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Determining the Applicable Law to Copyright Ownership: National Treatment Principle in Tension with Legacy Copyright Treaties

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Abstract

The present article examines a potential conflict between the national treatment principle, *which is* enshrined in most significant multilateral copyright treaties, on the one hand, and legacy copyright treaties — primarily bilateral ones, but also certain multilateral treaties such as the Montevideo Convention — containing conflict-of-laws rules not fully compatible with the national treatment principle, on the other. The analysis places special focus on the conflict-of-laws issue of copyright ownership. While the national treatment principle is often interpreted as mandating the application of *lex loci protectionis*, some legacy copyright treaties prescribe the application of *lex originis* or use other connecting factors for determining the law applicable to copyright ownership. The paper analyzes how such conflicts are to be resolved, focusing particularly on the interpretation of Article 20 of the Berne Convention. Through examination of case law and scholarly views, it is argued that Article 20 allows for the application of particular provisions of legacy copyright treaties on the condition that their application implies granting authors/right holders in the particular case more extensive rights, even if these provisions contradict the national treatment principle, which is one of the fundamental principles of the Berne Convention and, in general, of modern international copyright law. It is concluded that courts must assess the applicability of provisions contained in specific international treaties on a case-by-case basis, striving to reconcile competing provisions where feasible, in line with the principle of systemic interpretation inherent in international law. Overall, the analysis reveals that the applicability of conflict-of-

laws rules contained in legacy copyright treaties, which might be non-compliant with the national treatment principle, is, under certain conditions, not excluded, even when the Berne Convention is on the particular case generally applicable. The complex relationship between sources of particular international law requires a nuanced approach to resolving potential conflicts between them.

Keywords

applicable law to copyright ownership; national treatment principle; conflict of international treaties; Article 20 of the Berne Convention; copyright ownership; copyright conflict-of-laws; lex loci protectionis; lex originis.

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Научная статья

Определение применимого права к обладанию авторскими правами: принцип национального режима в конфликте с ранними международными договорами в сфере авторского права

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Аннотация

Настоящая статья исследует потенциальный конфликт между принципом национального режима, закрепленным в большинстве значимых многосторонних договоров об авторском праве, с одной стороны, и более ранними договорами об авторском праве — в первую очередь двусторонними, а также некоторыми многосторонними договорами, такими как Конвенция Монтевидео, содержащими коллизионные нормы, не совсем совместимые с принципом национального режима, с другой стороны. В анализе уделяется особое внимание к вопросу применимого права к обладанию авторскими правами. В то время как принцип национального режима часто интерпретируется как предписывающий применение права страны, для которой истребуется защита авторских прав (*lex loci protectionis*), некоторые ранние договоры об авторском праве предусматривают применение права страны происхождения (lex originis) или другие формулы привязки, отличающиеся от *lex loci protectionis*. В статье анализируется возможное решение таких конфликтов, с особым вниманием к толкованию статьи 20 Бернской конвенции. Анализ судебной практики и релевантной международно-правовой доктрины позволяет утверждать, что статья 20 Бернской конвенции допускает применение коллизион-

но-правовых положений более ранних договоров об авторском праве, если такое применение приводит к предоставлению авторам/правообладателям в конкретном случае более широких прав, даже если эти положения противоречат принципу национального режима, который является одним из основополагающих принципов Бернской конвенции и современного международного авторского права в целом. Делается вывод, что суды должны индивидуально оценивать применимость положений, содержащихся в конкретных международных договорах, стремясь по возможности согласовывать конкурирующие нормы в соответствии с принципом системного толкования, присущим международному праву. В целом, анализ показывает, что применимость коллизионных норм, содержащихся в ранних договорах об авторском праве, которые могут не соответствовать принципу национального режима, при определенных условиях не исключается, даже если на конкретное дело распространяется действие договоров, таких как Бернская конвенция, закрепляющих принцип национального режима. Сложное взаимодействие источников международного права требует взвешенного подхода к разрешению потенциальных конфликтов между ними.

Ключевые слова

применимое право к обладанию авторскими правами; принцип национального режима; конфликт международных договоров; статья 20 Бернской конвенции; приобретение авторского права; коллизионно-правовое регулирование в авторском праве; lex loci protectionis; lex originis.

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Introduction

The abolition of formalities as requirement for granting copyright protection on international law level is a reflection of the idea that an author in one country should be recognized and protected as such in other countries as well.[1] However, the lack of an explicit material law definition of both author and initial copyright owner in international copyright treaties presents a significant challenge to this fundamental idea. With the absence of a universally accepted material definition of both author and initial ownership of copyright at the international law level,[2] it becomes essential to approach this

[1] "Suite aux effets de la convention de Berne le droit d'auteur est un droit mondial et non pas territorial, comme les autres droits de propriété intellectuelle." [Bertrand A., 2010: marg. no. 118.18].

[2] There is an authorship presumption in Article 15(1) of the Berne Convention 1971. However, it is not a substantive law provision, as presumptions may be rebutted by evidence to the contrary, they just make the situation of one party of a dispute easier with the aim

issue through the lens of conflict-of-laws. When determining the applicable law governing (initial) copyright ownership, two primary approaches come to the fore: *lex loci protectionis* and *lex originis*.[3] Either it is the material law of each individual country that decides for each respective territory who the author and copyright holder is, or, respectively, the subjects enjoying this status are determined based on who it is in the country of origin of the work.

Nowadays, the most significant multilateral international copyright-related treaties embrace the principle of national treatment. That is the case for the Berne Convention 1886, the Universal Copyright Convention 1971 (hereinafter referred to as UCC), as well as for the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS).[4] This principle mandates countries to provide to foreign authors and right holders (at least) the same level of copyright protection as that provided to their own citizens. The national treatment principle in copyright law ensures that foreign authors and copyright holders are treated no less favorably than domestic authors and right holders in a given country. This principle aims to prevent discrimination based on nationality.

Some opinions assert that compliance with the imperative of the national treatment principle is possible only by applying the law of the country granting the copyright protection within the relevant territory (*lex loci protectionis*) to the entirety of the copyright statute.[5] Accordingly, some countries interpret the principle of national treatment, — especially within the meaning of Article 5(1) and (2) of the RBC — as implying the *lex loci protectionis* conflict-of-laws rule encompassing also the issue of copyright ownership. It is claimed that the independence of the "*enjoyment and exercise of rights*" from the protection of the work in its country of origin, as required by Article 5(2) RBC, can be achieved only by applying the same substantive law to foreign works as to those of local authors whose works are first published within the country.[6] Failing that, foreign authors and

to achieve better economy of disputes in which it would be disproportionately costly or difficult to prove certain facts [Leška R., 2019: 308-309].

[3] However, there are also some other thinkable connecting factors, such as *lex personalis* or *lex contractus*.

[4] The principle of national treatment is enshrined in Article 5(1) and (2) of the Berne Convention, and in Article II of the UCC. It is enshrined also in Article 3(1) of the TRIPS Agreement, which refers to provisions in other international treaties concerning intellectual property.

[5] Cf. [Drexl J. in: von Hein J., 2021: Rom II-VO Art. 8 Verletzung von Rechten des geistigen Eigentums, marg. no. 70]. Cf. also Cass. 1e civ., 10 avril 2013, n°11-12.508, 11-12.509 et 11-12.510 (ABC News).

