and videotape that led to its replacement by "exprimé" ("expressed") in RBC (Stockholm 1967).

Thus, in Warner Bros.-Seven Arts Inc. v. CESM-TV Ltd. (1971), 65 C.P.R. 215 (Ex.) Cattanach J. held that, for the purposes of s. 3(1)(d) of the Copyright Act, a videotape was a "contrivance" by means of which a work may be "mechanically performed": "the word ['mechanically'], in its common parlance, is not to be contrasted with activation by electromagnetic principles."

While no doubt correctly excluding telecasting as a "work produced by a process analogous to" photography or cinematography, Cameron J. reached this result by focusing almost exclusively on the technical differences between the media: Canadian Admira\nal Corp. Ltd v. Rediffusion, Inc., [1954] Ex. C.R. 382. This has caused commentators to doubt whether videograms are protected works under the Copyright Act: R.-M. Perry, Copyright in Motion Pictures and Mechanical Contrivances (1972), 5 C.P.R. (2d) 256, at pp. 266 ff.; Keyes and Brunet, op. cit., footnote 5, p. 82. A course on real estate

tions falling under the RBC. However, there is a critical difference. As will be recalled, RBC (Rome 1928) recognizes that photographic and cinematographic works may not be authors' literary or artistic works, but protects them nevertheless in articles 3 and 14 as special categories of related works. The objection that such works lack authorship or artistic character is thus not available to these categories. The technical means (electronic rather than chemical) of producing a videogram may differ from photography or cinematography, yet this should not prevent videograms qualifying. The creative processes and results are sufficiently similar between the two media for videograms to be treated as either photographic works or cinematographic works, or at least works "produced" by a process analogous to photography or cinematography. This seems to be accepted under RBC (Paris 1971) but this text, incorporating a change made at Stockholm 1967, replaces the word "produced" by "expressed" ("exprimé"), thus focusing more clearly on the end product than on the technical process creating it. Nonetheless, the same result should hold for RBC (Rome 1928): in a treaty dealing with creative works, "analogous process" can be read to include both the creative and the technical means used to achieve a work. Given the close analogy between the type of creativity needed to produce a videogram and that for cinematography or a series of photographs, there is no need to insist on as close an analogy between the technical processes used to translate the creative act into the finished product.

Text, supra, accompanying footnotes 69 ff.

The French text uses the word "obtenu" in articles 3 and 14, but the unofficial English translation inconsistently uses "produced" in article 3 and "effected" in article 14.


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For similar reasons, videograms should also fall under the UCC. Photographs and cinematographs, being included in the RBC (Brussels) article 2(1) definition of literary and artistic works, seem to fall easily within article I of the UCC. In fact, photographic works are undoubtedly covered but states are not bound to protect them; cinematographic works are a specific example listed in article I. There is no phrase like that in the RBC extending protection to works "produced/expressed by a process analogous to" photography or cinematography, but this absence may be explained on grounds of intended brevity: too much detail in the UCC would be "dangerous" and cause the language of article I to be read "limitatively". Bogsch's view that "cinematographic work" should be equated with "silent or sound motion pictures", regardless of genre, mode of realization and technical processes, seems reasonable, and would cover videograms.

C. Performers' Rights

The 1985 Report recommended that performers should be granted rights in their performances but, "[a]s with the provision of a performing right in sound recordings and rights in published editions, the protection of performers' performances should be provided to nationals of other countries on a reciprocal basis". This recommendation is consistent with Canada's obligations under the Conventions.

Performers were not regarded as "authors" at the RBC (Rome 1928) Conference. Performers' rights were debated but not made the subject of a Convention provision: only to a voeu requesting members to study the possibility of protecting them. Performers might well be considered artists; they might well be primarily responsible for a work becoming popular and generating income for authors; but, essentially, they interpreted an existing work without creating a new one. Protection they might deserve, but not as "authors".

117 Art. IV.3; Bogsch, op. cit., footnote 34, p. 10; Ulmer, loc. cit., footnote 36, at p. 22.
122 For the economic and political realities behind this principle, see footnote 88, supra. An interesting example of the relationship between a director/author and the
It was not until the 1961 Rome Convention\textsuperscript{123} that performers, along with broadcasters and record producers, were granted protection, but then only "neighbouring rights", not authors' rights. British and Australian copyright committee reports\textsuperscript{124} and most commentators\textsuperscript{125} correctly consider that performers have no rights under either the RBC or UCC.

D. Computer Programs

Many states now recognize computer programs as protectible works under domestic copyright laws that specifically embrace computer programs or that refer simply to literary works. Interlocutory decisions to the effect that computer programs qualify as literary works under the current Canadian Act have now been bolstered by a fully reasoned trial decision on the merits.\textsuperscript{126} Amongst other jurisdictions reaching similar results are "copyright" countries such as the United Kingdom, United States, Australia and South Africa,\textsuperscript{127} as well as "authors' rights" countries such as Germany, France, Holland and Japan.\textsuperscript{128}

actors of a play and the importance of the actors' interpretation occurs in Hamlet (Act III, scene ii), in Hamlet's famous speech to the cast who are about to put on a performance before the King and Queen of Denmark.

