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Some questions concerning the future revision of the Berne Convention

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1. — The Brussels Conference for the revision of the Berne Convention in 1948 unanimously accepted an invitation from the Swedish Government to hold the next revision conference in Stockholm.

As a result of the Brussels Conference a considerable number of amendments were made to the text of the Convention. Copyright was strengthened in some important respects and, in addition, more light was thrown on several points, whose correct interpretation had previously been the cause of much discussion. However, the rapid social and technical progress of the 1950's has brought new problems in the field of copyright to the forefront. Indeed, in recent years, the desire to have the Convention subjected to further revision has been growing more urgent.

In view of this fact, the Swedish Government, as already announced at the session of the Permanent Committee of the Berne Union held in Munich in 1959, took steps to enable the Stockholm Conference to be held in 1965.

As regards the programme of the Conference, whose preparation will be a matter for the Swedish Government with the assistance of the Bureau of the Berne Union, concrete recommendations have already been made in various quarters. In this connection, the Permanent Committee of the Berne Union has dealt with certain important questions. Mention should first be made of the work in connection with rights in cinematographic works done by the Committee,

since 1959, in close collaboration with UNESCO. Then again, certain international professional bodies interested in copyright have presented demands for more or less definite reforms.

However, there has been no general review of the Convention to discover which parts might call for revision. This article discusses a number of questions, in connection with such a review, which it would be interesting, from the Swedish point of view, to have debated at the Conference.

In view of the fact that Sweden, in common with the other Nordic countries, has just adopted new copyright legislation, which came into force on 1st July 1961 [1]), it is only to be expected that the Swedish Government, in drafting its proposals for submission to the Conference, will take as its point of departure the principles on which this legislation is based. The arguments in this article are put forward with this idea in mind. It must be emphasized, however, that they do not reflect any official standpoint, as far as Sweden is concerned, and should be attributed solely to the writer. In some respects, too, questions are discussed here which there was no reason to deal with in connection with the domestic legislation of the Nordic countries.

I shall deal only with such provisions of the Convention as directly concern the protection of copyright. I shall pass over the provisions on the structure and organisation of the Berne Union and, accordingly, shall not deal with the delicate and partly political question of its relations with the system of the Universal Copyright Convention, or the matter of the composition and working procedure of the Permanent Committee of the Berne Union.

2. — From some viewpoints it would be suitable to deal separately with the problems of broadcasting, films, the press, etc., but for practical reasons I prefer to follow the order of the Articles of the Convention.

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[1]) See *Le Droit d'Auteur*, 1961, pp. 156 *et seq.*; pp. 191 *et seq.*

In spite of the increasing exploitation of literary and artistic products, the basic provisions of *Article 2* concerning *the object of protection* do not seem to need any completing. The term "literary and artistic works" fully indicates the object of protection; the enumeration which follows of the different protected works is only given by way of example. The Brussels Conference removed earlier exceptions concerning cinematographic works, photografic works and works of applied art, and the Convention now seems to cover all objects in need of protection. It is true that the system is incomplete as regards works of applied art, where it is permitted to grant protection on a lower level, namely, that provided by the legislation on designs and models. The present tendency, however, is to create better protection for these works within the framework of the protection of industrial property, and earlier ideas to improve the Berne Convention on this point no longer seem to have any supporters.

The list of protected works mentions among other things cinematographic works [2]). It has been suggested that mention should also be made of newsreels and documentary films. This seems, however, unnecessary; at the Brussels Conference, the competent sub-committee stated that these films were covered by the Convention, as they are generally in the nature of works [3]). Only pure recordings are not covered, e. g. the recording of a theatrical performance by means of a stationary camera, but this group does not seem to be in need of protection.

Television films also seem in general to be works within the meaning of the Convention.

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[2]) After this article had been written, the question of a possible revision of the conventionary rules concerning the international protection of cinematographic works was taken up at the Geneva meeting, from 20th.24th June, 1961, by a working party set up within the Berne Union/ UNESCO. In the preliminary report of this group the same solutions are recommended, broadly speaking, as those suggested in this article.

[3]) *Documents de la Conférence de Bruxelles*, pp. 129 and 359.