[6] Cf. [Kyselovská T., Koukal P., 2019: 159–160]; [Ricketson S., Ginsburg J., 2005: 1298]; [Desbois H., 1966: 875].

right holders would be discriminated against [Von Hein J., 2021: 251]. Nonetheless, in my previously published article,[7] it has been shown that the national treatment principle, by its very nature, does not imply the *lex loci protectionis* conflict-of-laws approach with respect to copyright ownership, although significant issues remain associated with it. Either way, the interpretation of international treaties is fully in the hands of the respective sovereign countries and their judicial organs, and so is the meaning of the national treatment principle and its implications for the conflict-of-laws domain. It is not an easy task to impose a certain interpretation of international treaties on a sovereign country.[8]

It is an undeniable fact that several international copyright treaties rather explicitly impose conflict-of-laws rules differing from the *lex loci protectionis*. The Montevideo Convention of 1889, for example, prescribes the *lex originis* conflict-of-laws to the whole copyright statute,[9] and then there are several bilateral agreements that provide for the *lex originis* conflict-of-laws rule with regard to the copyright ownership issue and possibly also for some other particular aspects of copyright.

Therefore, it might apparently come to a conflict of application of international treaties imposing the national treatment principle on one side and treaties prescribing the *lex originis* (or other) conflict-of-laws rule on the other. That is true also for the copyright ownership issue as long as the particular country interprets the national treatment principle in the sense that it inherently implies *lex loci protectionis* conflict-of-laws rule in this regard. The aim of the present article is thus to analyze the resolution of the potential conflict of international treaties with focus on the copyright ownership issue, particularly when one of the treaties enshrines the national treatment principle and the other one provides for a conflict-of-laws rule not fully compatible with the national treatment principle. For the purpose of this article, it is therefore assumed that the principle of national treatment implies the *lex loci protectionis* conflict-of-laws rule, extending to the issue of copyright ownership.

[7] See: Hodermarsky J. Copyright owners, national treatment and current trends in private international law // Law. Journal of the Higher School of Economics, 2024, vol. 17, no. 1, pp. 213–245.

[8] Paul Olagnier described the issue very aptly in stating that "[...] la Convention d'Union est viciée dans son fonctionnement, tant qu'elle n'est pas assurée de trouver une interprétation identique par les différentes juridictions nationales, ce qui est pratiquement impossible." [Olagnier P., 1934: 11].

[9] Article 2 of The Montevideo Convention on the Protection of Literary and Artistic Works of January 11, 1889.

1. Bilateral International Treaties Enshrining a Special Copyright Ownership Conflict-of-laws Rule

The Berne Convention of 1886 (its latest revision concluded in 1971 in Paris is hereinafter referred to as RBC) was the first open[10] multilateral international treaty in the field of copyright law. However, countries have been concluding plenty of bilateral copyright treaties practically since the beginning of the 19th century. Some bilateral agreements in the field of copyright law (in some cases even in the field of commercial law which often regulate certain aspects of copyright) continue to hold significance.[11] Certainly, their importance has gradually diminished with the increasing number of contracting states to the Berne Convention and TRIPS Agreement. Nonetheless, when seeking copyright protection, it is advisable to verify whether there is a bilateral agreement that could in the particular case provide more favorable protection conditions than multilateral agreements [Bertrand A., 2010: 118.21]; [Von Hein J., 2021: 109].[12] Since most bilateral copyright treaties were concluded long ago, they are often overlooked due to a perception that they have either been entirely superseded or rendered obsolete through disuse, neither of which is true.

In the past, discussions were held regarding the termination of old bilateral international agreements through non-use, that is, tacitly (désuétude). Nowadays, the concept of désuétude in international law when it comes to international agreements can be rejected with certainty by referring to the Vienna Convention on the Law of Treaties (VCLT). With regard to Article 42 (2) VCLT[13] in conjunction with Article 54 VCLT, it is evident that international treaty may be terminated solely: 1) in conformity with the provisions of the treaty itself; or 2) by consent of all the parties to the treaty. There is no provision in the VCLT that would allow désuétude. Any tacit abrogation in the sense of "absolute silence" from the side of the contract-

[10] The first multilateral treaty specifically in the field of copyright law was the Austrian-Sardinian Agreement of 1840 (*Sardinischer Staatsvertrag*), which later gained adherence from several other Italian states. Similarly, the Anglo-Prussian Convention of 1846 was later joined by several German states [Ricketson S., Ginsburg J., 2005: 28].

[11] Cf. [Majoros F., 1971: IX]; [Schack H., 2019: 506 (marg. no. 985)].

[12] It is worth noting that the formal designation of a particular international instrument has no bearing on its substantive effect; it can still be regarded as an international agreement, whether termed a Convention, Accord, Protocol, Arrangement, Treaty, Declaration, or even an Exchange of diplomatic notes as unilateral declarations of intent.

[13] Article 42 (2) of VCLT — "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

ing parties is therefore inadmissible. The absence of désuétude in the VCLT as one of the ways of agreement termination reflects stable doctrinal views that rejected it even before the VCLT has entered into force [Majoros F., 1971: 23, 34–35].

In general, bilateral treaties approach the granting of "mutual" protection of copyright in two possible ways. One consists of granting protection in both contracting states to works published for the first time in the territory of either of them.[14] That is, the focus lies on the work as protected subject matter. The other common approach is that it is the authors/right holders from one state who are granted copyright protection in the other one. In this case, the focus is on the author/right holder as subject of copyright. The granted protection is bound to the subject, not the object of protection. Such a rule can be qualified as *lex originis* conflict-of-laws rule for copyright ownership issue. The latter approach was *principium regens* of a large part of bilateral treaties concluded throughout the 19th century. Bilateral treaties relying on this approach are subject to the present analysis.

The Treaty on the Mutual Protection of Copyright on Literary and Artistic Works from 1866 concluded between the Empire of Austria and France is one of the oldest treaties in the field of copyright.[15] Article 1 of the treaty provides that authors from one of the contracting states shall enjoy such benefits (*Vortheile*), protection (*Rechtsschutz*), and means of protection against infringements (*Rechtshilfe*) in each of the contracting parties as that state grants or will grant to literary and artistic works first published domestically.[16] Article 2 further prescribes that the protection under Article

[14] For example, Declaration of the United States and Austria-Hungary from 1907 (in Austria promulgated under Verordnung des Justizministers vom 9. Dezember 1907 über den Urheberrechtsschutz im Verhältnisse zu den Vereinigten Staaten von Amerika, RGBl. 1907, CXXI. Stück Nr. 265, S. 1084). Another example is the Agreement between the German Empire and the United States of America on the Mutual Protection of Copyrights (in Germany promulgated under RGBl. 1892, Nr. 23, S. 473-475). After the First World War the treaty's binding force was reaffirmed by law (RGBl. 1922 II, S. 475). Following the Second World War, the validity of the treaty was confirmed through an exchange of diplomatic notes (published in B Anz. No. 144/50). Cf. BGH, Judgment of February 26, 2014, I ZR 49/13 (Tarzan), paragraph 16.

[15] Staatsvertrag zwischen Österreich und Frankreich vom 11. Dezember 1866, RGBl. Nr. 169, wegen gegenseitigen Schutzes des Autorrechts an Werken der Literatur und Kunst. The text of the treaty is available in: Von Wretschko A. Das Gesetz vom 26. Dezember 1895, R.G. B l. Nr. 197, betreffend das Urheberrecht an Werken der Literatur, Kunst und Photographie. Wien, 1896, p. 181 et seq. This article does not address the issue of the incompatibility of bilateral copyright treaties with primary EU law. However, in practice, the potential implications of Article 351 of the *Treaty on the Functioning of the European Union* (TFEU) should not be neglected.

[16] Article 1 — "Die Urheber [...] sollen in jedem der beiden Staaten gegenseitig sich der Vortheile zu erfreuen haben, welche daselbst dem Eigenthum an Werken der

1 is conditional upon fulfilling the formal requirements foreseen by law in the country of origin.

