INTERNATIONAL CONSIDERATIONS OF COPYRIGHT LAW REVISION IN CANADA:

INTERNATIONAL OBLIGATIONS

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The object of this discussion is to review the nature and extent of Canada's present international commitments in the field of copyright. It is these commitments which constitute the parameters within which the copyright revision exercise must be carried out. In this regard, the 1957 Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs was keenly aware that "Canada is morally obligated in passing legislation to respect the Rome Revision of 1928 (which) places important limits upon its freedom of action in legislation"[1a].

Canada is presently a member of the two major international copyright conventions; i.e., the Berne Convention, of September 9, 1886, for the Protection of Literary and Artistics Works ("Berne Convention") and the Universal Copyright Convention, of September 6, 1952 ("UCC").

I Berne Convention

The members states of the Berne Convention constitute the International Union for the Protection of Literary and Artistic Works (generally referred to as the "Berne Union"). Subsequent to the conclusion of the Berne Convention in 1886, there have been revisions at Berlin in 1908, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971. Both the substantive and administrative provisions of the Paris Revision of 1971 entered into force on October 10, 1974. The revised versions are often referred to either as "Acts" or "Texts", and thus, for example, the Rome Revision is frequently cited as the Rome Text or the Rome Act of the Berne Convention.

From the outset, the Berne Convention's provisions have fallen into two classes: those governing matters of material or substantive law and those governing matters of administration and structure, (e.g. those provisions dealing with matters such as (i) the establishment of an assembly of member States[1] (ii) the establishment of an International Bureau of the World Intellectual Property Organization (WIPO)[2].

Canada is an adherent to the substantive provisions of the Rome Text of 1928 and the administrative provisions, only, of the Stockholm Text of 1967, which provisions came into affect in 1970.

(a) World Intellectual Property Organization

A moment's digression might be appropriate to briefly describe the World Intellectual Property Organization established pursuant to a special Convention[3] which came into effect at the same time, and which arose from the Stockholm Revision of the Berne Convention. The mandate of WIPO, one of fifteen of the United Nations specialized agencies, is the promotion of the protection of intellectual property[4] throughout the world through: (a) the fostering of co-operation among countries and (b) the centralization of the administration of a multiplicity of intellectual property Unions,[5] each founded on its own multilateral treaty.

WIPO is the successor organization of the Bureaux Internationaux Réunis Pour La Protection de la Propriété Intellectuelle (BIRPI), an organization which, in turn, resulted from the merger in 1893 of the Secretariats of the Berne Union and the International Union for the Protection of Industrial Property (Paris Union). As of January 1, 1978 there were 78 member states of WIPO, and 71 members States of the Berne Convention.

(b) The Structure of Berne

(i) National Treatment and Convention Minima

A recent publication by WIPO[6] examines the underlying structure of the Berne Convention and advises that the Convention: (i) rests on three basic principles and (ii) contains a series of stipulations with respect to minimum protection to be granted to all works (the "Convention minima"). The three basic principles[7] referred to are: (a) "national treatment" or "assimilation": works originating in one of the member States i.e. works by nationals of such State, ("personal criterion") or, works first published in such state, ("geographical criterion") must be given the same protection in each of the other member States as the latter grants to its own nationals; (b) "automatic" protection: protection must not be conditional upon compliance with any formality; (c) "independence" of protection: protection is independent of the existence of protection in the country of origin of the work.

The Convention minima pertain to the species of works to be protected, the nature of the protection to be afforded such works

and the duration of such protection. The Convention minima must be afforded to the works of Country "A" by Country "B" notwithstanding that the same are not made available to the nationals of Country "B". This then is a departure from the strict application of the national treatment doctrine but only vis-à-vis the protection granted by one Union country, "B" to the works of a national of a second Union country, "A". Thus, ostensibly, foreign works may receive higher levels of protection than domestic works. As of March 1, 1978 Canada was one of eleven member countries of the Berne Union adhering to the substantive provisions of the Rome Text. Some 21 countries adhered to the substantive provisions of Brussels Text and 31 countries adhered to the substantive provisions of the 1971 Paris Text. The principle of national treatment has been enshrined in the Convention since its inception and thus, applies to all member countries irrespective of level of adherence, notwithstanding the fact that successive revision has resulted in an augmentation of the "minimum" standards of protection. Thus, an adherant to the Paris Text must incorporate into its domestic legislation the minimum standards established by such Text and must offer such protection in its country to the works of all Union nationals, irrespective of the level of protection afforded in the latter's country.

(ii) Relationship Between Texts

It should be noted that a divergence of opinion exists with respect to the effect of adherence by two or more members of the Berne Union to different Texts of the Union vis-à-vis the protection

of the works of affected nationals. One author has suggested that a work of a national of one of two countries, both of which are Berne Union members, (but neither of which has ratified the same Text) would not be entitled to Berne protection in the other country "since there appears to be no Berne Text in force between the two countries".[8] However, the better view would appear to be that expressed by WIPO in its 1978 "Guide to the Berne Convention" which commented with respect to Article 32 of the Paris Text,[9] the Article which regulates the relations between Union countries bound by different Texts of the Convention: "Whether one considers each Act to be a different treaty or that there is a single Convention expressed in successive Acts, the essential point is that every Union country has rights and obligations vis-à-vis every other Union country whether or not bound by the same Act".[10]

Given (1) the doctrine of national treatment and (2) the continuity of relationships between countries bound by different Texts, and (3) the fact that with each successive revision, the Convention minima have been augmented, there are those who would argue that it might well be in a country's best interests to refrain from adhering to any subsequent Texts of the Convention. The authors of such country would enjoy in countries offering higher levels of protection the benefit of such protection, while at the same time their own country would only be required to offer the lower levels of protection available to its own authors (national treatment), and such Conventional minima as the latter country was obliged to provide to foreigners by the Text of the Convention to which it

adhered (whether or not available to its own authors, "independence of protection"). Those parties which advance such an argument must however address two factors which could serve to militate against the adoption of such a policy.

Firstly, adoption of such a policy would appear to be of value only to the extent that a country was prepared to refrain from granting higher levels of protection to its own nationals; a question, the answer to which, should not stand or fall upon the issue of the concommitent increase in the protection afforded to foreign nationals.[11]

Secondly, while it is true that any country which has joined the Union subsequent to the Paris Text coming into force must extend to the works of all other Union members the protection of that Text, this is not necessarily the relationship between two member countries each of which has adhered to an earlier Text, where one has subsequently adhered to a later Text. Article 32(1) provides that the relationships between such countries are to be governed by the latest Text which has been accepted by both. The following example has been cited as illustrative of the principle[12]

> "... a country (the United Kingdom) which, so far as substance is concerned, is bound by the Brussels Act (1948) and another (Canada) has not yet accepted any later Act that of Rome (1928): in the relationship between these two countries, the Rome Act applies".