\textsuperscript{123} See text, supra, accompanying footnote 101. Ulmer, op. cit., footnote 83, p. 9, noting that performers would necessarily have less extensive rights than true authors, gives a practical reason for excluding the former from the RBC: "The high level of copyright protection which has been achieved nationally and internationally in the Countries parties to the Berne Convention can be maintained only if the circle of authors is kept within certain limits."

\textsuperscript{124} Whitford Report, op. cit., footnote 104; Spicer Report, op. cit., footnote 105.

\textsuperscript{125} Ostertag, loc. cit., footnote 36, at p. 43; H.L. Pinner (ed.), World Copyright (1953), vol. 1, p. 1050 (Mentha); Mak, op. cit., footnote 107, p. 109; Klaver, loc. cit., footnote 71, at p. 162 ("more or less universally-held opinion"); Ulmer, loc. cit., footnote 36, at pp. 21-22 (seemle); Buck, loc. cit., footnote 107. Cf. Ladas, op. cit., footnote 4, para. 199.

\textsuperscript{126} Apple Computer Inc. v. Mackintosh Computers Ltd. (1986), 10 C.P.R. (3d) 1 (Fed. T.D.) ("Apple Canada "). Any appeal from this decision will have the support of a contrary 3:2 decision of the High Court of Australia, delivered a few days after the Canadian decision but without knowledge of it, on the similar provisions in the Australian Copyright Act, before they were amended specifically to include computer software: Computer Edge Pty. Ltd. v. Apple Computer Inc. (1986), 60 A.L.J.R. 313 (Aust. H.C.) ("Apple Australia "). See generally, T. Sinnott, Copyright in Operating System Software on Computer Chips: A Tale of Two Apples (1987), 3 I.P.J.I.

\textsuperscript{127} United Kingdom: the Copyright (Computer Software) Amendment Act 1985 (U.K.) now assimilates programs to literary works, a policy the U.K. government proposes to continue: Department of Trade & Industry, Intellectual Property and Innovation, Cmnd. 9712 (1986), para. 9.3.


Australia: Copyright Amendment Act 1984 (No. 43) includes computer software as
Partially against this background, the 1985 Report recommended that computer programs should be a separate category of copyright subject-matter. 129 "Computer masks", the series of layered circuits designed to create a program and integrated into a semi-conductor chip, should however be protected by sui generis legislation outside the Copyright Act, following the model of the United States Semiconductor Chip Protection Act of 1984. 130 In both cases, material reciprocity rather than national treatment was recommended. In the case of computer programs (including, presumably, computer masks) this was because of the "unclear status of computer programs internationally". 131 The 1985 Report thus appears to reject the view espoused by the White Paper that human-readable programs (source and object codes) are, but machine-readable programs (machine codes) are not, works under the RBC or UCC. 132

protected work. Machine code created prior to the effective date of this amendment however has been refused copyright protection: Apple Australia, supra, footnote 126.


France: the Law of July 3, 1985 (no. 85-660, art. 1.V), clearing up prior conflicting decisions, expressly confers copyright protection on programs, prompting a commentator to suggest that the assimilation provisions of art. 5(1) apply to them: F. Toubol, The Protection of Computer Programs in France. [1986] E.I.PR. 15, at p. 16.


Japan: Law for Partial Amendments to the Copyright Law, No. 62 of June 14, 1985, granting software copyright protection; see D.S. Karjala, Protection of Computer Programs under Japanese Copyright Law, [1986] E.I.PR. 105, also indicating that three prior decisions had held similarly.


130 Ibid., pp. 46-48. The U.S. Act is referred to, supra, footnote 7.

131 Ibid., p. 45. Cf. G. Karnell, Copyright in Computer Programs—An International Survey, [1985] E.I.PR. 126, at p. 128 (the RBC does not "demand protection for computer programs"); D.S. Karjala, Lessons from the Computer Software Protection Debate in Japan (1984), 53 Ariz. St. L.J. 53, at p. 78, n. 55 ("although many agree that the Berne Convention definition [in RBC (Paris 1971) article 2(1)] could fairly naturally be applied to programs, it is hard to make a legal case that it clearly must apply, as it was drafted at a time when no one was thinking about computer programs, much less about the possibility that they might require some special treatment").

132 Op. cit., footnote 37, pp. 79-85 (for explanation of source, object and machine codes, see text. infra, accompanying footnotes 138 ff). The White Paper recommended a complex scheme, the broad features of which were: source and object codes should be subject to copyright and national treatment; a right granted to the copyright owner would be to make a machine code based on them, but anyone with access to the source or object code could exercise this right themselves to make a machine code; machine code would be subject to a 5-year copyright based upon material reciprocity rather than national treatment.
The Government Response rejected the 1985 Report’s view that computer programs should be subject to reciprocity and stated instead that they would be subject to national treatment. Computer masks would also be "protected in the Copyright Act but will be distinguished from traditional works". Whether masks will be extended national treatment or only material reciprocity was left unstated; the Government’s silence on this point may mean that the Report’s recommendation of material reciprocity has been accepted. The reasons for rejecting the Report’s other recommendation were also left unstated.