From the wording of Article 1, it is clear the primary goal of the treaty is to protect right holders originating from one country within the other country's territory. Therefore, it is necessary to apply the principle of *lex originis*, with the place of first publication being decisive. A problematic situation arises if publication occurs simultaneously in both countries. Nevertheless, it is evident that the treaty distinguishes the authorship/ownership requirement from other criteria for copyrighted works in the sense that requirements directly pertaining to the protected subject matter must be assessed in accordance with domestic law (*lex loci protectionis*). To whom belongs copyright to the particular work decides the law of the origin, whilst what specific rights are conferred to the right holder and whether such work is protected at all decides the *lex loci protectionis*. It is required that foreign authors in the territory of the other contracting country receive protection for those works that would enjoy a national author in regard to identical works if they were first published in that country's territory.

A rather similar legal structure can be found in the treaty between Austria-Hungary on the one hand and Great Britain and Ireland on the other, concluded in 1893.[17] Article I, paragraph 2, stipulates author and his legal successors from one contracting country enjoy the same rights in the other country as if the work were first published in the place where the infringement occurred.[18] Article I, paragraph 4, further emphasizes that a foreign author will be granted protection in the territory of the other contracting country only if the national legal order in question provides protection for such subject matter.[19]

Literatur oder Kunst gesetzlich eigeräumt sind oder werden, und denselben Schutz, sowie dieselbe Rechtshilfe gegen jede Beeinträchtigung ihrer Rechte genießen, als wenn diese Beeinträchtigung gegen die Urheber solcher Werke begangen wäre, welche zum ersten mal in dem Lande selbst veröffentlicht worden sind."

[17] Staatsvertrag zwischen der österreich-ungarischen Monarchie einerseits und Großbritanien und Irland andererseits vom 24. April 1893, RGBl. Nr. 77 ex 1894, betreffend den gegenseitigen Schutz der Urheber von Werken der Literatur oder Kunst und der Rechtsnachfolger der Urheber. The text of the Agreement is available in: Von Wretschko A. Das Gesetz vom 26. Dezember 1895, R. G. Bl. Nr. 197, betreffend das Urheberrecht an Werken der Literatur, Kunst und Photographie. Wien: 1896, p. 190 et seq.

[18] Article I al. 2 — "Es werden daher die Urheber von Werken der Literatur oder Kunst, deren Werke in dem Gebiete des einen der hohen vertragschließenden Theile zuerst veröffentlicht worden sind, ebenso wie ihre Rechtsnachfolger in dem Gebiete des anderen Theiles denselben Schutz und rechtliche Hilfe gegen jede Beeinträchtigung ihrer Rechte genießen, als wenn das Werk zuerst veröffentlicht worden wäre, wo die Beeinträchtigung erfolgt ist."

[19] Article I al. 4 — "Diese Vortheile sollen den Urhebern und ihren Rechtsnachfolgern jedoch gegenseitig nur in dem Falle gewährt werden, wenn das betreffende Werk auch durch die Gesetze des Staates, wo das Werk zuerst veröffentlicht worden ist, geschützt ist [...]."

Another in this context noteworthy bilateral treaty is the Convention between France and Spain of 1880[20], which replaced the previous convention from 1853. Article 6 enshrines the principle of most-favored-nation treatment, which obliges each contracting party to grant the other party the same level of protection as is granted on that country's territory to any other foreigner, should he enjoy more extensive rights than the citizens of the contracting party.[21] Regarding the determination of ownership of copyright, Article 1, paragraph 1, contains an interesting formulation. It states authors who prove they hold copyright (whether initial or transferred) ("*droit de propriété ou de cession totale ou partielle*") in one of the two contracting states in accordance with that state's law shall enjoy corresponding rights in the other contracting state, under this sole condition and without any additional formalities.[22] The explicit expression of the "sole condition" — proof of copyright acquisition under the law of one of the contracting countries for those rights to be recognized in the other one — inevitably leads to the conclusion that this essentially expresses the *lex originis* rule. Certainly, this provision may encourage potential future right holders to pick for the country of origin the country with a legal system that designates them as the initial right holder, and subsequently seek protection in the other contracting country based on this designation. A dispute between two different right holders, whilst each of them relies on one legal order to designate them as right holders, could be resolved in such a way that the 'competing' subjects would not be able to invoke their rights in the respective countries against each other. Their respective absolute rights would be somewhat relativized. The determination of who would be entitled to derive economic benefits from the copyright for their own account remains in this case problematic. Another option is to recognize as author and/or initial right holder in both countries the person who first satisfies the legal requirements in regard to the particular work in either of the countries. In any case, the straightforward application of the *lex loci protectionis* principle in regard to copyright ownership is unequivocally excluded under this Convention.

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[20] Convention for the Reciprocal Protection of Intellectual and Artistic Works, signed in Paris on June 16, 1880 (Convention pour la garantie réciproque des oeuvres d'esprit et d'art, signée à Paris le 16 juin 1880); the text of the convention is available in [Majoros F., 1971: 108 et seq.].

[21] Regarding the most-favored-nation principle arises a similar issue as for its conflict-of-laws dimension as with the national treatment principle discussed in this analysis.

[22] Article 1(1) of the Convention: "[...] les auteurs [...] qui justifieront de leur droit de propriété ou de cession totale ou partielle, dans l'un des deux Etats contractants, conformément à la législation de cet Etat, jouiront, sous cette seule condition et sans autres formalités, des droits correspondantes dans l'autre Etat [...]."

Other than these typical pre-Berne bilateral treaties, there are also treaties from rather modern times that explicitly enshrine a conflict-of-laws rule different from the *lex loci protectionis,* which is said to be the only with the national treatment principle compliant conflict-of-laws approach. In this context, it is important to mention the treaty concluded between the Soviet Union and Austria,[23] as well as the treaty between the Soviet Union and Sweden.[24] Both treaties remain in force also after fall of the Soviet Union, as Russia became the legal successor to these treaties [Lutkova O. V., 2018: 92]. The treaty with Austria, in Article 9, stipulates the establishment, scope, and termination of copyright are governed by the law of the contracting country in the territory of which the act of exploitation or infringement of copyright takes place.[25] A nearly identical rule can be found in Article 8 of the treaty with Sweden.[26] The only substantial difference between these two treaties lies in their *ratione materiae* scope, with the Swedish treaty also covering photographs –Article 1(a). It is quite evident that these treaties adopt a different approach to conflict of laws than the RBC. They require the copyright statute to be governed by *lex loci delicti*. Notably, despite relying on the traditional delictual connecting factor, the conflict-of-laws rule in these treaties is not limited to situations of infringement but includes also the case of regular lawful use.[27] The dogmatic proponents of *lex loci protectionis* assert that the *lex loci delicti* conflict-of-laws rule in the realm of intellectual property is identical to the *lex loci protectionis*, owing to the territoriality principle inherent in intellectual property rights, according to which such rights can only be infringed where they are protected [Regelin F., 2000: 220 et seq.].[28] They also argue *locus delicti commissi* (the place where the act was committed) and *locus damni infecti* (the place where the harm occurred) in copyright law inherently coincide due to

[23] The Agreement between the Union of Soviet Socialist Republics and the Republic of Austria on Mutual Protection of Copyright (Vienna, December 16, 1981, with amendments and additions), ratified by the Presidium of the Supreme Soviet of the USSR, July 11, 1983, No. 9658-X.

[24] The Agreement between the Union of Soviet Socialist Republics and the Kingdom of Sweden on Mutual Protection of Copyright (Moscow, April 15, 1986).

[25] Article 9 — "The establishment, scope, and termination of copyright shall be governed by the law of the Contracting Party within whose territory the act of exploitation or infringement takes place."

[26] Article 8 — "The establishment, scope, and termination of copyright in a work or photograph shall be governed by the law of the Contracting State within whose territory the act of exploitation or infringement takes place."