To the extent that Great Britain has incorporated the Convention minima of the Brussels Act into the protection afforded its own

nationals, Canadian nationals will receive the same protection in Great Britain ("national treatment"). However, to the extent that the Conventional minima of the Brussels Act have not been made available by Great Britain to its own nationals, Canadian nationals would only have available to them in Great Britain, the Conventional minima of the Rome Act. While, admittedly, it would seem unlikely that a country would adhere to a later Text of the Convention and not provide the full benefit of protection established by such Text to its own nationals, by adhering to such Texts, such country could ensure that its nationals receive the benefit of the Convention minima of such later Text in all Union countries adhering to such Text, even if these countries, similarly, did not afford their own nationals such protection.

(c) Protected Works

As an adherent to the Rome Text, Canada is bound to make provision for the protection of the rights of authors over their "literary and artistic works".[13] Article 2 of the Rome Act defines "literary and artistic works" in part as including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression". The reference to "scientific works", which also appears in the enumeration of protecive works set forth in the UCC, while appearing somehow more appropriate in the context of a patent treaty rather than a copyright convention has been explained as follows:

> "The scientific work is protected by copyright not because of the scientific character of its content; a medical text book, a treatise on physics, a documentary on interplanetary space are protected not because they deal with medicine, physics or the surface of the moon, but because they are books and films. The content of the work is never a condition of protection. In speaking of a domain not only literary and artistic, but also scientific the Convention encompasses scientific works which are protected by reason of the form they assume".[14]

Article 2 of the Rome Text contains an "inexhaustive" list of examples of such literary and artistic works. In essence, they comprise literary, artistic (including photographic), dramatical and musical works and their derivatives (e.g. translations and adaptations) together with cinematographic productions and productions "effected by any other process analogous to cinematography".[15]

Considerable discussion[16] has arisen subsequent to the advent of magnetic (video) tape whether the process by which video tape records that which it captures is a "process analogous to cinematography" and the resulting possibility that works captured on video tape have not been protectable by copyright. The authors of the Keyes/Brunet Report stated that:

> "The present Canadian Act is designed to be compatable with the Rome Text ..., insofar as protection is provided to works <u>produced</u> by a process analogous to cinematography. Videotape cannot be included in this definition. The Stockholm Revision expanded the definition of "film" to include any technical means that results in a work <u>expressed</u> by a process analogous to cinematography".[17]

However, in commenting on the significance of the movement to the word "expressed", the Guide to the Berne Convention indicates that "the draftsmen of the revised Text chose a general formula using the word "expressed" ... in order to underline that which was at issue was the form of work and not the method of making it public. It is not the process employed which is analogous, as the effects, sound and visual, of such process".[18] A reasonable argument can thus be made that this statement would seem to indicate that the change in language was effected to make it abundantly clear that the intent of the language of earlier Texts was always to provide protection for all processes which resulted in works analogous to films, rather than to add a measure of protection which hitherthereto was not provided.

Canada is, thus, bound by the Rome Text to provide protection to all works of the types enumerated principally in Article 2, and as well, in Articles 3 and 4. Absent from both the Rome Text and subsequent Texts are any references to items such as sound recordings, broadcasts, and performer's performances. However, as noted above, the works enumerated are not meant to be exhaustive. "The expression "literary and artistic works" must be taken as including all works capable of being protected. The use of the words "such as" shows that the list is purely one of examples and not limitative".[19] Four questions thus arise:

(a) <u>first</u>, while the list has been characterized as exemplary only, may a member country in

defining for itself "literary and artistic works" exclude from the protection of the law one of the types of works enumerated in Article 2?

(b) second, may a country enlarge the list of "literary and artistic works" protected by its law?,

(c) third, if a country may enlarge its list of protected works, must the protection offered same be accorded not only to the works of its own nationals but similarly to the works of all Union nationals and works first published in any Union country?, and

(d) fourth, are there certain works or "forms of expression" which by their nature are not "literary and artistic works" as contemplated by the Berne Convention, and are thus, not subject to the Convention?

Dr. Stephen P. Ladas in his authoritative treatise "The International Protection of Literary and Artistic Property" advises that the answer to the first question is to be found in the wording of Article 2(3):"'the countries of the Union shall be bound to make provisions for the protection of the above mentioned works', thus, a member country must at least protect all the species of works enumerated in Article 2."[20]

Similarly, the second question must be answered in the affirmative; a country may indeed enlarge the list of works to which it will offer protection: "by merely listing examples, the convention allows member countries to go further and treat other productions in the literary, scientific and artistic domain as protected works."[21]

However, the fact that a country treats a certain production as a protected work (i.e. Canada's protection of sound recordings) does not mean that other Berne Union countries have any obligation to do the same.

With respect to both the third and fourth questions, the authors of the Keyes/Brunet Report expressed the view that:

> "despite the constraints placed on flexibility by the non-discriminatory nature of the conventions, it remains possible to control the protection of material other than "convention" works...
>
> The Berne Convention requires convention treatment to be accorded to convention works, but only to such works.
>
> Similarly... the UCC...
>
> Certain works fall outside of the ambit of protection as spelled out by the wording of the conventions. Sound recordings are not protected by other convention, as evidenced by the existence of separate treaties which protect sound recordings. Nor do the conventions require, for example, the protection of broadcast, editions, computer programs or performances"
>
> This makes it possible,in domestic copyright law, to distinguish convention and non-convention subject matter, as has been done in the United Kingdom and Australia."[22]

It is not clear from the foregoing statement whether Messrs Keyes and Brunet view certain works as beyond the ambit of the Convention, because

(a) they have not been specifically enumerated, or

(b) they are not by their nature, "artistic and literary works" or "literary, scientific, and artistic works" as those terms are used in the Berne and Universal Conventions.

One thing is certain, however; the existence of separate treaties with respect to subject matter such as sound recordings and broadcasts does not, of itself, substantiate the claim that these works are beyond the pale of "literary, scientific and artistic works". The exclusion of these works from the enumerative list speaks only to the fact that their inclusion in such list would result in their mandatory protection in all Berne countries; a step for which, the majority of Union members are, apparently, not ready. The placing of sound recordings, broadcasts and performances in a separate treaty, serves to encourage States to commit themselves to providing protection for these works.

Thus, notwithstanding the existence of the Neighbouring Rights Convention and related conventions (other than Berne and UCC), and in view of the fact that the list of enumerated works is not exhaustive, the only viable basis for the proposition that sound recordings, etc., are non-Convention material is that they do not constitute "productions in the literary, scientific and artistic domain".

Insofar as the views expressed by the authors of the Keyes/Brunet Report regarding the manner in which the Conventions are to be understood serve as the basis for many of the recommendations in the Keyes/Brunet Report with respect to protection of "non-Convention" works for Canadians only, the importance of these views cannot be over emphasized. It would appear, however, that both the weight of authority and the better view of the application of the Convention would hold otherwise.