Another question concerning cinematographic works is whether, in order to be protected, the work requires to be fixed on a cinematographic film. For my own part, I do not believe this to be the case; I do not think there is any need for a fixation at all, but space does not permit me to develop here my reasons for this view.

From what I have said it emerges that, in my opinion, Article 2 can be left as it stands.

3. — The provisions of *Articles 4 to 6,* concerning *the application of the Convention with regard to the origin of the works,* demand careful study.

a) In the normal case of a published work, the Convention applies the principle of territoriality; it protects all works which are first published within the Berne Union, irrespective of the nationality of the author, and thus even in cases where the author belongs to a country outside the Union. On the other hand, it does not protect works first published outside the Union, even if the author belongs to a country of the Union. The more natural principle of nationality, according to which protection is granted to works by nationals of the countries of the Union, only applies to unpublished works.

This somewhat peculiar regulation — it does not have any counterpart in national legislation, as far as I know — is explained by the fact that the Convention originally seems to have been created as a protection not so much for the authors as for the publishers. The principle of territoriality supported their interest in gaining protection for all works published within the Union and in pressing the authors not to sell their works outside the Union.

In the Universal Convention, however, the principle of nationality applies also to published works [Article II (1)]; it thus becomes the main rule, as is generally the case in national legislation. One may well ask then whether it is not about time to enlarge the Berne Convention in the same way.

In this connection, we should observe that in some countries persons domiciled therein are assimilated to the nationals of these countries. According to the Universal Convention, a contracting State may proclaim such assimilation for the purpose of the Convention [Article II (3)]. One might ask whether the Berne Convention ought not, in this regard too to follow the Universal Convention.

The advisability of establishing a counterpart to Protocol I annexed to the Universal Convention may finally be considered. According to this document, stateless persons and refugees, having their habitual residence in a State, Party to the Protocol, shall, for the purposes of the Convention, be assimilated to the nationals of the State.

b) Even if the amendments now discussed are incorporated in the Convention, the principle of territoriality will be of importance for works by authors belonging to a country outside the Union; such an author will enjoy protection for works of his published in a country of the Union. In this case, protection seems justified mainly out of consideration for the publisher belonging to this country, wo has risked capital on the publication; by giving protection to the author, protection is also given, indirectly, to the publisher. Before the Brussels Conference the notion of publication comprised printed publications only. However, the publisher might have a just claim for (indirect) protection in respect of other forms of publishing. The Brussels Conference saw to the interests of manufacturers of phonograms and of film companies by enlarging the notion of publication to comprise all forms of issuing copies of works [4]). It might be worth considering whether one should not also see to the interests of some other groups

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[4]) Article 4 (4). The Conference also adopted new rules, prescribing that in the case of works of architecture, or of graphic and plastic works forming part of a building, the country of the Union where these works have been built or incorporated shall be considered as the country of origin [Article 4 (5)]. These rules seem to have been made in the interests of the owners of the building. It is not clear, however, if they are applicable if the author does not belong to the Union.

of organisers or promoters in the field of copyright, in cases where the works which they introduce to the public come from countries outside the Union. To put a play on the stage, to arrange a concert, to produce a radio or television programme demands capital and experience. It is not satisfactory that works thus introduced to the public should be unprotected against exploitation by others, to the detriment of the organiser, because the author does not belong to a country of the Union [5]).

c) From what I have said it emerges that it is of great importance to know whether the first publication takes place inside or outside the Union. As to publications within the Union, it is also important to know in which country the publication takes place. This decides, among other things, the term of protection, which shall not exceed the term granted in that country.

A special question arises in this connection as to what is meant by "first publication" when the publication has taken place simultaneously in several countries. For normal cases where the author belongs to the Union, some rules on the subject are given in Article 4. For the more unusual case where the author does not belong to the Union, there are no corresponding rules. Are the special rules of Article 4 applicable in this case? There are different opinions on this point, so I think that the Convention needs to be clarified here [6]).