[27] It is to be noted the determination of the place of use poses similar challenges as the determination of the place of infringement.

[28] Cf. also [Klass N., 2007: 376]; [Stieß K., 2005: 145].

its potentially ubiquitous nature, occurring in the same location and at the same moment [Schack H., 1998: 1018]. The nature of intellectual property rights implies that the infringing act and its harmful consequence always occur simultaneously and cannot be separated, as copyright infringement means unlawful action (*Handlungsunrecht*), such as unauthorized reproduction, distribution, display, and similar acts. That means that alone the unlawful act is simultaneously the harm as such [Stieß K., 2005: 145].[29]

Following this interpretation, there is obviously no space left for any conflict with the national treatment principle. Notwithstanding, the last word on this issue is once again left for national interpretation. For the purpose of this article, it can be concluded that based on its possible interpretation the *lex loci delicti* rule provides more freedom for discretion in cross-border and multi-state infringements. Especially in online environment, there may be efforts to avoid inconvenient dépeçage and thus to attach the copyright statute to *lex loci delicti commissi*, potentially including the ownership issue. That way the complicated application of multiple *leges loci protectionis* in multi-state infringements would be avoided. And then, that gives once again rise to a potential conflict with the national treatment principle enshrined in the RBC.

2. Montevideo Convention of 1889

The Convention is the second oldest multilateral treaty in the field of copyright law (after the Berne Convention) that marked a significant success [Ricketson S., Ginsburg J., 2005: 1171]. Its significance in the context of this study lies primarily in its conflict-of-laws solution of issues related to

[29] See also the decision of the Austrian Supreme Court (OGH), Decision (Beschluss) of August 9, 2006, 4 Ob 135/06s (Tonträgerhersteller/Gruppe D), in which the act of reproduction of a work was assessed under Austrian law, even though the infringement on Austrian territory involved *de facto* only the right of distribution, as the protected subject matter was reproduced abroad and thereafter sent to Austria by mail. That means that the act of reproduction itself occurred abroad. In its reasoning, the court stated "Verletzungen von Immaterialgüterrechten sind gem § 34 Abs 1 IPRG nach dem Recht des jeweiligen Verletzungsstaats zu beurteilen [...]. Im Anlassfall wurden unter Verletzung von Leistungsschutzrechten des Klägers hergestellte Vervielfältigungsstücke über das Internet (auch) gegenüber Inländern beworben und auf Bestellung nach Österreich ausgeliefert. Die Rechtsverletzung wurde damit in Österreich wirksam; ihre einzelnen Handlungselemente (Vervielfältigung und Verbreitung) sind vom selben Täter zu verantworten. Sie stehen in einem so engen faktischen und wirtschaftlichen Zusammenhang, dass sie als Teile eines einheitlichen Vorgangs anzusehen sind, dessen Schwerpunkt in Österreich liegt, weil und soweit die unter Verantwortung des Beklagten vervielfältigten Schallträger an österreichische Nutzer verkauft werden [...]. Die Vorinstanzen haben deshalb zutreffend auf den gesamten Sachverhalt österreichisches Sachrecht angewendet [...]."

copyright ownership, which this Convention establishes. Furthermore, the *iura conventionis* guaranteed in this convention go beyond the rights guaranteed by the Berne Convention in certain respects.[30] Unlike other American copyright conventions, the Montevideo Convention allows accession also by states from other continents [Khadjavi-Gontard B., 1977: 27]; [Boguslavsky M. M., 1973: 78].[31] The convention does not create union, as is the case with the Berne Convention, and therefore it applies only in relation to states that have agreed to the accession of a particular state.[32] The convention is structure-wise and content-wise based on the Berne Convention but does not include provisions regarding unpublished works [Bowker R., 1912: 363]; [Ricketson S., Ginsburg J., 2005: 1171–1172]. It makes no distinction between nationals of contracting states and foreigners (Article 1).

The contracting states of the Convention are obliged to recognize the rights of authors and their legal successors whose works originate from the contracting states [Goldstein M., 1995: 249]. Article 2 of the Convention provides that the author of a work shall be entitled in other contracting states to such rights as are granted by the law of the state where the work was published or created [Ottermann M., 2019: 515]. Thus, the attachment of the copyright statute to the *lex originis* is the fundamental rule. The Montevideo Convention is not founded on the principle of national treatment [Troller A., 1965: 164]. Article 4 derogates from the default *lex originis* rule and establishes the principle of material reciprocity with respect to the duration of copyright protection [Khadjavi-Gontard B., 1977: 28]. Another exception to the *lex originis* rule can be found in Article 11, which stipulates that the legal consequences of copyright infringement (but not its scope or existence related issues) shall be assessed under *lex* loci delicti commissi [Troller A., 1965: 165]. When applying the lex originis *rule*, the place of origin shall be deemed the place of the first publication or creation of the work.

[30] As an example, the author's right to dispose of his work can be mentioned on this place (Article 3 Montevideo Convention — "El derecho de propiedad de una obra literaria o artística comprende para su autor la facultad de disponer de ella [...]."), cf. [Goldstein M., 1995: 249]. For a comparison of the Montevideo Convention with the Brussels Revision of the Berne Convention, see: [Troller A., 1965: 164-165].

[31] This possibility was introduced by the Buenos Aires revision in 1910 [Olagnier P., 1934: 7–8].

[32] In relation to Argentina and Paraguay, the Convention was acceded to by France, Spain, Belgium, and Italy. Germany acceded to the Convention with respect to Argentina, Bolivia, and Paraguay [Münzer G. in: Püschel H., 1980: 362]. Austria's accession was recognized only by Argentina. The European states did not undertake obligations toward one another under this Convention, but exclusively toward the designated American states [Troller A., 1952: 28]. In relations between the American states themselves, the application of the Montevideo Convention was excluded by the Buenos Aires Convention of 1910, which, however, just like the Montevideo Convention, enshrines the principle of *lex originis* [Olagnier P., 1934: 7].

Regarding the applicability of the Montevideo Convention, it is necessary to address its relation to the UCC and the Berne Convention. Article XVIII of the UCC provides that in the event of a conflict between inter-American treaties concluded among American states (such as the Montevideo Convention) on one side and the UCC on the other, the one concluded later shall take precedence.[33] It is an explicit *lex posterior* rule, which generally means the precedence of the UCC. It is apparent that as long as the national treatment principle enshrined in the UCC is interpreted as mandating the *lex loci protectionis* as the connecting factor for copyright ownership, application of the *lex originis* rule is, in this regard, ruled out. It is to be emphasized that Article XVIII of the UCC applies only to relationships arising between American states [Troller A., 1965: 136], not to inter-American treaties in general. With respect to European countries, Article XIX of the UCC must be applied. However, it provides similarly to Article XVIII that, in the event of conflicts between the UCC and other treaties, the UCC shall prevail. However, let us keep in mind that this provision applies only to treaties preceding the UCC.[34]

The actual applicability of the UCC in contemporary cases is quite rare, as it is practically derogated in favor of the RBC (see Article XVII of the UCC); therefore, it is more practical to focus on resolving conflicts between the provisions of the Montevideo Convention and those of the Berne Convention. The potential conflict between these treaties is often sidestepped by stating that the Montevideo Convention is applicable only on a transitional basis, i.e., completely outside the scope of the Berne Convention (mainly temporal).[35] As shown further, it is not that simple. It is undisputed that attaching the entire copyright statute to the law of the place of origin, as demands Article 2 of the Montevideo Convention, is in contradiction with Article 5(2) RBC. Given the lack of an explicit provision in the Montevideo Convention regarding its relationship with the RBC, it is up to Article 20 of the RBC to resolve any potential conflicts. Since its detailed analysis in the context of bilateral treaties follows later in the text, it is sufficient to refer to that section here, as the solution is essentially the same.