It is of course a nice matter of policy how far computer programs should be protected by copyright or by some other regime. Our discussion will be limited to the question of RBC and UCC compliance on which, it seems, the 1985 Response and the White Paper are in disagreement. This is not surprising: the literature also reveals a similar confusion. The current trend of articles, some of which read almost like computer industry briefs, leans in favour of protecting computer programs in all their forms. To some extent, despite its contrary protestations, the World Intellectual Property Organization (WIPO) itself may have unintentionally contributed to the confusion by preparing its 1978 Model Provisions on the Protection of Computer Software. By suggesting norms such as a shorter term of protection different from those under the RBC, the Model Provisions might be read as implicitly admitting that the RBC does not apply to programs. Subsequently, experts representing both RBC and UCC states and meeting under the aegis of WIPO, after some indecision, cautiously accepted that the Conventions may, not must, apply to programs.

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136 See R. Braubach, Computer Software International Protection, [1980] E.I.P.R. 225. The Report of the WIPO International Bureau to the First Session of this meeting states of the RBC position: "It seems to be generally accepted that computer software could enjoy copyright protection, provided that the conditions of copyright law are fulfilled." (Doc. LPCS/I/2, Nov. 30, 1979, para. 8). The Report adopted by the Expert Group is just as cautious: "Despite the fact that the existing international convention[s] were not specifically designed to grant protection to computer software, an attempt
A return to the actual texts and bases of the Conventions seems in order. It is first necessary briefly to define our terms. A computer program is initially written by a human programmer, perhaps first using flow charts (drawings), but eventually as a series of instructions (source code) to be inserted into a computer. The computer transforms the source code into machine code, a corresponding series of electric impulses that may interact with an existing program or with the computer's central processing unit to achieve a desired result. Either before, but most likely after, the machine code is generated, it can be represented by an object code, a binary or hexadecimal form of the source code understandable by a programmer. The machine code may be embedded or stored either temporarily or permanently in a material support such as silicon chip, magnetic tape or disc. It is imperceptible and unintelligible to humans, though it may be physically represented and printed out in its corresponding object code.

Source and object codes should qualify as protected works under the RBC. Under article 2(1), "literary and artistic works" include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". If the code qualifies as a "literary work", it is irrelevant that its expression is in alphanumeric, hexadecimal or binary notation: the code is a "production" and the RBC expressly makes the "mode or form" of the work's "expression" irrelevant. The key question is whether it is a "literary work" by an "author".

The work seems to be created by an "author" in the traditional sense: personal intellectual creativity of an order far greater than for many other protected works (letters, simple drawings, photographs) is required to produce a program. Its form is literary: the notation of

should nevertheless be made to rely on those conventions as much as possible to avoid the need to prepare a new treaty, whose objectives were covered—at least partly—by existing conventions, particularly the Berne Convention. (Doc. LPCS/I/4, para. 42, Nov. 30, 1979). Similarly, the 1983 WIPO meeting: see Note, WIPO: Legal Protection of Computer Software (1983), 17 Jo. World Trade Law 537, at pp. 538-539.

137 Terminology in this area is in disarray. For convenience, we shall accept the language used by Reed J. in her judgment in Apple Canada, supra. footnote 126.

138 The following discussion does not deal specifically with flow-charts, which should have no difficulty being protected as "artistic works" (drawings) under the RBC. With this change, the discussion of source and object code applies equally to such drawings.

139 A human may transform source code to object code, but the availability of assembly programs designed to do this mechanically make this an unlikely event because of its cost inefficiency and practical uselessness. Whether the translation involves the creative act of an "author" is irrelevant, since the originality involved in creating the source code should equally support the object code.

140 Despite a 1985 German decision anomalously requiring something akin to novelty in the patent sense rather than originality for a computer program to qualify as a copyright work: Schroeder, loc. cit., footnote 128, at pp. 89-90.
source and object codes are visually perceptible and readily comprehensible by other programmers versed in the language. That the codes may lack aesthetic appeal is irrelevant: so do many technical drawings, letters and plastic works of geography, topography or science that, as specific examples of protected works dating from the original BC 1886, undoubtedly qualify for protection. The purpose for which the work is eventually intended, to drive or interact with a machine, should not disqualify the work; as the examples of technical drawings and plastic works indicate, the function or purpose to which a work is put or intended seems irrelevant under the RBC or the UCC. The White Paper’s view that source and object codes were literary works subject to the Conventions therefore appears correct. The 1985 Report’s proposal to subject these works to material reciprocity seems contrary to the national treatment requirements; the Government Response to extend national treatment has however rectified the matter.