With respect to the question whether or not sound recordings, broadcasts, etc. are "productions in the literary, scientific and artistic domain" it is submitted that the following passages, set forth the correct view. The first passage is from Bogsch, the Law of Copyright under the UCC; in this passage Bogsch comments on the meaning to be given to the parallel wording of the UCC, ie "literary, scientific and artistic works..."[23] "'Scientific, literary and artistic' do not refer to mutually exclusive categories... (these) words should not be analyzed one by one and in their non-technical meaning. They should be considered together, as an expression, meaning works susceptible of copyright protection."[24] The second passage is from the WIPO Guide to the Berne Convention, which expressed the view that "The expression 'literary and artistic works' must be taken as including all works capable of protection.[24a]

Presently, some 58 countries[25] including the United States, Australia, Great Britain and Canada, protect sound recordings under their respective copyright statutes (in the latter two countries such protection has prevailed for over 50 years). In several countries, including both Great Britain and Australia, broadcasts are also protected by copyright. It is submitted that, in view of both the foregoing analysis, and the supportive views hereinafter set forth, forms of expression such as broadcasts, sound recordings, and performances must be considered "literary, scientific and artistic works" and as such, when offered copyright protection by a Union country, will be subject to the Berne and Universal Conventions and their respective national treatment provisions.

Stephen Ladas was of the view that a country was free to enlarge the list of works protected by its law, for instance, "stage effects or scenic arrangements or sound recordings could be included in the copyright law of a particular Union country, in which case authors of other countries must be protected in such country by virtue of the national treatment provision of Article 4 as well as the stipulation of Article 19".[26,27]

The Patent and Trade Mark Institute of Canada stated that, in its view, it was not clear that the distinction offered by the

authors of the Keyes and Brunet Report between Convention and non-Convention works "may lawfully be drawn under the Treaties".[28] The PTIC is of the view that the doctrine of national treatment is the cornerstone of both the Berne and UCC treaties and its application goes beyond the works clearly required to be protected to all productions in the "literary, scientific and artistic domain". Indeed, the WIPO Guide to the Berne Convention, after suggesting, as noted, that by merely listing examples, the Convention allows member countries to also treat other literary, etc. productions as protected works, cites as examples of the latter "sound recordings" and "broadcasts".

The PTIC in its brief submitted to the Government in response to the Keyes/Brunet Report noted that:

> "The general and prevalent practice of member countries is an important guide to the meaning of treaties and on that basis it would appear that although Convention minimums do not apply to performances, broadcasts or sound recordings, never the less if a member country does protect them in its copyright law that protection must be given to creators regardless of their nationality. This practice appears to reflect the clear spirit of both treaties."[29]

In a legal opinion prepared for the Canadian Motion Picture Distributors Association, J.G. Castel, Professor of Public International Law, Osgoode Hall Law School, was of the opinion

that the recommendations of the Keyes/Brunet Report with respect to granting protection in essence only to Canadians with respect to certain species of "non-convention" works: "...constitute an artificial and unsuccessful attempt to circumvent the prohibitions against discrimination based on nationality to be found in the 1928 (Rome Text) and the 1952 (UCC) conventions."[30]

Professor Castel subsequently expanded his views and stated that it was his opinion that:

> "(1) the recommendations, if implemented, would breach the very clear national treatment provisions of the Conventions. Established rules of interpretation of treaties would compel an international or national tribunal to reach such a conclusion.
>
> (2) the recommendations, if implemented, would also violate the spirit of the relevant provisions of the Conventions. This would amount to bad faith carrying out Canada's obligations under the Conventions and constitute a breach by Canada of its obligations under them since it is well established under international law that treaties must be performed in good faith.
>
> (3) ...it cannot be argued that if the recommendations were implemented, in fact, no discrimination would result on the basis of nationality since in some cases, Canadian authors would also be denied protection - i.e. the authors of a Canadian film broadcast by a foreign broadcasting station which is rediffused by a Canadian cable system."[31]

Finally, the Manitoba Court of Appeal had occasion to review the national treatment provisions, i.e. Article 4, of the Rome Text. In rendering its opinion, both with respect to the ability of

Union members to enlarge the list of works protected by national law, above and beyond those enumerated in Article 2, and with respect to the question of whether protection of such works could be offered only to a country's nationals or would necessarily have to be accorded to all Union members, the Court expressed the view that:

> "Beside the consideration that it is not likely that the contracting states meant to forego the power to grant their natives such protection as they judge proper, the spirit as well as the wording of the Convention, the logical connection between Articles 4, 5 and 6, the use of such terms therein as "apart from" and "as well as" and of the words "wider provisions" in Article 19 all show conclusively that it was contemplated that the Union countries might grant their natives larger protection than that defined by the Convention, and agreed upon that such larger protection would enure to Union authors in the circumstances mentioned without which Article 4 would be all together purposeless and well-high meaningless. In short, the protection granted by Articles 9 to 14 is irreduceable. It is a minimum, but may be made greater in any Union country as a consequence of its legislation respecting its natives."[32]

(d) Moral Rights

The Rome Text requires member countries to provide protection not only for an author's "pecuniary" or economic interests in copyright, (e.g. the rights to reproduce or to perform) but also the author's non-pecuniary interests (the droit moral).

The prerogatives enshrined in Article 6 of the Rome Text, and incorporated in its entirety in Section 12(7) of the present Canadian Copyright Act[33] are: firstly, the right of the author to have his name associated with his work, or to refrain from so doing, i.e. remain anonymous (the "right of paternity") and secondly, the right to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honour or reputation (the "right of integrity").[34]

It is interesting to note that the Stockholm Text modifies the language of the Rome Text ("independently of the author's copyright"), to underscore the precept that moral rights and pecuniary rights, as contemplated under the Berne Convention, are both integral facets of copyright. Article 6 bis of the Stockholm Text begins: "independently of the author's economic rights...".

(e) Term of Protection

Article 7 of the Rome Text represents a compromise with respect to an effort to establish a Convention minimum in respect of a term of protection for the majority of protectable works. The subsequent Brussels Text overcame the need to compromise and established a minimum term of protection (the life of the author plus fifty years) binding on all the countries of the Union for these same works. Paragraph 1 of the Rome Text states

straightforwardly that: "the term of protection granted by the present Convention shall be the life of the author and fifty years after his death". The compromise referred to above, necessitated at the time of the drafting of the Rome Text by the apparent unwillingness of those countries favouring a term of thirty years after the author's death to increase the same to fifty years[35] is to be found in paragraph 2 of Article 7. This paragraph provides that notwithstanding the unequivocal statement in paragraph 1, to the extent that the term of life plus fifty years is not adopted by all the countries of the Union, term shall be regulated by the law of the country where protection is claimed.

Thus, subject only to the Convention minima of the UCC with respect to term,[36] and to the extent that the 11 members of the Union presently bound by the Rome Text have not adopted a term of "life plus fifty", Canada is at liberty, under Berne, to diminish its present term of protection of "life plus fifty".