[33] Article XVIII UCC — "This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. [...]."

[34] Cf. [Desbois H., Françon A., Kéréver A., 1976: 124].

[35] See, for example: [Ottermann M., 2019: 515]; in this sense also: [Ulmer E., 1975: 34].

With regard to the Montevideo Convention, there is one more American treaty that is relevant for the discussion — the Washington Convention[36] of 1946. Interestingly, Article XI of the Washington Convention stipulates the admissibility of waiving or transferring moral rights is governed by the law of the country where the contract was concluded (*lex loci contractus*). This can potentially contradict the national treatment principle. Furthermore, in its Article IX, the Convention obliges contracting states to grant an unconditional protection to a work, provided that the conditions for protection are fulfilled in one contracting state (in the country of origin) [Olian I. A., 1974: 87].[37] This provision does not imply the *lex originis* connecting factor for copyright ownership [Troller A., 1952: 29]. Instead, it reflects the principle of national treatment [Troller A., 1965: 174]. To this extent, it derogates the *lex originis* principle enshrined in the Montevideo Convention. Most importantly, the Washington Convention replaced prior inter-American treaties (Article XVII).[38] That is, it replaced also the Montevideo Convention. However, it did not supersede obligations between European and American countries. Thus, the Montevideo Convention is binding up to this day in France, Spain, Belgium, and Italy with respect to Argentina and Paraguay. Germany acceded to it with respect to Argentina, Bolivia, and Paraguay [Münzer G. in: Püschel H., 1980: 362]. Austria's accession was recognized only by Argentina. The European states did not commit to apply the Montevideo Convention among themselves, but solely with respect to the specified American states [Troller A., 1952: 28]. It is evident that Montevideo Convention serves *grosso modo* the same function as a bunch of bilateral copyright treaties.

3. Conflict with National Treatment Principle

Having introduced the *lex originis* rule in the Montevideo Convention along with several bilateral treaties that establish conflict-of-laws rules dif-

[36] Inter-American Convention on the rights of the author in literary, scholar and artistic works. All American conventions, except the Montevideo Convention, were (or, in some cases, still are) open to accession by American states only.

[37] Article IX of the Washington Convention — "When a work created by a national of any Contracting State or by an alien domiciled therein has secured protection in that State, the other Contracting States shall grant protection to the work without requiring registration, deposit, or other formality. [...]"

[38] The Washington Convention has replaced the Buenos Aires Convention of 1910. The Havana revision of the Buenos Aires Convention (1928), which superseded the original Buenos Aires Convention, incorporates the *lex originis* conflict-of-law principle similar to the Montevideo Convention [Troller A., 1952: 28]. Whether the Montevideo Convention is considered an inter-American treaty within the meaning of Article XVII of the Washington Convention is a matter of interpretation. Some scholars lean towards the view that it is not; cf. [Goldstein M., 1995: 252], for example.

fering from *lex loci protectionis*, particularly regarding copyright ownership, it is now time to analyze the potential conflict between these international agreements and the national treatment principle, and ultimately to show how such a conflict is to be resolved.

Where two or more international treaties cover the same subject matter, it is necessary to consider any potential conflict between these treaties and decide which of them is to be applied in a particular case. We talk about a conflict between two treaties as different sources of particular international law. It should first be noted the conclusion of a multilateral treaty does not, *per se*, preclude the application of an older bilateral or multilateral treaty concerning the same subject matter [Boguslavsky M. M., 1973: 19].[39] The legacy treaties must be assessed primarily in light of Article 20 of RBC and, where applicable, Article XIX UCC, which may prevent their application in their entirety or of some of their individual provisions. The TRIPS Agreement and its relationship with legacy copyright treaties are omitted from this analysis, as the resolution of potential conflicts is rather evident from the analysis of Article 20 of RBC below.[40] Moreover, as for the national treatment principle, to a certain extent it merely refers to the RBC.[41] Similarly, there is no reason to discuss WIPO Copyright Treaty 1996 (WCT), as it fully relies on the Berne Convention in this regard.[42]

This study focuses on two multilateral copyright treaties that establish the principle of national treatment — the UCC and the RBC. Both of these global trendsetters in establishing the national treatment principle are widely recognized.[43] Both treaties include a specific provision regulating its relationship with other international treaties — Article XIX UCC and Article 20 RBC. Whilst Article XIX of the UCC is relatively straightforward, leaving little room for doubt regarding the relationship between the UCC and legacy treaties, Article 20 of Berne Convention requires a more comprehensive analysis. Before analyzing the mentioned provisions of the

[39] It is necessary to reject the generalized view that the Berne Convention takes precedence over all other treaties in the field of intellectual property within its scope (such opinion is expressed, for instance, in [Schaafsma S., 2022: 6]).

[40] Article 1(1) TRIPS states explicitly that countries are free to provide more extensive protection — "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. [...]"

[41] See Article 3(1) TRIPS.

[42] See Article 1 WCT.

[43] As of 2024, the Berne Convention has 181 contracting parties and the Universal Copyright Convention has 99 contracting parties.

RBC and UCC, it is appropriate to first examine the nature of potential conflicts between international agreements in general by referring to the relevant international law doctrine.

First thing to be noted is the primacy of multilateral treaties over bilateral treaties is merely a political dogma, rather than a legal rule; see: [Majoros F.,1971: 40–41]. To portray the relationship between international treaties, the dissenting opinion of Prof. Anzilloti in the *Compagnie d'Electricité de Sofia et de Bulgarie* case before the then Permanent Court of International Justice[44] can be highlighted, according to whom the most important and delicate task of interpreting a legal text is to decide whether the contradictory nature of two particular rules is not solely a mere semblance; in other words, how two seemingly contradictory rules are to be coordinated, and only if they cannot, then finally to decide which of them is to be applied over the other.[45]

The international law doctrine quite uniformly rejects mutual intolerance between conflicting provisions contained in different legal instruments, favoring instead their mutual harmonization to the highest possible degree. In the event of a conflict between two international obligations, it is necessary, before giving preference to one of them to the detriment of the other, to assess whether it is possible to reconcile them, to blend them together [Bureau D., 2001: 205 et seq.]. One can speak of the so-called presumption of non-conflict. A conflict arises only when two treaties relating to the same subject matter are incompatible in the sense that they cannot be applied simultaneously in mutual harmony; see: [Villiger M., 2009: 402].[46]

It should be noted even in the case of incompatibility of provisions, one cannot conclude that the overridden (derogated) instrument is abrogated. If two norms cannot be reconciled, one norm will be given priority in a specific case, to the exclusion of the other [Bureau D., 2001: 214 et seq.]. No multilateral treaty implicitly abrogates earlier bilateral agreements [Majoros F., 1971: 53]; [Bureau D., 2001: 203], and any two (or more) competing provisions must, as a matter of principle, be subject to interpretation

[44] The successor institution to the Permanent Court of International Justice is the today's International Court of Justice.

[45] Cf. [Cour permanente de justice internationale, 1967: 356-357] — "Déterminer si la contradiction entre deux règles n'est qu'apparente et de quelle manière elles doivent se coordonner entre elles, ou bien déterminer laquelle de deux règles contradictoires s'applique à l'exclusion de l'autre, est une des tâches les plus importantes et les plus délicates de l'interprétation des textes juridiques."