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[5]) Cf. J. Forns in *Le Droit d'Auteur*, 1951, pp. 51 *et seq.*; G. Straschnov in *Le Droit d'Auteur*, 1952, pp. 5 *et seq.* In the new Scandinavian legislation the notion of publication is the same as it is in the Berne Convention.

[6]) There is a doubt particularly as to whether the so-called 30-days-rule [Article 4 (3) *in fine*] is applicable when an author from outside the Union publishes his work both inside and outside the Union. If it were so, it would operate for the benefit of the author, a consequence which does not seem to be in line with the original purpose of the rule. If a Russian author first publishes his work in Russia, he should not indeed be allowed to obtain protection in the Union by publishing it, e. g. in Poland, a couple of weeks later.

d) A further question concerning the notion of publication is whether only lawful measures are referred to or if an illegal publication also counts[7]). The wording of Articles 5 and 6 speaks in favour of the interpretation that only such publication is relevant as is made with the consent of the author. Article 4 says nothing about this question. Some clarification seems desirable.

4. — I now pass on to the provisions concerning the *moral right* in *Article 6bis*. It has been suggested in earlier discussions that this right should be enlarged, particularly as regards cinematographic works; one proposal is that the authors of a film should be granted a right to control the publication of the film. These suggestions, however, do not seem realistic. On the other hand, any suggestion to reduce the moral right will no doubt meet with firm resistance on the part of many countries, e. g. France. It seems best, therefore, to leave this Article as it stands.

5. — One of the most important results of the Brussels Conference was that *the general term of protection*, laid down in *Article 7*, was fixed at 50 years *p. m. a.*, without any possibility of reservation. The authors, however, are not contented with this success but have claimed a still longer term. In some countries these claims met with comprehension, and in January 1961 a committee of experts set up within the Berne Union submitted a draft protocol to the Berne Convention for the extension of the term of protection[8]). As for Sweden's position, however, it can scarcely be expected that our Government would take any initiative aimed at prolongation of the term. For us, the 50 years provided for in the Brussels text means a considerable prolongation, as it is, and proposals to increase the protection further would certainly not be accepted in Sweden at the moment.

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[7]) Cf. A. Troller in *Le Droit d'Auteur*, 1952, pp. 98 *et seq.*
[8]) See *Le Droit d'Auteur*, 1961, p. 56.

Even if the main 50-years-rule of protection is left as it stands, some modifications might be envisaged in special cases, namely, the term of protection of cinematographic works. Under the present Convention the countries of the Union are free to decide what term they wish to grant to these works [Article 7 (3)]. But there are several countries desiring to have this special régime for cinematographic works abolished or, at the very least, to have a minimum term for this group written into the Convention.

I shall finally touch upon an interesting question regarding another special case, namely, the calculation of the term of protection for *anonymous and pseudonymous works*. The term here counts from the date of the publication [Article 7 (4)]. This seems to be the case also for posthumous works of this kind. If you find an 18th century manuscript and publish it without the author's name, you will have an exclusive right to it for 50 years. To prevent this peculiar result, it would be advisable to introduce a rule providing that if it can be proved that the author is dead, the term shall count from his death. From this it would follow that if it can be assumed that the author has been dead for at least 50 years, the work is free. Such a rule already exists in the legislation of some countries.

The provision which I have now discussed is unsatisfactory from another point of view as well. The wording gives the impression that protection starts from publication, so that unpublished works would not be protected. It has even been maintained that this is the actual meaning of the provision. If it is so, I feel that a modification is necessary; there is a general opinion that unpublished works are even more worthy of protection than published works (cf. particularly the Anglo-Saxon doctrine on the importance of "the dedication to the public" of the work), and I believe that this also goes for anonymous and pseudonymous works.

6. — As regard the term of protection, it might be suitable to mention the *domaine public payant*. The Brussels Conference expressed a recommendation in favour of this institution. In my view, however, the *domaine public payant* belongs to the sector of public right and should not be treated in a convention on private rights such as the Berne Convention.