However, it must be noted that the Rome Text contains an important qualification affecting the doctrine of "national treatment" as it touches upon the question of term. Paragraph 2

of Article 7 imposes a comparison of terms and requires that no foreign work receive longer protection than it receives in its "country of origin".[37]

Thus, were Canada to reduce the term of protection which it offers generally to literary and artistic works from a term equal to the life of the author plus fifty years, a significant number of other Union countries would be obliged to reduce the term of protection offered to Canadian works in their respective countries to the same extent. The Keyes/Brunet Report advised that the rule of the shorter term "permitted" Berne countries to reduce the term given to Convention works to that given in the country of origin and that further, a reduction by Canada "could invite the application of the rule by Berne countries".[38] It would appear that the authors of the Report viewed the application of the rule of the shorter term as being permissive. While it is true that the rule of the shorter term as ennunciated in the Paris Text is permissive,[39] the language in the Rome Text is mandatory, i.e. Article 7(2) provides that: "...the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work".

Thus, where the relationship between two Union members adhering to different Texts of the Convention is governed by the Rome Text (or the Brussels Text, which incorporates the same language in this regard as the Rome Text) the application of the "rule of the shorter term" will be mandatory, and where the relationship between these two countries is governed by the Paris Text, the application of the "rule of the shorter term" will be permissive.

The first two paragraphs of Article 7 of the Rome Text, i.e. those discussed above, pertain to the term of copyright for "literary and artistic works" (as defined in Article 2). However, the copyright legislation of many countries also provides certain specific terms of protection for works encompassed within this broad class of "literary and artistic works" on the basis of either: (a) technology (e.g. photographic works and works produced by processes analogous to photography) or (b) attributes of the "author" (e.g. posthumous, anonymous, and pseudonymous works and works by joint authors).

With respect to such categories of works, the Rome Text provides that, save for works by joint authors, the term of protection is to be regulated by the law of the country where

protection is claimed, subject to the "rule of the shorter term". The term of copyright protection belonging in common to joint authors of a work must be calculated according to the death of the last surviving author. The rule of the shorter term is applicable once again, subject however to the stipulation that "in no case may the term of protection expire before the death of the last surviving author".[40]

(f) Scope of Protection

Article 4 of the Rome Text grants to authors: "such rights as the respective laws now accord or shall hereafter accord to nationals, as well as the rights especially accorded by the present Convention.

Thus it may be seen that, as noted earlier, two sources of protection are contemplated: the legislation of the country where protection is claimed (national treatment) and the stipulations of the convention (Convention minima). The application of the doctrine of national treatment and the exceptions to same established by the provisions regarding term of protection, together with the provisions pertaining to moral rights have been discussed above. With respect to Convention minima, the Rome Text adopts the form of a specific enumeration of a compendium of rights which each country is bound to secure to authors. The rights enumerated are:

(a) reproduction (including adaptation) of literary, scientific and artistic works[41]

(b) public presentation of dramatic or dramatico-musical works and both live and recorded public performance of musical works.[42]

(c) translation of literary scientific and artistic works and the public presentation of translations of dramatic or dramatico-musical works.[43]

(d) communication to the public by radio-diffusion of literary and artistic works.[44]

(e) adaptation of musical works to instruments capable of reproducing same mechanically (a making of records and tapes)[45]

(f) reproduction, adaptation and public presentation by cinematography of literary, scientific or artistic works.[46]

The foregoing then, represents the nature and extent of Canada's obligations pursuant to the Berne Convention. The second multinational copyright treaty to which Canada adheres is the Universal Copyright Convention.

II Universal Copyright Convention ("UCC")

As noted earlier, one of the two major objectives of the World Intellectual Property Organization is to ensure administrative cooperation among the intellectual property Unions.[47] While the International Bureau of WIPO does administer the far greater portion

of the multinational intellectual property conventions, centralization is incomplete as far as copyright and neighbouring rights are concerned to the extent that the UCC is administered by UNESCO (United Nations Educational, Scientific and Cultural Organization) and the Rome Convention on Neighbouring Rights is administered jointly by WIPO, UNESCO and the International Labor Office (all three of which are United Nations agencies.)

The UNESCO Medium-Term Plan (1977-82) advises that UNESCO's involvement in the field of Intellectual Property is based on:

(1) (a) the provisions of Article 27 of the Universal Declaration of Human Rights:

> "Every one has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", and

(b) Article 15 of the International Convenant on Economic, Social and Cultural Rights

(2) UNESCO's Constitution, which expressely provides that UNESCO should encourage: "cooperation among the nations and all branches of intellectual activity" by fostering "the mutual knowledge and understanding of people" and by recommending "such international agreements as may be necessary to promote the free flow of ideas by word and image"; and

(3) the resolutions of UNESCO's General Conference, which has expressed the opinion that the organization should advance toward the universal improvement of copyright[48].

"UNESCO's role consists in organizing the protection of copyright so as to enable works to reach an increasingly wide public, with a view to promoting the development of education, science and culture."[49]

In the light of its mandate, and in view of the state of affairs extant in the field of international copyright protection in 1947, UNESCO embarked on a course of action which eventually lead to the adoption of the UCC in 1952. The object of the exercise was to create a new Convention, the terms of which would be sufficiently flexible to accommodate the disparate national systems of copyright protection prevailing throughout the world and in so doing to unite:

(a) all the member states of the Berne Union[50], and

(b) states, parties to one or more Pan American conventions[51,52] and in particular, those states which were not also members of the Berne Union, principally and most importantly, the United States of America, and

(c) states which had not acceded to any system of international protection, some of which regulated their relations through bilateral agreements.[53]

The Universal Copyright Convention was framed by the participants of an intergovernmental conference which took place in Geneva in September of 1952 and it became effective on September 16, 1955. The Convention was revised in Paris on July 24, 1971 simultaneously with the revision of the Brussels Text of the Berne Convention.

Canada became bound by the Convention as from August 10, 1962 and has not, to date, adhered to the Paris Text. As of January 1, 1978 there were 72 member states, 25 of which had adhered to the revised Paris Text.

(a) Relationship Between Berne and Universal Conventions

Most people on learning of the co-existence of two major international conventions covering the same field i.e. copyright, wish to know first and foremost why there was a need for two conventions. The answer, to a large degree, was the desireability of fully including the United States of America within the international copyright community, coupled with the limited possibility of the United States joining the Berne Convention due to major differences between the Convention minima and the American Copyright Act, the latter of which would have had to have been amended considerably to accommodate the former. The question next most often posed is: "How do the two Conventions work together; if there is a conflict between their provisions, which Convention takes precedence?".

Article XVII of the UCC, together with the Appendix Declaration to Article XVII provide the answers to these questions. Para. 1 of Article XVII provides that: "This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention". The following para. of Article XVII establishes that in application of para. 1 above, a Declaration has been annexed to Article XVII which is to serve as an integral part of the UCC for States also bound by the Berne Convention as of January 1, 1951 or which become bound by same at a later date.

The Appendix Declaration contains a preamble and two provisos; the first proviso sets forth the Berne "safeguard clause", which pertains to member states of both the Berne and Universal Conventions which withdraw from Berne, seeking to rely solely on the UCC. The second proviso crystallizes the aspirations expressed in the preamble to avoid any conflict which might result from the co-existence of the Berne Convention and the Universal Convention by providing that: "The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin[54] within the meaning of the Berne Convention, a country of the International Union created by the said Convention."