Machine code however presents a problem. It may be embodied in a silicon chip that has been preceded by making a number of circuit diagrams, that are then etched and layered as “computer masks” into a chip. The diagrams may qualify as artistic works but, in this form or as computer masks, will probably fall within the sub-category of works of art applied to industrial purposes. Since such works shall, under RBC article 2(4), “be protected so far as the domestic legislation of each country allows”, Canada may grant copyright protection for whatever period it chooses to such works. However, the UCC subjects Canada to a fixed minimum term of ten years protection if it chooses to protect works of applied art. In both cases, if the items are protected as artistic works, the national treatment requirements apply. If, however, a state is not required by the Conventions to grant protection to such works, it must be equally free to attach protection to some feature of the work that is not artistic. If it chooses this route, its scheme would seem to be

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142 Text, supra, accompanying footnote 133.


144 RBC (Paris 1971), article 7(4), but not any version of the RBC up to and including Brussels 1948, requires a minimum of 25 years protection for such works.

145 Art. IV.3.
outside the Conventions. It would not matter whether formally the scheme appeared within the Copyright Act or not: domestic labelling cannot change the nature of any Convention obligation. Because the 1985 Report and the Government Response to it have not mapped out the scheme proposed with any precision, it is impossible to say at this stage whether or not it complies with RBC or UCC obligations.

Machine code that is embedded or stored either permanently or temporarily on a fixed support but that is not itself preceded by any work other than source or object code presents a more major problem. Is machine code a "literary work" or a "production in the literary [or] scientific domain"? This language seemingly implies that a work must comprise humanly perceptible and intelligible symbols, which electric impulses decidedly are not. Even if this objection is not fatal, the process of converting source or object code into machine code does not involve "authorship" and is less "literary" or "scientific" work than the process of sound recording which, for the purposes of the Conventions, belongs to the mechanical rather than creative arts. Ulmer and Kolles seek to overcome this difficulty by regarding the process of program creation as a composite whole. They then compare it with the process of film-making, showing how the assembly of many creative inputs produces a final product perhaps more creative than the sum of its parts. The analogy, true on the issue of creativity, is false on the question of other elements of protectability: a cinematographic film is a protected category of work, whereas the very question with machine

146 Thus, under s. 901(a)(2) of U.S. Semiconductor Chip Protection Act, supra, footnote 7. mask work is defined as "a series of related images, however fixed or encoded—(A) having or representing the predetermined three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product; and (B) in which series the relation of the images to one another is that each image has the pattern of the surface of one form of semiconductor chip product". It is difficult to see any "artistic work" in this definition at all.

147 Text, supra, accompanying footnote 133.

148 A Canadian court has so held in an interlocutory decision dealing with this precise language embodied in s. 2 of the Copyright Act, taken directly from the equivalent language of art. 2 of the RBC (Rome 1928): La Société d'Informatique R.D.G. Inc. v. Dynabec Ltée. [1984] C.S. 1189, aff'd. (1985), 6 C.P.R. (3d) 322 (Que. C.A.).

149 This objection recently prevailed in Apple Australia, supra, footnote 126, before a 3:2 majority of the High Court of Australia, which held that machine code embodied in a chip did not qualify as a "literary work" under the domestic copyright law; but see now, supra, footnote 93. In a companion case in Canada, a trial court did not accept that these objections prevented machine code from being a translation or reproduction in material form of source or object code: Apple Canada, supra, footnote 126. The cases were decided virtually contemporaneously without reference to one another; indeed, the Canadian court partly relied on the intermediate Australian appellate decision (1984), 53 A.L.R. 225 reversed by the Australian High Court.

150 Text, supra, accompanying footnotes 9 ff.

code is whether it is protectible and, if so, as what sort of work. As the case of sound recordings again demonstrates, it is perfectly possible for copyright works (for example, music and lyrics) to be used in the creation of an ultimately non-copyright work, where the latter (the recording) does not qualify as the literary or artistic work of an author.\textsuperscript{152} Even if, unusually, the sound recorder is the same person as the music composer and lyricist, and the music and lyrics have been composed specifically for the purpose of being recorded, this does not change the nature of the act of recording and render it a protected work.

There seems equal difficulty in considering machine code a translation, adaptation, alteration or reproduction in any manner or form\textsuperscript{153} of source or object code: the requirement of humanly perceptible and intelligible symbols would seem to apply to the derivative work as well as the original work. Again, the same reasons as prevent a sound recording being a translation or other derivation from the underlying musical work under the RBC\textsuperscript{154} apply equally to machine code. The White Paper was thus right to think that machine code was outside the Conventions.\textsuperscript{155} To the extent that the 1985 Report proposes to treat machine code as a protected work, national treatment would appear to be non-obligatory.

Canada could, of course, voluntarily legislate that converting source or object code (a protected work) into machine code is a right reserved to the author. In this event, this right should qualify for national treatment under RBC article 4(1) and UCC article II.\textsuperscript{156}

The discussion above has ignored the practical results intended to be achieved by the operation of machine code. The program may be used, for example, to present an audio-visual display such as a videogame. There seems no reason why this result should not qualify as an artistic and/or musical work expressed in a particular mode or form, despite its fluctuating and transitory character and the need for further human invention to produce the display. The product is well within the ontological and teleological conception of artistic and musical works. The involvement of a new instrumentality, the computer, in the translation of a kinetic artistic/musical conception to the screen should be viewed simply as a technological development within the traditional arts. The 1985

\textsuperscript{152} Text, supra, accompanying footnotes 98 ff.