[46] Majoros describes this phenomenon as the "règle de l'efficacité maximale," which holds that among two or more competing provisions, the preferred one should be the one that most effectively achieves the objectives of the conflicting conventions, given the subject matter at hand, see [Bureau D., 2001: 215].

whose primary objective should be the conciliation of the potential conflict in question and the harmonious application of both of these provisions. If it is not possible to reconcile the provisions as such, it should be attempted to reconcile the agreements in their entirety taking regard to their common purpose and rationale. This principle is also expressed in Article 30 (3) of the Vienna Convention on the Law of Treaties 1969 (hereinafter referred to as VCLT).[47] Some authors consider the *lex specialis*[48] and *lex posterior*[49] rules as methods for resolving apparent conflicts between norms. According to these authors, antinomy of norms arises only when these rules are insufficient to resolve the conflict between the norms. However, these rules are designed to address and resolve true conflicts cannot be reconciled, not merely apparent ones. In international law, conflicts of norms and their conciliation possess distinct character due to the fact that the particular norms originate from various sources of international law.

One of the tools that can assist in such conciliation is Article 31(3) (c) of VCLT, which provides that, in the interpretation of treaties, the relevant rules of international law are to be taken into account. One such rule of international law is that one international treaty is to be interpreted in light of another and *vice versa* (systemic interpretation). This principle was applied, for example, in the decision of the European Court of Human Rights in the Al-Jedda v. the United Kingdom case, which concerned a conflict between obligations under the UN Charter and the European Convention on Human Rights.[50] Without going into detail, the Court concluded in this

[47] This rule is sometimes somewhat misleadingly referred to as *lex posterior derogat priori* (see, for example, [Čepelka Č., 1986: 61]). However, it does not imply the direct and unconditional application of all norms contained in the later treaty as if there were no earlier treaty concluded; instead, as Article 30 (3) of VCLT stipulates that "[...] the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty," it is necessary to deal with the detailed analysis of the "compatibility."

[48] *Lex specialis* rule means resolution of contradiction between two norms that have different personal or material scopes of application. If the contradictory norms affect different groups of people or different regulatory objects, the more specific rule takes precedence over the more general rule: *lex specialis derogat legi generali*. The more specific rule therefore applies all cases which fall under its scope of application, the general rule to all those cases that do not fall under the scope of the more specific rule [Krejci H., 2002: 9 –10].

[49] Lex posterior rule means resolution of contradiction between two norms that have different temporal scopes of application. If one legal norm with the same personal and material scope of application is more recent than the other, and the norms therefore have a different temporal scope of application, the *lex posterior derogat legi priori* principle applies. The more recent law takes precedence over the older one and the older one is derogated.

[50] Judgment of the European Court of Human Rights of 7 July 2011 in the case of Al-Jedda v. the United Kingdom, Application No. 27021/08, paragraph 102 — "In the event of any ambiguity [...] the Court must [...] choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."

case that the two international instruments can be applied in parallel, since relying on a teleological interpretation of the two treaties, the conflict between them is only an apparent one. Based on the rules of interpretation in the VCLT, a reconciliation of obligations arising from competing international treaties must be sought, as only in this way it is possible to realize the fundamental principle and obligation of *pacta sunt servanda*. Although the VCLT, according to Article 4, applies only to treaties concluded after its entry into force (and the VCLT came into force only after the last revision of the RBC (Paris, 1971) was concluded), most of the rules contained therein are based on customary international law, which has applied independently of the VCLT within the normative system of international law also before the VCLT came into force [Villiger M., 2009: 410]; [Kur A., Dreier T., 2013: 11]; [Ricketson S., 2004: 220].[51] Thus, the rules of interpretation in Article 30 VCLT can, in effect, be used together with other rules of customary international law not mentioned in Article 30 of the VCLT (such as the *lex posterior* rule[52]).

According to the doctrine's predominant view, Article XIX UCC[53] provides for the priority of the UCC over any bilateral arrangement that is in force between two or more contracting countries to the UCC on the date of its entry into force. This is true even if the application of the bilateral treaty would *in casu* mean a more extensive protection of the author's rights, i.e., it would be *iure materiali* more extensive.[54] There are as well differing views advocating the need for an extensive interpretation, and thus not preventing the application of bilateral arrangements providing for more extensive protection. However, given the absolute absence of ambivalence in the literal wording of Article XIX, one should trust the rationale of the makers of the UCC and hence follow the principle *clara non sunt interpretanda*.

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[51] Consistent with this is the judgment of the European Court of Human Rights of 21 February 1975 in the case of Golder v. the United Kingdom, Application No. 4451/70 — "La Cour est disposée à considérer, avec le gouvernement et la Commission, qu'il y a lieu pour elle de s'inspirer des articles 31 à 33 de la Convention de Vienne du 23 mai 1969 sur le droit des traités. Cette convention n'est pas encore en vigueur et elle précise, en son article 4, qu'elle ne rétroagira pas, mais ses articles 31 à 33 énoncent pour l'essentiel des règles de droit international communément admises et auxquelles la Cour a déjà recouru."

[52] Cf. Article 59(1) of the Vienna Convention on the Law of Treaties (VCLT), which permits the *lex posterior* rule in principle only if all parties to the earlier treaty conclude the later treaty.

[53] Article XIX UCC — "This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of [UCC], the provisions of [UCC] shall prevail. [...]"

[54] Cf. [Majoros F., 1971: 79].

A slightly different regime was negotiated in the UCC for treaties between two or more American republics (Article XVIII). This different regime is discriminatory in nature and one can barely find a rational justification for it, be it in terms of its form of expression or its material basis. Considering the scope of this study, a detailed analysis of this Article is omitted.[55] Furthermore, the UCC is already of limited relevance, as all of its contracting countries are currently also contracting countries to the RBC, or are WTO members (cf. Article 9 of TRIPS), and the UCC provides in its Annex Declaration relating to Article XVII(c) that "[i]n relations between States bound by the Berne Convention, the Universal Copyright Convention shall not apply with respect to the protection of works the country of origin of which, under the Berne Convention, is a State of the Berne Union".[56] Moreover, the application of the UCC is also precluded should a country withdraw from the Berne Union.[57]

On the other hand, Article 20 RBC is way more challenging for interpretation. Its content cannot be clarified by simply referring to the paremia *interpretatio cessat in claris*. The foundation of today's content of Article 20 is the Article 15 (together with the Additional Article) of the original Berne Convention 1886 [Majoros F., 1971: 48]. The wording of Article 20 has remained unchanged since the 1908 Berlin Conference, and reads as follows:

"The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable." This so-called "principle de la non-diminution de la protection" can be divided into two parts. The countries of the Union may conclude other agreements among themselves, provided that these agreements: 1) grant to authors more extensive rights than the RBC, or 2) contain other provisions not contrary to the RBC.

It may seem to be a problem that most norms in bilateral treaties, albeit granting more extensive rights to authors, can be perceived as in some way

[55] A more detailed analysis of the differential approach in regard to US treaties cf. [Majoros F., 1971: 78–87].

[56] This is a clause by which the general rule of priority of later treaty (in this case, the UCC) is derogated in favor of the earlier treaty (in this case, the RBC) [Čepelka Č., 1986: 59–60].

[57] Appendix declaration relating to Article XVII(a) UCC — "[...] Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the [RBC], after January 1, 1951, shall not be protected by the [UCC] in the countries of the Berne Union; [...]."

contradicting the provisions of the RBC. International law norms always exhibit a degree of contradiction that cannot be resolved by conventional technical procedures of positive law *per se*. *Majoros* argues that the drafters of the RBC in terms of its Article 20 barely had other incompatibility situations in mind than those in which a bilateral instrument explicitly reduces the extent of author's protection [Majoros F., 1971: 54].[58] Similarly, *Olagnier* also points out that the ratification of the Berne Convention did not cause *inapplicability* of other agreements that are more favorable for rightholders and were negotiated between particular countries [Olagnier P., 1934: 7]. Accordingly, if the rationale of a treaty is to establish merely a minimum standard of protection, such a treaty should not, in principle, preclude compliance with other country's obligations that set a higher standard of protection [Niemann I., 2006: 301].