Thus, with respect to two countries, each of which is a member of both the Berne Convention and the Universal Convention (irrespective of whether such countries are "linked" by the same Text or different Texts of the Berne Convention),[55] where a work originates from within a Berne member country, the UCC is not applicable.

With respect to the situation where a work has a Berne country as its country of origin, where, however, one country is a member of both the Berne and Universal Conventions and the second country is a member of the Universal Convention only, Bogsch[56] suggests that it is uncertain whether or not the UCC may be invoked, due to ambiguity in the wording of the Declaration, and that, to the extent that both Conventions rest on the principle of national treatment, "in many cases application of one Convention will lead to the same result as application of the other".

Like the Berne Convention, the UCC also contains Convention minima which are a departure from the strict application of the doctrine of national treatment. Where these minima require different levels of protection (eg. Berne minimum term of protection for most Rome Texts countries is "life plus 50"; UCC minimum term of protection is "life plus 25"), the uncertainty as to which Convention is applicable will result in a problem of application. It has been suggested that in view of the foregoing, notwithstanding that it may be neither equitable, for the country in which protection is claimed, nor juridical, insofar as it cannot be supported by any language in the Convention, the most prudent course of action for a country to follow would be to protect those works to which both Conventions may apply to the extent and in the manner which satisfies both Conventions.

The second proviso of the Appendix Declaration establishes a mechanism aimed at deterring countries from withdrawing from the more onerous requirements of the Berne Convention in favor of reliance on the UCC alone for the international protection of the works of their respective nationals. In essence, works which have as their country of origin (as defined in the Berne Convention) a country which withdraws from the Berne Union, may not be protected by the Universal Convention in those countries which adhere to both the Universal and Berne Conventions.

(b) The Structure of UCC

(i) National Treatment and Convention Minima

As noted previously, the UCC rests on the same principle as that which serves as the basis of the Berne Convention, i.e. national treatment. Article II of the Convention provides that:

> (1) Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.

(2) Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its nationals".

Article II, like its counterpart, Article 4 of the Rome Text, not only establishes the treatment to be accorded to protectable works, it also establishes the three classes of works which, due to their "nationality" are subject to the provisions of the Convention; these are:

(i) published works of nationals of any Contracting State, and

(ii) works first published in any Contracting State, and

(iii) unpublished works of nationals of any Contracting State.

However, unlike the Berne Convention, which contains a compendium of rights which each country is bound to secure to authors "the (Universal) Convention contains express minima only on two points: duration (Article IV) and the right of

translation (Article V). The provisions on formalities (Article III) may result in deviations from assimilation in order to make the acquisition of protection more simple than this would be if it were left to pure national treatment. On all other points, however, the Convention contains no possible exceptions from national treatment and no express minimum requirements. All that it provides for is that the protection must be "adequate and effective".[57]

(ii) Relationship Between Texts

Paragraph 4 of Article IX of the 1971 Paris Text provides that relations between States which are party to that Text and States which are party only to the 1952 Geneva Text (e.g. Canada) are to be governed by the Geneva Text. However, any State which is party only to the 1952 Text, may by notification deposited with the Director-General of Unesco, declare that it will allow the application of the 1971 Text to works of its nationals or works first published in its territory by all States party to the 1971 Text.

Paragraph 4, then, regulates relations between States party to the 1952 Text which never accede to the 1971 Text and States who accede only to the 1971 Text. However Paragraph 3 establishes a bridge of commonality between these two groups by providing that if a State is not a party to the 1952 Text and accedes to the 1971 Text, it automatically becomes a party to the 1952 Text, and that after the 1971 Convention comes into force, no further accessions to the 1952 Text alone will be possible. The Report of General Rapporteur of the 1971 Conference, commenting on the effect of Paragraph 3, stated:

> "This assures the existence of a common text between any two UCC members, thus providing a legal basis for their mutual copyright obligations, but at the same time allows the 1971 Text to eventually supercede the 1952 Text as it attracts more and more ratifications and accessions".[58]

(c) The Conventions and the Copyright Act

Notwithstanding Canada's adherence to both the Berne and Universal Conventions, and our attendant responsibility to ensure that our domestic copyright law reflects our respective obligations thereunder, it appears that the present provisions of the Canadian Copyright Act do not, in fact, reflect our Convention obligations, but rather conflict with same.

Section 4 of the Act provides, in effect, that the protection of the Act extends to literary, dramatic, musical and artistic works;

(a) if the author was at the date of the making of the work (i) a British subject or (ii) a citizen or subject of a country which has adhered to the Berlin or Rome Texts[59] of the Berne Convention, or (iii) a citizen or subject of a country named in a governmental "certificate", or (iv) resident within "Her Majesty's Realms and Territories".

(b) in the case of a published work, the work was first published (i) within "Her Majesty's Realms and Territories", or (ii) in a country which had adhered to the Berlin or Rome Texts of the Berne Convention or (iii) a country named in a governmental "certificate".

The Copyright Act does not contain any provisions extending the protection of the Act specifically to the works of UCC nationals or works first published in a UCC country, as it does vis-à-vis Berne. To the extent that a country adheres to both Berne and UCC, the foregoing will not be of consequence. However, what of countries which adhere to the UCC only; how are the works of their nationals or works first published in such countries[60] accorded protection under the Act?

The mechanism for extending the protection of the Copyright Act to UCC members, not also members of Berne, is the issuance by the Minister of Consumer and Corporate Affairs of a "certificate", as contemplated under Sections 4(1) & (2) of the Act.

Not only does it appear that there is an apparent gap in the protection which Canada offers to some Berne Union members, it would also appear that Section 4(1) of the Copyright Act conflicts with the requirements of both Article II of the Universal Convention and Articles 4 and 6 of the Berne Convention, under which protection must be offered to both of the following:

(i) any work authored by a national of a member country and if published (a) under Berne, first published in a Union country or (b) under UCC, irrespective of country of first publication, and

(ii) any work first published in a member country.

The conflict between the Act and the UCC results from the apparent requirement of the Act that published works must be published in one of the three classes of enumerated countries.

The conflict between the Act and the Berne Convention results from the possible construction of Section 4(1) of the Act which

would result in protection being made available to all published works only if:

(i) the author is a British subject, or a Berne Union national, and

(ii) the work is first published in Her Majesty's Dominions or a Berne Union country or a country to which the Act has been extended (ie issuance of a Ministerial Certificate).

(d) Protected Works

Article I of the Convention provides that each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other proprietors of literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engraving and sculptures.

The works which the Convention requires to be protected, then, are all "literary, scientific and artistic works". The meaning to be ascribed to this term, both under the UCC and under Berne has been fully discussed earlier; similarly the significance of the fact that the list of enumerated works is not exhaustive.[61]

(e) Scope of Protection

It will be seen that Article I not only sets forth the kinds

of works which must be protected, it also establishes the mode(s) of protection which must be afforded such works.