\textsuperscript{153} RBC (Paris 1971) arts. 2(3), 9(1). Apple Australia, supra, footnote 126, refused to treat machine code as such versions. Apple Canada, ibid., however did hold machine code a reproduction in material form of source or object code under the similar Canadian Act, and seemingly would have also held it a translation.

\textsuperscript{154} Ostertag, loc. cit., footnote 36.


\textsuperscript{156} Ibid., pp. 84-85 is unclear on this point, but elsewhere recognized that granting a new right to a protected work falls under art. 4(1): p. 94 (retransmission rights); see further text, infra, accompanying footnotes 161 ff.
Report’s proposal to treat this category as an “audio-visual work” replacing the outmoded term “cinematographic work”\(^{157}\) seems to accord with this view.

### III. What Rights are Subject to National Treatment?

The 1985 Report recommended granting new types of rights to works already covered by the Copyright Act, as well as those works that it recommended should be protected. It correctly recognized that new rights granted to works not covered by the RBC did not fall under the national treatment requirements of the RBC and accordingly those rights could run in favour of Canadians only or could be extended to foreigners on some ground such as material reciprocity. New rights granted to works protected by the RBC, however, had to be accorded national treatment.\(^{158}\)

This still leaves the question of what “rights” are encompassed by the national treatment requirement of the Conventions. So far as the UCC is concerned, article I simply obliges states to “provide for the adequate and effective protection of the rights of authors” in the enumerated works; Article II requires “the same protection” to be granted to foreign as to national works. Although these obligations leave considerable discretion to states on what rights to grant, the right in question must be an author’s right.\(^{159}\) Given the higher level of protection generally required by the RBC, it must generally follow that “rights” not required by the latter will equally not be required by the UCC. An RBC member like Canada, which complies with the obligations imposed by the RBC, would normally automatically comply with UCC obligations. The discussion will therefore concentrate on the RBC, with only occasional reference to the UCC.

RBC (Rome 1928) Article 4(1) requires national treatment for three classes of rights:

1. rights which a country’s laws presently grant to “natives”, that is, nationals;
2. rights which a country’s laws later grant to nationals;
3. rights specially granted by the Convention.


\(^{159}\) Spain’s proposal to list a number of rights was rejected because, according to the Rapporteur-Général, “these rights should include those given to authors by civilized countries but... an enumeration was dangerous, because it might read limitatively”: UNESCO, *op. cit.*, footnote 26, p. 74. No intention to change the nature of author’s rights as understood under the RBC appears.
Ladas has argued that "rights" should be broadly interpreted; any other view would be a "dangerous theory". But what is meant here by "rights"? As is common in legal matters, the black and white ends of the spectrum are clear enough; it is the grey shading in the middle that causes difficulty.

At an abstract level, the owner of a right must possess it against some person(s); the right relates to some act or omission of that person and must be enforceable by law. As used in the RBC, an author’s right tracks the primary meaning common to most national copyright laws: an author has in relation to his or her work the right to exclude others from reproducing or using the work in some way. The RBC extends this primary meaning to include a right to receive remuneration from the user of the work, even where the author is unable to prevent the use. Again, the right must be understood in the sense contemplated by the RBC and not merely a state’s domestic law.

One can envisage a state compensating authors for uses made of their works, in ways that fall outside this concept of rights. Thus, a state might choose to protect a work’s ideas rather than its expression. It would then depart from the RBC understanding of authors’ rights and, for that matter, copyright; such a right would be outside the RBC. More specifically, if home taping of copyright works such as videotapes was thought detrimental to authors, a scheme could be established whereby home taping was made legal. To compensate authors for such uses, the government could then distribute monies from a fund set up from general taxation or even from taxation specially levied on manufacturers of home taping hardware or software. The author would have a “right” against the fund but it would not be in respect of a particular use by a particular user, any more than paying the proceeds of a tax levied on the manufacturers of handguns to the victims of gun crimes would be considered a victim’s right against gun manufacturers. This sort of “right” may well be beyond the concept of “rights” contemplated by article 4(1); if so, it would not be subject to the principle of national treatment.