This approach to interpretation, which is not *prima facie* obvious from the literal reading of Article 20, was confirmed by Swiss case law in the early years after the Berne Act of 1886 entered into force. In the case of Gounod v. Mayer, Kunz & Co., the principal question was whether a provision of a bilateral treaty that is irreconcilably in contradiction with a provision of the Berne Convention 1886 can still be applied after the Berne Convention 1886 entered into force and became applicable on the case in question. In particular, the case concerned the conflict between the principle of national treatment (Article 2 of the 1886 of the Berne Convention 1886) and the principle of material reciprocity provided for in Article 20 of the Franco-Swiss Convention[59] of 1882. According to the latter mentioned Article 20 in conjunction with Article 1 of the Franco-Swiss Convention, authors of musical works first published in France enjoy in Switzerland the same rights French law grants to Swiss composers. Article 20 of the Franco-Swiss Convention, referring to French law, thus constitutes a rule of substantive reciprocity, provided that the French law referred to in this unilateral conflict-of-laws rule provides identical protection to Swiss authors as to French authors [Majoros F., 1971: 65, 66]; for details see: [Schaafsma S., 2022: 54 et seq.]. In the present case, Charles Gounod sought damages from the Tribunal de commerce de Genève against Mayer, Kunz & Co.[60] and an injunction

[58] The doctrine agrees that the TRIPS Agreement, *WIPO Copyright Treaty 1996*, and even the *Treaty on the Functioning of the European Union (*TFEU) and *Treaty on European Union (*TEU) constitute treaties in the sense of Article 20 RBC. The Berne Convention generally does not impede their application (cf. [Dreier T., Hugenholtz P. B., 2006: 73]). Nonetheless, bilateral treaties are, in this context, often overlooked.

[59] Convention entre la Suisse et la France, pour la garantie réciproque de la propriété littéraire et artistique, signée le 23 février 1882.

[60] Tribunal de commerce de Genève, 5 juin 1890, Charles Gounod c. Mayer, Kunz et Cie. The text of the decision is available in: Union internationale pour la protection des

against further use of the opera work Faust, of which Gounod was the composer. The question of whether to apply French law, which grants authors broader rights than those provided under the Berne Convention prescribing the principle of national treatment (implying the application of Swiss law) is a textbook example for interpreting Article 15 and the Additional Article (now Article 20 of RBC) governing conflicts between "Union" provisions and bilateral agreements. The company, in its defense, argued that because of the entry into force of the Berne Convention, French authors were not entitled to invoke French law in their favor on Swiss territory and that their rights were limited to those conferred by the Swiss law, according to which there was no infringement. The Tribunal de Commerce, as the court of first instance, recognized that authors coming from a Berne Union country enjoy in other countries the rights that the respective national legislation grants to its own citizens. According to the first instance court, the provisions of the bilateral treaty of 1882, which granted French authors in Switzerland the privilege of application of French law, appeared to be abrogated in light of Article 15 and the Additional Article of the Berne Act (now Article 20 of RBC). Therefore, the action was dismissed.

Gounod lodged an appeal, and the Cour de Justice Civile de Genève reversed the first instance decision stating that the Berne Convention explicitly provides that it does not affect the validity of existing treaties insofar as they grant authors broader rights than the Berne Convention.[61] Furthermore, the court pointed out that the provision of the Additional Article (contained in today's Article 20) was evidently aimed at cases other than the one at issue in the present dispute. The provisions of older bilateral treaties are rendered inapplicable due to the conclusion of the later convention only in those cases where they contain provisions contrary to the new one, unless the provisions of the earlier convention guarantee *in casu* more extensive rights to authors. The court stated that such provisions, although contrary to the fundamental principles of the Berne Convention, survive by virtue of a formally expressed special exception and that this is most evident from the grammatical construction of the Additional Article.[62] The appel-

oeuvres littéraires et artistiques. Suisse — Droit international — Traité franco-suisse du 23 février 1882. Le droit d'auteur. 1890, vol. 3, no. 9, pp. 98–100.

[61] Cour de justice civile de Genève, 14 juillet 1890, Charles Gounod c. Mayer, Kunz et Cie — "[Convention de Berne] stipule expressément que la Convention internationale n'affecte en rien le maintien des conventions existantes, en tant que ces conventions confèrent aux auteurs des droits plus étendus que ceux accordés par l'Union; les droits des auteurs français ne sont donc pas modifiés par l'entrée en vigueur de la Convention de 1886."

[62] Cour de justice civile de Genève, 14 juillet 1890, Charles Gounod c. Mayer, Kunz et Cie — "[...] disposition finale [qui stipule que les conventions antérieures sont modifiées

late court thus dealt with the question of how to accommodate the relative contradiction between the elements of "granting more extensive rights to authors" and being "contrary to the Convention." The court reasonably argued that there is in fact no contradiction (collision) at all, but rather that the mentioned elements can very well naturally coexist in parallel. While in the eyes of the first instance court the unilateral conflict-of-laws rule leading to the application of the law providing broader protection to the author was deemed to be in contradiction to the Berne Convention regime, the Cour de Justice de Genève upheld the applicability of Article 20 of the Franco-Swiss Convention.

Nonetheless, the decision of the appellate instance was challenged and the case went up to the Tribunal féderal, which upheld the decision of the previous instance and which in its judgment on the merits left no room for any doubt. In the court's view, the parties to the Berne Convention expressly reserved the continuing applicability of existing agreements to the extent that such agreements confer broader rights to authors, and did not intend to abrogate their prior bilateral commitments (and prevent future negotiations of such) except for those which, without conferring broader rights to authors, would be contrary to the Convention of 1886.[63] Adopting a contrary position would entirely negate the rationale and the spirit of the provision of the Additional Article. The conclusion of the Swiss highest judicial body is fully compliant to the present-day principles of the VCLT which encourages taking into account the objective and purpose of

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par la convention nouvelle, en tant qu'elles renfermeraient des stipulations contraires à cette convention nouvelle] vise évidemment d'autres cas que celui dont il s'agit au procès; les conventions anciennes sont modfiées par la nouvelle convention toutes les fois qu'elles contiennent des stipulations contraires, autres que celles accordant aux auteurs des droits plus étendus que ceux accordés par l'Union; les stipulations de cette dernière espèce, bien que contraires au principe qui est à la base de l'Union, n'en subsistent pas moins, en vertu d'une exception spéciale formellement exprimée; c'est ce qui résulte de la manière la plus claire de la construction grammaticale de la fin de l'article additionnel."

[63] Tribunal fédéral, 13 décembre 1890, Charles Gounod c. Mayer, Kunz et Cie — "Il ressort [...] avec évidence de l'alinéa 2 de l'article additionnel, rapproché de l'art. 15 de la Convention de 1886, que les parties contractantes ont réservé expressément le maintien des conventions existantes, en tant qu'elles confèrent aux auteurs des droits plus étendus que ceux accordés par l'Union, et qu'elles n'ont voulu interdire pour l'avenir et abroger pour le passé que les stipulations qui, sans conférer des droits plus étendus, seraient contraires à la Convention de 1882. Dans l'esprit de cette convention, les droits plus étendus doivent subsister en tout état de cause, et il est inadmissible qu'ils puissent rentrer dans les stipulations « contraires à la Convention » [...]. Il serait, en effet, absurde que l'article additionnel ait d'une part expressément déclaré respecter les droits plus étendus dont il s'agit, et qu'il les ait compris en même temps dans la catégorie des stipulations contraires à la dite Convention, et par conséquent caduques. Admettre une semblable antinomie serait enlever à cette disposition tout sens et toute portée quelconque."

the treaties to solve a potential conflict between them (see Article 31(1) of VCLT).[64]