As noted, the Convention requires only that each Member State offer adequate and effective protection for Convention works. "Adequate and effective" is not defined in the Convention; however, the Report of the Rapporteur-Général, the Chairman of the Geneva Conference, stated that the rights conferred on authors by the Convention "should include those given to authors by civilized countries".[62] One commentator has observed, appropriately, that the lack of enumeration of rights has both its advantages and disadvantages. With respect to the latter "there is no sure guide in borderline cases or where uniformity or near-uniformity among civilized countries is missing". On the other hand, "as the views of the civilized countries change in respect of what is adequate, so will the obligations of the countries under Article I. As soon as a new method of communication, multiplication, expression or realization of a work is invented, and as soon as civilized countries recognize in their domestic laws some rights of the authors in connection with these methods, the recognition of the same right to works (to which the Convention applies) will become mandatory under the Convention".[63]

As noted above, the right to translate is one of the two Convention minima. Article V provides that copyright includes

the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under the Convention. The second paragraph of Article II establishes that a Contracting State may, by its domestic legislation, restrict the right of translation of writing, but only subject to the detailed limitations set forth in the paragraph. Canada's Convention obligation to secure to authors the right to translate is fulfilled through the provisions of section 3(1)(a) of the Copyright Act. However, were some form of restriction of the right to translate contemplated for the purposes of the revision of the Copyright Act, such restriction would have to accord with the provisions of Article V, paragraph 2 of the Convention.

(f) Term of Protection

The second of the two Convention minima (departures from the principle of national treatment) is found in Article IV. Paragraph 2 of this Article provides that the minimum term of protection for works protected under the Convention is to be the life of the author and 25 years after his death.

The application of this general proviso to Canada is subject to certain of the qualifications contained in the subsequent provisions of Paragraph 2. Where a country generally computes term of copyright

based on the life of the author but where, however, the term of protection for certain classes of works is computed from the date of first publication (both of which are the case in Canada),[64] such country may maintain these exceptions to the minimum term requirement and may extend them to the other classes of works. However, for all of these classes, the term of protection may not be less than 25 years from the date of first publication, save for photographs and works of applied art in respect of which the minimum term is "10 years".

Thus, for works the term of protection for which is a function of the life of the author, the minimum term allowed by the UCC is life plus 25 years and for works, the term of protection which is a function of the date of publication, generally, the minimum allowable term is 25 years after publication.

It appears that where a country (eg. Canada), maintains a mixed system of protection as of the effective date of the UCC, it is at liberty to protect any class(es) of works <u>whether presently protected on the basis of "life plus 50</u>" or newly created, on the basis of "date of first publication plus ...".[65]

Paragraph 4 of Article V establishes the application of the "rule of the shorter term" under the UCC. No Contracting State is obliged to grant protection to a work for a period longer than

that fixed for the class of works to which such work belongs, (a) in the case of unpublished works, by the law of the Contracting State of which the author is a national, and (b) in the case of published works, by the law of the Contracting State in which the work was first published, Paragraphs 5 & 6 add further refinements to this general principle. Firstly, the work of a national of a Contracting State, first published in a non-Contracting State, is to be treated as though it was first published in the Contracting State of which the author is a national. Secondly, in the case of simultaneous publication in two or more Contracting States, the work is to be treated as though first published in the State which affords the shortest protection. Finally, any work published in two or more Contracting States within 30 days of its first publication is to be considered as having been published simultaneously in such Contracting States.

The following observation with respect to the application of the rule of the shorter term, by the Rapporteur-Général of the Geneva Conference, is of major importance vis-à-vis the guiding principle of the Convention, ie national treatment

> "... if the class to which a work belongs was not protected in the country of origin, so that the period of protection there was zero, other Contracting States need not protect the work[66]

Bogsch, in analyzing Article IV points out that in the circumstances described above other Contracting States need not protect such works, "even if under the laws (of these States), works of the class to which the particular work belongs enjoy protection".[67]

Further, Bogsch is of the view that where a State provides different terms of protection for the different rights protecting the same work (ie. the reproduction right and the translation right), other Contracting States may differentiate between the different rights when applying the rule of the shorter term. Thus, for example, in Canada sound recordings are protected against unauthorized reproduction (the making of copies); however, there is no public performance right (authorization of the owner of copyright in a sound recording is not required in order to play such recordings in public). The United Kingdom also affords protection for sound recordings, both as to reproduction and public performance. Applying the rule of the shorter term to performing rights in sound recordings, the United Kingdom need not offer this form of protection in the United Kingdom to Canadian sound recordings.

Thus, while, as suggested earlier, the ability to deny protection universally to certain types of works on the basis of their "non-

Convention" status is at best dubious, it appears that a country may, applying the rule of the shorter term, deny protection to specific types of works or to specific rights attached to certain types of works on a country by country basis.

Presently, under the Copyright Act, the rule of the shorter term applies only to works of joint authorship and therefore all other works are protected in Canada until the expiration of the terms offered works of such kind in Canada, even if in their respective countries of origin such works fall into the public domain at an earlier date. While the application of the rule of the shorter term is permissive under the UCC, under Berne, as noted, for countries such as Canada bound by the Rome Text, the rule is obligatory. Thus, insofar as the Conventions are not self-executing in Canada (ie. they do not have the force of law until adopted in domestic legislation) it would appear that the present Canadian Copyright Act does not comply with our Berne Convention responsibility to ensure that the rule of the shorter term will be applied where appropriate.

(g) Formalities

Pursuant to Article III of the Convention, any Contracting State, which under domestic law, requires as a condition of copyright, compliance with formalities such as deposit,

registration, etc. must regard these requirements as satisfied with respect to all protectable works under the Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of first publication all authorized copies of the work bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication, placed in such manner and location as to give reasonable notice of a claim of copyright.

A Contracting State, may however require formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

Further, a Contracting State may require that a person seeking judicial relief must, when bringing an action, comply with procedural requirements, to the extent that such requirements extend to such States own nationals.

The Canadian Copyright Act does not require compliance with any formalities in order to obtain copyright. However, voluntary registration of a claim to copyright is permitted and such registration provides certain benefits.[68]

While it is true that registration is not a condition precedent to "obtain" copyright, it is a condition precedent for the full "enjoyment" of all of the benefits available under the Copyright Act. However, it would appear that the phrase "condition of copyright" as it appears in paragraph 1 of Article III has a different meaning than the phrase "formalities or other conditions for the acquisition and enjoyment of copyright" as it appears in paragraph 2 of Article III. It appears that the former relates only to "formalities which, if not fulfilled, prevent the acquisition of copyright or result in the loss of the once acquired copyright before the expiration of the applicable term".[69] Therefore, to the extent that the preceeding construction of these phrases is correct, formalities or requirements which pertain only to the enjoyment of copyright (as opposed to its acquisition or loss), such as those in the Copyright Act, would not conflict with UCC obligations.