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162 As in article 11 bis (2), where the author’s right to authorize public radiodiffusion of his or her works may be regulated by the state, but not so as to prejudice the author’s moral right or the author’s right to receive an “equitable remuneration”.
163 Contrary to the position in the United States (Sony Corp. of America v. Universal City Studios, Inc., 78 L. Ed. (2d) 574 (U.S.S.C., 1984), private home taping for listening or viewing entertainment probably is infringement under the Copyright Act (Tom Hopkins International Inc. v. Wall & Redekop Realty Ltd., supra, footnote 116, at p. 410 (B.C.C.A.)). The only defences possible would seem to be based on public policy or equitable notions of laches or acquiescence, in the light of the long passivity of the Canadian industry in taking action against offenders.
On the other hand, if authors were given a right to collect compensation directly from blank tape and machine manufacturers, as the 1985 Report recommended, this would seem to be the sort of "right" caught by article 4(1). Tape and machine manufacturers can logically be put under a duty towards authors not to put into commerce equipment that, to their knowledge, will likely be used largely to copy protected material without authority; replacing the duty with an obligation to pay authors compensation based on the likely use of the equipment to copy such material would seem to fall within the traditional concept of "author's rights".

This view concedes a state's power to deal with a perceived inequity by means other than granting an individual a legal cause of action against a wrongdoer. Nothing in the RBC requires a state to benefit authors by providing solutions within a copyright framework if it considers another scheme to be politically, economically or socially more expedient. Thus, domaine public payant (royalties from public domain works paid into a fund to support living authors), social security pay-

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164 S. Stewart, International Copyright in the 1980s (1981), 28 Bull Copr. Soc. 351, at pp. 368-369; cf., Steup, loc. cit., footnote 28 at p. 287. A state acting thus might be in breach of RBC (Paris 1971), article 9(1) by not sufficiently providing for the author's right to authorize reproduction of his or her work or going beyond the exceptions to that right permitted in article 9(2), but that is another matter.

Article 4(2) (set out at text, supra, preceding footnote 23) does not affect this conclusion. It refers in its first sentence to the "enjoyment and exercise of these rights", i.e., the rights just mentioned under art. 4(1). In its second sentence, it refers to "the author" and "his rights". Article 4(2) therefore intends to elaborate the consequences of the principle of assimilation but does not intend to enlarge the basic concept of "author's rights". Commentators who concentrate on art. 4(2) to claim that any scheme benefiting authors must be granted national treatment miss the point: see, e.g., E.A. Seeman, A Look at the Public Lending Right (1980), 30 ASCAP Cop. Law Symp. 71, at pp. 94-96.

165 Op. cit., footnote 2, pp. 74-76, recognizing an obligation to extend national treatment in such a scheme. The Government Response to this recommendation was guarded: "The Government recognizes the merit of the Sub-committee's objective to compensate creators but will have to examine the best way to implement it.": op. cit., footnote 3, p. 14.


167 Keyes and Brunet, op. cit., footnote 5, p. 125 (semble). That this right is outside both the RBC and the UCC is confirmed by the fact that it was only made the subject of a voeu both at RBC (Brussels 1948) and at the UCC Conference: Documents, op. cit., footnote 70, p. 427; UNESCO, op. cit., footnote 26, p. 98.
ments, and tax reductions or subsidies given to authors in respect of the publication of their works are not "rights" subject to article 4(1). 168

The sort of rights that are subject to article 4(1) seem to be rights expressly enumerated in the RBC, either as rights states are obliged or entitled to grant, or rights in pari materia. Thus, as suggested above, a state could grant the author of a computer program in source or object code the right to convert it into machine code. Similarly, it could, as the Report recommended, grant retransmission rights to the broadcast of protected works or renting for such works. These rights should fall under article 4(1), as indeed the Report expressly or implicitly recognized. 169

Special mention should be made of two particular rights that the Report forbore from recommending as copyrights, the droit de suite and the public lending right.

A. Droit de Suite

The droit de suite entitles artists and their heirs to a share in the increased value of the copyright works when the work is resold. The 1985 Report recommended that such a right not be granted, partly because it claimed that national treatment would have to be accorded to it. 170 Whatever other reasons militate against the enactment of a droit de suite, the claim that it would be caught by article 4(1) seems implausible.

Prior to the RBC 1928, firm BC adherents such as France and Belgium introduced a droit de suite in 1920 and 1921, but extended its application to foreigners only on the basis of material reciprocity. No country commented adversely on this limitation at Rome in 1928 where a voeu requesting states to consider adopting a droit de suite was adopted. Nor did they in 1948 at Brussels when the right almost failed to be introduced after the British, Dutch and Nordic delegations felt unable to accept it as a conventional obligation. The Dutch delegation specifically denied that the right could be considered an "author's right". A compromise was reached: the droit de suite was introduced as article 14 bis of the RBC but no member was obliged to enact it. Moreover, the right was subjected to material reciprocity rather than national treatment. 171

Up to 1948, therefore, a general consensus existed excluding the droit de suite from the "rights" covered by article 4(1). It is now excluded

169 Op. cit., footnote 2, pp. 77-78 (retransmission); 71-73 (renting right). The Government Response accepted the former but was guarded on the latter: op. cit., footnote 3, pp. 14, 15.
170 Ibid., p. 29. The Government Response agreed "in principle" with this recommendation: ibid., p. 6.
from the national treatment provision because of the express provision in RBC (Brussels) article 14 bis (now RBC (Paris 1971) article 14 ter) subjecting it to material reciprocity. It would thus be paradoxical if a state bound to the RBC prior to Brussels 1948 were obliged to extend national treatment if it enacted a *droit de suite*, but a state bound at the level of Brussels 1948 or later had to grant material reciprocity only. Especially in light of the historical trend to increase levels of protection with each successive revision of the BC, this paradox cannot represent the legal position.