The Swiss highest federal court upheld the legal interpretation that favored the more extensive protection of French authors, and that even to the discriminatory disadvantage of Swiss society [Majoros F., 1971: 67–68]. The fact that the Franco-Swiss convention provided French authors (and not only them, but any author having France as the country of origin of his work) with enjoyment of broader rights than Swiss citizens are generally provided with in the Swiss territory does not contradict in any respect the provisions and the nature of the Berne Convention. The Berne Convention prohibits merely negative discrimination against foreigners from the Berne Union countries, but not against the country's own citizens. In a different case, the Dame Strauss Halévy et Emile Strauss v. Bosson et Collomb, the application of the Berne Convention provisions was preferred to the application of the same Franco-Swiss Convention, since the application of the Berne Convention meant in this particular case a broader protection of the author's rights.[65]

Although some modern bilateral and multilateral copyright-related treaties grant right holders more extensive protection than the RBC,[66] it is rare for such protection to result from the application of foreign copyright law determined by a conventional conflict-of-laws rule that does not comply with the national treatment principle. This is why older decisions from the late 19th century are presented here, rather than relying on recent rulings, as there are barely any. It remains conceivable even today, perhaps particularly in the context of initial copyright ownership, that the connecting factor in a conflict-of-laws rule could be decisive for the "extent of protection" granted to the "right holder," or for protection to be granted at all. Under the prism that the primary rationale of international copyright treaties is to protect the author as a creative natural person expressing his intellectual personality in the work, it is imaginable that, in cases of con-

[64] Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) — "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[65] Tribunal fédéral, 25 septembre 1891, Dame Strauss-Halévy et Emile Strauss c. Bosson et Collomb. The text of the decision is available in: Union internationale pour la protection des oeuvres littéraires et artistiques. Suisse — Convention du 9 septembre 1886 — Traité franco-suisse du 23 février 1882, Articles 20 et 21. Le droit d'auteur. 1891, vol. 4, no. 11, pp. 130–132.

[66] See, for example, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership from 2018 (CPATPP) which evolved from the Trans-Pacific Partnership Agreement (TPP). The term of protection for copyright and related rights is stipulated there to be 70 years (cf. Article 18.63 TPP).

flict between two conflict-of-laws rules, preference would be given to the one that establishes the natural person as the author in the specific case. Conversely, looking at the same scenario through the lens of protection of the incentive to create and thereby the protection of creativity on its own as the ultimate rationale of copyright and international copyright treaties, the conflict-of-laws rule that designates a legal person as the right holder may be given preference. This is because the incentive to create often manifests through the financial resources invested in the provision of tools and conditions for the individual engaging in the creative work as such.

However, it is not possible to make an absolute conclusion that it will always be the provision granting the most extensive protection of author or right holder that will unconditionally be given precedence. The collective interests by which right holders are limited — the so-called *emprunts licites* (e.g., right of quotation), which find their expression, for example, in Articles 10 and 10bis RBC, cannot be limited by reference to a law that does not provide for similar collective interest copyright exceptions and cannot be regarded in this sense as providing more extensive copyright protection [Majoros F., 1971: 69–70].[67]

One can also mention situations where national law provides *in casu* more extensive protection to a foreigner than applicable international treaties do. The said above explained rule of granting most extensive protection to author/right holder holds for conflicts between two or more international agreements, but not to a "conflict" between a treaty and national law. In the latter mentioned case, it is possible to come to the conclusion that the international treaty is generally to prevail [Despagnet F., 1909: 203]. It is therefore not excluded that a foreigner who is endowed with legal status resulting from an international treaty may also be disadvantaged in comparison to other foreigners. This would not be the case if such a disadvantageous application of the law conflicted with the principle of non-discrimination enshrined in a constitutional law or a relevant international treaty. There are countries that insist on the *lex loci protectionis* principle as a matter of state sovereignty, because they do not want to let foreign value systems intrude into the national legal order through conflict-of-laws norms. On the other hand, French case law prefers the application of the *lex originis* rule as for copyright ownership, as long as the Berne Convention prescribing national treatment is not applicable in the particular case.[68]

[67] On the contrary, Niemann argues that "[d]ie Ausnahmebestimmungen der Art. 9 und 10 RBÜ sind [...] als Ausnahmen vom Mindestrecht zu begreifen, d. h. insofern besteht keine Pflicht zum Urheberschutz, diesen zu gewähren ist aber keineswegs verboten." [Niemann I., 2006: 303].

[68] See the decision of the French Highest Court in the case of Le Chant du Monde, on which the RBC was not applicable — Cass. 1e civ., 22 décembre 1959 (Le Chant

Conclusion

The article began with the premise that the national treatment principle has conflict-of-laws implications in the sense that it mandates the countries to use the *lex loci protectionis* connecting factor also for the ownership of copyright issue. This assumption gives rise to a potential conflict between national treatment principle, as established by multilateral treaties such as the Berne Convention, and bilateral copyright treaties that prescribe different conflict-of-laws rules, particularly concerning the determination of copyright ownership.

It was shown that in addition to the Montevideo Convention 1889, which prescribes rather explicitly the *lex originis* conflict-of-laws rule, there is a number of bilateral treaties that implicitly or explicitly demand the use of various connecting factors for the copyright ownership issue other than the *lex loci protectionis*. Notwithstanding the complex nature of Article 20 RBC, the RBC does not prevent, under certain circumstances, the application of from the *lex loci protectionis* differing conflict-of-laws rules contained in legacy copyright treaties. Applicability of a provision of a bilateral treaty between two countries that are also parties to the RBC is determined based on the principle of purpose compatibility (cf. Article 30 (4) (a) VCLT, which refers to Article 30(3) VCLT).[69] Courts must determine the primacy of applicability of provisions in particular international treaties on a case-by-case basis, aiming to reconcile competing provisions where possible, in line with the principle of systemic interpretation in international law. General tolerance between norms within particular international law, and thus their relative compatibility, is the ideal aimed for. It is therefore possible that, in certain cases, the *lex originis* principle for copyright ownership may apply, even when the RBC — and thus the principle of national treatment — would generally govern. It was demonstrated on case-law examples that it is not always the *lex posterior* rule that decides provision of which international treaty prevails.

The ultimate rule is to try to coordinate the application of all potentially conflicting treaties in a way that their common purpose and rationale is preserved, and thus to achieve harmony through their "simultaneous" ap-

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du Monde) — "[...] aucun texte ne prive les étrangers auteurs d'oeuvres littéraires ou artistiques publiées ou représentées originairement hors de France, comme en l'espèce, de la jouissance en France du monopole d'exploitation résultant d'un droit d'auteur [...]." and contrast with the case ABC News — Cass. 1e civ., 10 avril 2013, n° 11-12.508, 11-12.509 et 11-12.510 (ABC News). See also: [Niboyet M.-L., 2015, 79].

[69] As for the relationship with third countries in this sense, the norms of the bilateral treaty will generally have no effect on these third countries in the light of the *pacta tertiis non nocent* principle [Čepelka Č., 1986: 61].

plication. With regard to the subject matter at hand, the provision most effectively achieves the objectives of the conflicting conventions in the particular case should be given preference. In copyright realm, the usual rationale of international agreements is to provide foreign authors/right holders with possibly the most extensive protection. Copyright ownership is, however, a preliminary question to the provision of protection as such. For this reason, it may be decisive how a particular legal order perceives the rationale of copyright — whether it views copyright primarily as a means to protect authors as natural persons investing their intellectual creativity in their works, or rather as a mechanism to safeguard creativity itself and promote future creation of creative content, often driven by financial incentives. The choice between determining copyright ownership based on *lex originis* or *lex loci protectionis* in case of conflict between two international copyright treaties can vary depending on the specific perception of the ultimate rationale of copyright.

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