The requirement that, in order to enjoy fully all the benefits available under the Copyright Act, one must register, may, however, conflict with the comparable "no formalities" requirement of the Berne Convention. Article 4, paragraph 2 of the Rome Text provides that the enjoyment and exercise of the rights referred to in paragraph 1 are not to be subject to any formality.

The WIPO Guide to the Berne Convention in reviewing the counterpart Article of the Paris Text, suggests that "what one must look at is whether or not the rules laid down by the law concern the enjoyment and exercise of the right".[70] The WIPO Guide also stated, however, in words which echo the construction given to the UCC: "the word "formality" must be understood in the sense of a condition which is necessary for the right to exist - administrative obligations laid down by national laws, which, if not fulfilled, lead to a loss of copyright".[71]

If primacy is to be given to the notion of "formalities", ie obligations with respect to the acquisition or loss of copyright, the Copyright Act would not appear to conflict with same. If, however, the concept of "enjoyment and exercise of rights" stands on an equal and independent footing vis-à-vis "formalities" (as opposed to being a function of the latter, ie only formalities which affect the enjoyment and exercise of rights), then it would appear that the Copyright Act fails to reflect Canada's obligations under the Berne Convention.

(h) Conclusion

It will be appreciated that, as the revision process moves forward, continued cognizance of present international obligations must be maintained. Moreover, as the foregoing analysis reveals

it would appear that certain amendments to the Copyright Act may well be appropriate simply to reflect Canada's present Convention responsibilities.

FOOTNOTES

1a. Ilsley Commission, Report on Copyright, p. 10

1. Rome Text, Berne Convention, Article 22.

2. Rome Text, Berne Convention Article 24.

3. Convention Establishing the World Intellectual Property Organization Signed at Stockholm on July 14, 1967.

4. "Intellectual Property" is often used synonymously with copyright, as distinct from industrial property, a term used to denote matters dealing principally with the protection of inventions, trademarks and industrial designs and the repression of unfair competition. However, the term "intellectual property" has increasingly received recognition as an appropriate term when used to denote both copyright and the various species of industrial property and it is in this context that it has been incorporated into the name of, and is used by WIPO.

   Article 2 of the Convention Establishing the World Intellectual Property Organization defines "intellectual property" as including: "the rights relating to:

   - literary, artistic and scientific works,
   - performances of performing artists, phonograms and broadcasts,
   - inventions in all fields of human endeavor,
   - scientific discoveries,
   - industrial designs,
   - trademarks, service marks and commercial names and designations,
   - protection against unfair competition

   and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

5. In addition to the Berne Union already mentioned, WIPO centralizes the administration of the following Unions through its International Bureau in Geneva: The Paris Union (for the protection of Industrial Property); the Madrid Agreement (for the repression of false or deceptive indications of source on goods); the Madrid Union (for the international registration of marks); the Hague Union (for the international deposit of industrial designs); the Nice Union (for the international classification of goods and services for the purposes of registration of marks); the Lisbon Union (for the protection of appellations of origin and their international registration): the Locarno Union (establishing an international classification for industrial designs); the IPC Union (for the establishment of international patent classification); the PCT Union (for the co-operation in the filing, searching and examination of international applications

for patents); the Rome Convention (for the protection of performers, producers of phonograms and broadcasting organizations); the Geneva Convention (for the protection of producers of phonograms against the unauthorized duplication of their phonograms); and UPOV (for the protection of new varieties of plants).

In addition, upon the following established Conventions coming into force, the International Bureau of WIPO will administer: the Trademark Registration Treaty (for the filing on an "international application" where protection is sought in several countries); the Vienna Agreement (for the establishment of an international classification of the figurative elements of marks); the Vienna Agreement (for the protection and international deposit of typefaces); the Budapest Treaty (for the international recognition of the deposit of micro-organisms for the purposes of patent procedure) and the Brussels Convention (relating to the distribution of program-carrying signals transmitted by satellite).

6. World Intellectual Property Organization, General Information Brochure, WIPO publication number 400 (e), Geneva, 1978.

7. For further discussion of these principles and their constituent elements refer to "Guide to the Berne Convention", the World Intellectual Property Organization, Geneva, 1978.

8. Bogsch, Law of Copyright under the UCC, Third Edition, R.R. Bowker, New York, 1972.

9. 1) Article 32 of the Paris Text also appeared as Article 32 of the Stockholm Text, which was adopted two years prior to the publication of the revised Third Edition of the work by Bogsch referred to in the preceding foot note. 2) Article 32(1) Paris Text, Berne Convention
"This Act shall, as regards relations between countries of the Union, and to the extent that it applies, replace the Berne Convention of September 9, 1886 and the subsequent Acts of Revision. The Acts previously in force shall continue to be applicable in their entirety or to the extent that this Act does not replace them by virtue of the preceding sentence, in relations with countries of the Union which do not ratify or accede to this Act."

Article 32(2) Paris Text, Berne Union

Countries outside the Union which become party to this Act shall, subject to paragraph (3) apply it with respect to any country of the Union not bound by this Act or which, although bound by this Act, has made a declaration pursuant to Article 28(1)(d). Such countries recognize that the said country of the Union, in its relations with them:

(i) may apply the provisions of the most recent Act by which it is bound, and

(ii) subject to Article 1(6) of the Appendix has the right to adapt the protection to the level provided for by this Act.

10. Guide to the Berne Convention, World Intellectual Property Organization, Geneva 1978, page 135.

11. This subject will be dealt with further under the heading "Accession to International Conventions".

12. Guide to the Berne Convention, World Intellectual Property Organization, Geneva, 1978, page 134.

13. Refer to Rome Act, Articles 1, 2(1), 2(3).

14. Guide to the Berne Convention, World Intellectual Property Organization, Geneva 1978, page 12.

15. In the Rome Text and under Canada's present Copyright Act, films are granted protection on the basis of assimilation to literary and artistic works if the author has given them an original character; absent this character, such productions enjoy protection as photographic works.

16. See, for example, Canadian Admiral Corporation v. Rediffusion Inc. (1954) 20 CPR 75; Perry, Copyright in Motion Pictures, Video Tape and Other Mechanical Contrivances, Canadian Communications Law Review, Volume -98; Adams, Video Cassettes Pose Copyright Problems: Revisions to the Copyright Act will Deal with Them, Broadcaster, January 1978, page 12; A.A. Keyes and C. Brunet, Copyright in Canada - Proposals for a Revision of Law, Consumer & Corporate Affairs, Canada, page 83. Hereinafter cited as the Keyes & Brunet Report.

17. Keyes/Brunet Report.

18. Guide to the Berne Convention WIPO, Geneva, 1978, page 15.

19. Guide to the Berne Convention, WIPO, Geneva, 1978, page 13.

20. Ladas, The International Protection of Literary & Artistic Property, p. 212.

21. Guide to the Berne Convention, WIPO, Geneva, 1978, page 17.

22. Keyes/Brunet Report, p. 21.

23. 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, UCC, Article I.

24. Bogsch, The Law of Copyright Under the UCC, p. 8.

24a. Guide to the Berne Convention WIPO, p. 13.