In truth, the *droit de suite* is exceptional in a scheme either of copyright or author’s right: it does not relate to the use of the work, but rather to the obtaining of a share of the profits on resale. Nor is it a right to exclude or to receive compensation on use.\(^{172}\) As an exceptional non-obligatory right exempt even under the latest RBC text from the fundamental principle of national treatment, it does not support an argument that the fundamental concept of authors’ rights has somehow changed since 1948. In any event, the *droit de suite* should not be considered a “right” under Rome article 4(1).

The same should hold true for the UCC. Even a commentator such as Bogsch, who favours a broad interpretation of the UCC, mentions the reciprocal nature of the *droit* in Belgium and Germany without adverse comment.\(^{173}\) Presumably, Bogsch accepts that this is not an “author’s right” under the UCC and therefore is not subject to national treatment.\(^{174}\) A state bound by both the RBC and UCC is entitled to condition the *droit de suite* by reciprocity;\(^{175}\) to require a state bound only by the UCC

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\(^{173}\) Bogsch, *op. cit.*, footnote 34, pp. 235, 343.

\(^{174}\) Acord: Ulmer, *loc. cit.*, footnote 36, at pp. 18-19; Steup, *loc. cit.*, footnote 28, at p. 288; Katzenberger, *loc. cit.*, footnote 172. *Contra*: Nordemann, *loc. cit.*, footnote 172, at pp. 340-342, while noting that a pre-Conference proposal to make the *droit de suite* the subject of national treatment under the UCC was defeated; R.E. Hauser, The French *Droit de Suite*: The Problem of Protection for the Underprivileged Artist under the Copyright Law (1958), 6 Bull. Copr. Soc. 94, at p. 110; Nimmer, *op. cit.*, footnote 107, para. 17.04[B], n. 6 (public lending right and tax on equipment should also qualify as rights “equivalent” to copyright; but are they in fact authors’ rights?).

\(^{175}\) Text, *supra*, accompanying footnotes 171 ff. UCC article XVII and its appendix declaration contain the “Berne safeguard” clause: this ensures that the UCC does not
to extend national treatment would be anomalous, especially given the lower level of obligation generally imposed by the UCC.

B. Public Lending Right

A number of countries, including Canada in 1986, have introduced a public lending right for books but have not extended it to foreigners.\(^\text{176}\) If the scheme takes the form of giving the author a right to receive remuneration from an entity such as a library each time it authorizes a person to borrow his or her book, a good argument exists for treating the right as an "author's right" under article 4(1). It is a right to receive remuneration on use of the work, a sort of right of distribution or renting right. Whether or not a state includes the scheme in its copyright legislation is irrelevant to the obligation to provide national treatment.\(^\text{177}\)

Many states compensating authors for public lending have not proceeded in this way. They have reached an equivalent result by setting up a fund established from general revenue or by specific taxation on lending facilities, and distributing it in some predetermined manner to authors. Such a scheme, now established from general revenue in Canada for local authors,\(^\text{178}\) is more a form of welfare legislation directed towards a particular class than a form of "author's right" against any user or lending facility in respect of a particular use of the author's work: it should be outside article 4(1) and, for that matter, UCC article II.\(^\text{179}\)

IV. RBC Rome 1928, Art. 19: An Exception to National Treatment?

A minor problem posed by RBC (Rome 1928) article 19 should be mentioned for the sake of completeness. This provision states:

affect the RBC, which continues to govern relations between RBC states who are also UCC members.

\(^{176}\) For a summary of countries, see B. Brophy, A Guide to Public Lending Right (1983), para. 1.10.

\(^{177}\) Ulmer, loc. cit., footnote 36, at pp. 22-23; Steup, loc. cit., footnote 28, at pp. 281-282. See also 1931 H.C. Debates (Canada), at p. 2432: "If something in the Copyright Act is in contravention of the Rome convention, we have no right to put it somewhere else." (Mr. Rinfret).

\(^{178}\) The 1985 Report, op. cit., footnote 2, p. 20. For a convenient summary of the provisions, see University Affairs (Dec. 1986), at p. 11.

\(^{179}\) Stewart, loc. cit., footnote 164; Steup, loc. cit., footnote 28, at p. 288. Contrary views (a) simply assert that every right flowing from authorship is subject to national treatment, without analyzing the concept of a "right" (e.g., W. Nordemann, Public Lending Rights in Federal Germany (1976), 90 R.I.D.A. 61, at pp. 82-83); or (b) wrongly focus on art. 4(2) without appreciating that provision does not enlarge the concept of "rights" under art. 4(1) (see, e.g., Seeman, loc. cit., footnote 164).

