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Complying with the Berne Convention: A Floor without a Ceiling?

The United States, in the good company of more than 160 nations, is a signatory of the Berne Convention. The Convention is premised on two core principles: The first is the substantive minimum principle, securing to foreign works minimum copyright protection from which national laws cannot derogate. The second is the national treatment principle, which shields foreign authors against discrimination as compared to the protection granted in Berne members to the copyrights of local authors.

A third principle, the one of "maximum protection", is much less understood and has been widely ignored in past decades as a valid cannon of interpretation and as having any impact on the implementation of the Convention. According to this principle, signatories of Berne (in some cases) are also under the obligation not to overprotect copyrights. The view that Berne in fact sets not only a floor, but also a ceiling to copyright protection, involves some serious complications, which so far have hindered its acceptance as a meaningful limitation on the power of Berne members to secure rights in foreign works. The paper explores the historical roots of the maximum protection approach and its legal foundation. It further explains the policy motivations behind it and its contemporary relevance in the face of current efforts to further cement the position of rightsholders under the auspice of multinational agreements.

Against this backdrop, it shall be argued that the maximum protection line is theoretically plausible. As a matter of policy, it is even warranted; yet politically, it does not appear to have a promising future, particularly within the current interpretative framework of the Convention. As a practical matter, the maximum protection principle appears toothless against the vigor of domestic positive rules. Such outcome is particularly likely in jurisdictions such as the United States, in which even rules the Convention stipulates explicitly are not self-executing.

To be more successful, however, the maximum protection stance should not rest (solely) on textual interpretation of Berne provisions. Rather, setting a protection ceiling must establish itself upon teleological interpretation, while drawing it dispositive force from the spirit and general purpose of the Berne Union. In this respect, the paper advocates for developing a solid maximum protection theory that could counterweight, at least to some extent, the tendency to expand protection by piggybacking on international instruments to accelerate acceptance of protectionist rules in domestic legislation.