25. Canadian Recording Industry Association Brief, Appendix C.

26. Ladas, Stephen The International Protection of Literary and Artistic Property, page 213.

27. Rome Text, Berne Convention, Article 19, "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 favor of foreigners in general."

28. Patent and Trade Mark Institute of Canada, Brief in response to Keyes/Brunet Report, page 5.

29. PTIC Brief, page 5.

30. C.M.P.D.A. Brief, Schedule C, page 5.

31. C.M.P.D.A. Brief, Schedule C, page 5.

32. Gribble v. Manitoba Free Press Ltd., (1932) 1 DLR 169 per Prendergast C.J.M. at pages 172-173.

33. "Independently of the author's copyright and even after transfer of said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation".

34. See, Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 Harvard Law Review 554 (1940); Stevenson, Moral Right Under Common Law: A Proposal, 6 ASCAP Copyright Law Symposium 89 (1955); Treece, American Law Analogues of the Author's "Moral Right", 16 American Journal of Comparative Law 487 (1968).

35. at the time of the drafting of the Rome Text in 1928:

(a) a term of "life plus thirty" was in effect in seven countries
(b) a term of "life plus fifty" was in effect in eighteen countries (including Great Britain acting on behalf of Canada
(c) Brazil provided a term of "life plus sixty"
(d) Spain provided a term of "life plus eighty"
(e) Liberia provided a term of "life plus twenty"
(f) in Haiti, the term differed depending on the category of the author's heirs.

36. Refer to discussion at pp. 37-41.

37. Article 4(3) of the Rome Text defines "country of origin": (a) in the case of unpublished works, as the country to which the author belongs; (b) in the case of published works, as the country of first publication; (c) in the case of works published simultaneously in several countries of the Union, as the country, the laws of which grant the shortest term of protection; and (d) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin" (the "rule of the shorter term").

38. Keyes/Brunet Report, page 61.

39. Paris Text, Berne Convention, Article 7(8) "in any case the terms shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the terms shall not exceed the term fixed in the country of origin of the work".

40. Rome Text, Berne Convention, Article 7 bis (3) "in no case may the term of protection expire before the death of the last surviving author".

41. Articles 9, 12.

42. Articles 11 and 13.

43. Articles 11 and 8.

44. Article 11 bis.

45. Article 13.

46. Article 14.

47. Convention Establishing the World Intellectual Property Organization (Stockholm, July 14, 1967) Article 3(ii).

48. UNESCO Medium-Term Plan (1977-82), Document 19C/4, para. 9216.

49. op. cit. f.n. 48, para. 9217.

50. UCC Article XVII and Appendix Declaration Relating to Article XVII.

51. UCC, Article XVIII.

52. There are 6 principal Pan American Conventions: Mexico City, 1902, Rio de Janeiro 1906, Buenos Aires 1910, Carracas 1911, Havana 1928 and Washington 1946. These conventions are participated in by the various "American Republics", i.e. the countries of South and Central America, Mexico, United States of America and certain

Carribean nations. Canada is not a Republic and therefore is not a party to any of these conventions; nor are the non self-governing territories of the Western atmosphere.

53. UCC, Article XIX.

54. Article 4(3) of the Rome Text, which defines "country of origin" is set forth in footnote #37.

55. For a different view with respect to the nature of the relationship between two countries, each of which is a member of both the UCC and Berne, where, however, neither country has ratified the same Berne Text (and thus in the view of the author are not "linked" vis-à-vis Berne obligations) see Bogsch, The Law of Copyright Under the Universal Convention, page 120. To the extent that such view is based on the supposition that there is no Berne Text in force between Berne members which have not ratified the same Berne Text, refer to page 5.

56. Bogsch, The Law of Copyright Under the UCC, page 123.

57. Op. cit. Bogsch, p. 5.

58. Records of the Conference For Revision of the Universal Copyright Convention, p. 87.

59. The actual language of Section 4 of the Act, corresponding to section a(ii) in the text (ie. a citizen or subject of a country which has adhered to the Berlin or Rome Texts) refers to countries which have "adhered to the Convention and the additional Protocol thereto set out in Schedule II (to the Canadian Copyright Act)". The Keyes/Brunet Report points out, as does Bogsch, that Schedule II reproduces the Berlin Text and thus, it appears that if construed strictly, the Act affords protection only to countries which have adhered to the Berne Convention since as early as the Berlin Text. Any country which joined the Berne Union at the Rome level or subsequent thereto would not be protected in Canada even though Canada ratified the Rome Text and reproduced it in Schedule III to the Copyright Act.

60. It is to be noted that Section 3(4) of the Act establishes a 14 day grace period for "simultaneous publication"; ie. a work will be deemed to be first published within Her Majesty's Dominions or within a foreign country to which the Act extends, if, within 14 days of publication in some country not included in either of the above categories it is also published in a country which is so included.

61. Refer to pages 7-16.

62. Records of the Intergovernmental Conference, UNESCO, page 74.

63. Op. cit. Bogsch, page 6.

64. Exceptions in Canada to the general term of "life plus fifty" are:

i) literary, dramatic, or musical works or engravings in which copyright subsists at the date of death of the author, but which have not been published (nor, in the case of a dramatic or musical work, been performed in public; nor in the case of a lecture, been delivered in public) before the date of the author's death, copyright subsists until publication, performance, or delivery, which ever happens first, and for a term of 50 years thereafter: Copyright Act, S. 6;

ii) sound recordings, copyright subsists for 50 years from the making of the original plate from which the contrivance was directly or indirectly derived; Copyright Act, S. 10;

iii) photographs, copyright subsists for 50 years from the making of the original negative from which the photograph was directly or indirectly derived; Copyright Act, S. 9;

iv) works prepared or published by or under the control of the Crown or a government department, subject to any agreement with the author belongs to the Crown, and in such case, subsists for 50 years from the date of first publication; Copyright Act, S. 11.

65. "If, at the said date, a country follows the method of computation from first publication for certain classes of works, such country is entitled not only to maintain this method in respect of such classes but may also extend the same method "to other classes of works". There is no limit to this extension, and it would probably not be contrary to the Convention to extend the method in question to all classes of works", Bogsch, The Law of Copyright Under the UCC, page 46.

66. Report of the Rapporteur-Général, Geneva Conference, page 9.

67. Op. cit. Bogsch, page 54.

68. The Keyes/Brunet Report points out that "...registration overcomes the defence of S. 22 by which, if a defendant proves he had no reason to suspect that copyright subsisted in the work, a plaintiff is only entitled to an injunction. Further, by virtue of S40(3), unless it is registered, an assignment of copyright is void against

a subsequent bona fide assignee who has himself registered his assignment. Finally, under S. 48, performing rights societies are required to file the lists of works they administer, failing which it appears they may not be entitled to collect royalties"; Keyes/Brunet Report, p. 205.

69. Bogsch, The Law of Copyright Under the UCC, p. 34.

70. Guide to the Berne Convention, WIPO, p. 33.

71. Ibid, p. 33.