Of course, whether or not the scheme appears in a state's copyright law is irrelevant: the accident of location does not turn a "non-right" into a "right", and vice versa.
The provisions of the present convention shall not prevent a claim being made for the application of any wider provisions which may be made by the legislation of a country of the Union in favour of foreigners in general.

This confusing provision, first introduced in RBC Berlin 1908, was eventually amended by RBC (Brussels 1948) by removing the final words, "in favour of foreigners in general", after an attempt to do so at Rome in 1928 failed.\(^\text{180}\)

Read literally, article 19 suggests that RBC states can claim rights greater than the RBC minima only when the other RBC forum extends such protection to "foreigners in general".\(^\text{181}\) If the legislation simply grants greater rights to its own nationals, article 19 arguably would not apply. This would then undercut the fundamental principle of BC 1886 that a BC author should be able to claim national treatment if the national legislation confers larger rights on nationals alone.\(^\text{182}\)

Fears that article 19 in its original form had this effect seem in hindsight unwarranted. Before 1908, some Belgian courts had held that RBC members could claim only the minimum rights guaranteed by the RBC even though Belgian law conferred greater rights and made them available to foreigners generally, without condition of reciprocity. Under this theory, the RBC prevented its members obtaining protection an RBC state purported to extend to all foreigners. Disagreeing with this interpretation, the Belgium delegation at Berlin, with Italy's support, proposed an amendment to overturn these views which it feared might gain currency in other RBC states. Moreover, non-RBC states might be deterred from joining the Union if they thought that their authors would lose existing protection.

The amendment Belgium proposed accurately reflected its intention by confirming that RBC protection was only a minimum and was without prejudice to more liberal national laws.\(^\text{183}\) Unfortunately, although Belgium's reasoning appears to have been adopted,\(^\text{184}\) the language of its proposed amendment was not. The proposal was redrafted and passed in the delphic form set out in article 19.

The apparent inconsistency between articles 4 and 19 of RBC (Berlin and Rome) justifies recourse to the Berlin travaux préparatoires. These indicate that article 19 was inserted out of abundant caution. It


\(^\text{181}\) Documents, op. cit., footnote 70, pp. 105, 379.

\(^\text{182}\) The provision is most critical in those countries which, not following the British tradition, treat international conventions as incorporated in their law without the need for further implementing legislation.

\(^\text{183}\) Procès-Verbaux, op. cit., footnote 98, pp. 94-96.

\(^\text{184}\) Ibid., pp. 148-149.
did not intend to cut down the basic principle of national treatment in article 4 of RBC Berlin and Rome; nor did it intend to expand the concept of protected works or author's rights. Rather, it intended to deal with the special case of a domestic law that was drafted to cover both nationals and all foreigners: RBC nationals could claim the benefit of such a law. Article 19 did not intend that they could claim wider protection only in such a case: this would be inconsistent with article 4(1). The Brussels 1948 amendment, in eliminating the last six words of article 19, returned to a form of wording that eliminated the possibility of any argument and reinforced the intent of article 4(1).

RBC (Rome) article 19 therefore does not affect the basic principle of national treatment set out in Article 4(1).

Conclusion

The 1985 Report's recommendations, as modified by the Government Response to them, appear for the most part to comply with Canada's obligations of national treatment under the texts of the RBC and UCC to which Canada is bound. Where the Report may have mistaken the extent of the Convention obligations, it has generally managed to surpass rather than breach them. On the other hand, in mistaking the requirements for the droit de suite, the Report has forborne from making a recommendation partly because of spurious reasoning. Whether this right should be recommended should be reconsidered on its merits.

The discussion has revealed a noticeable tendency amongst some commentators to assume or accept with perfunctory analysis that the interpretation of the Convention national treatment requirements should be an expansive one. Occasionally, this seems to have been the result of wishful thinking, or of a natural and, perhaps, commendable desire to create greater international copyright uniformity and levels of protection without forcing states to resort to fresh treaties to cover emerging or unforeseen problems. A natural reluctance of states to seek authoritative guidance from the International Court of Justice, the ultimate arbiter of disputes under the RBC and UCC, has also contributed to doctrinal uncertainty and confusion.

This study has sought to dispel some of this confusion by demonstrating that texts of both Conventions, viewed in light of their history and purposes, bear the unmistakable and indelible imprint of Continental notions of authors' rights in literary and artistic works, only smudged diplomatically by Anglo-American notions of copyright. Once this is appreciated, many of the apparent difficulties in the texts disappear and a coherent, though not necessarily ideal, interpretation consistent with the basic intent of the framers can emerge.

The RBC and UCC were both drafted to ensure that many new developments may fairly fall within their coverage. But lines inevitably
have to be drawn in texts designed to be dynamic yet bounded. The
sometimes unpalatable conclusion may have to be reached that a newly
emergent problem or solution cannot, upon a good faith purposive inter-
pretation of the treaties, be included within their coverage. Rather than
engaging in semantic gymnastics to fit the unfittable into the ambit of
the Conventions, one may have to conclude that new treaties may have
to be concluded as the only means available to cope with the lack of
international copyright uniformity in an era when communications know
no boundaries.