7. — In Article 8 the Convention starts *the enumeration of the minimum rights of the author.*

It is well known that the Convention does not contain any provision stipulating a general right for the author to reproduce the work, i. e. to make copies of it. Nor is such a general right constituted if you add the various separate rights provided for in this field by the Convention (the right to make gramophone records, films, tapes, etc.). The oldest and perhaps the most important one is lacking: the right to reproduce the work by printing or by similar means. At the Brussels Conference there was an Austrian proposal to complete the Convention in this respect, but it did not meet with any success [9]).

From the point of view of principle, this lack of a general right of reproduction is no doubt a serious gap in a system of protection that is otherwise on a high level. To fill it would, however, entail a whole string of difficulties, above all with regard to the exceptions which must be admitted to such a general right, e. g. copying for private use and educational purposes, photocopying in libraries and industry, the right of composers to use poems for compositions, etc., such exceptions being recognized in many countries. Having regard to the diversity of domestic legislation in this field I strongly doubt whether the Conference could achieve any result here.

My conclusion is that this question should be left aside and that the revision, as a general rule, should be confined to those rights already written into the Convention.

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[9]) *Documents de la Conférence de Bruxelles*, pp. 237-238.

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the right to record the work and the right to perform it to the public by means of the record. The authors claim that two further rights should be prescribed: the right to distribute the records and the right to transmit a performance, made by means of a record, over wire. The right of distribution was discussed at the Brussels Conference, but proposals to write it into the Convention did not meet with any success [16]). For my own part, I find it reasonable to recognize this right, with this restriction, however, that it should not apply to records which are lawfully brought into the market. On the other hand I do not see any need for a right of transmission: the authors want it as a basis for their claims for supplementary remuneration for transmissions, but this question can always be dealt with in the contracts concerning the performance which is to be transmitted.

The provisions of paragraph 2 of Article 13, concerning the compulsory licence in this field, are strongly contested by the author. They are, however, applied in many countries, and I cannot see any possibility of changing them.

Some countries permit recording for private use and educational purposes. I feel that the Article should be completed with provisions on these exceptions [17]).

The Convention does not contain any provisions concerning mechanical rights in literary works. Proposals made by the Brussels Conference to write such rights into the Convention met with very strong resistance from France [18]). For my part, I feel that symmetry demands that the Convention should be completed in this regard.

16. — *Article 14* concerning *rights in cinematographic works* will probably be at the very centre of the discussion at the Stockholm Conference [19]).

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[16]) *Documents de la Conférence de Bruxelles*, pp. 332-334.

[17]) Such exceptions are prescribed in the new Swedish Act, Articles 11 and 17.

[18]) *Documents de la Conférence de Bruxelles*, pp. 339 *et seq.*

[19]) See note [2]).

have an interest in maintaining a proper, self-dependent right in the film. It has been suggested by Professor Ulmer that such a right ought to be given as a neighbouring right [21]), and I share this opinion. This right should, accordingly, not be treated in the Berne Convention.

17. — I shall pass over *Article 14bis* concerning the "*droit de suite*". This right is of no present interest in Sweden.

18. — *Article 15* gives wide powers *to the publisher to represent an anonymous author.* It has an historical background, but is also justified by practical reasons. Some arguments speak in favour of introducing similar powers in other fields. The contributors to a film are often anonymous, i. e. their names do not appear on the film copies, and it might be possible to give the producer legal powers to represent these authors. To a certain extent such a provision could form an alternative solution to the previously discussed problem of copyright in cinematographic works.

19. — The last provision I intend to say a few words about is *Article 27bis*. This Article, included by the Brussels Conference upon a Swedish initiative, gives States the possibility of bringing disputes concerning the interpretation or application of the Convention, not settled by negotiations, before the *International Court of Justice.* It has been maintained that this provision is difficult to get going, and proposals have been made to establish an organ which would be competent to deliver pronouncements on questions of interpretation without the necessity of a judicial procedure beforehand. The Director of the Bureau of the Berne Union has suggested that the Permanent Committee of the Berne Union [22]) should

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[21]) In *Le Droit d'Auteur*, 1953, pp. 107-108.
[22]) See *Le Droit d'Auteur*, 1958, p. 105.

be entrusted with this authority. The problem ought to be dealt with in connection with the conglomerate of questions concerning the functions of the Committee, which I touched upon earlier but discreetly passed over.