Copyright

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Contents

STATE OF THE INTERNATIONAL UNION ON JULY 1, 1965

Country [1]	Class chosen [Art. 23 (4)]	Date of Accession (Art. 25)	Date on which the Convention was declared applicable (Art. 26) [2]	Date of Accession to the Rome Text	Date of Accession to the Brussels Text
1. **Australia** [3]	III	14-IV-1928	5-XII-1887	18-I-1935	—
Nauru, New Guinea, Papua and Northern Territory	—	—	29-VII-1936	29-VII-1936	—
2. **Austria**	VI	1-X-1920	—	1-VII-1936	14-X-1953
3. **Belgium**	III	5-XII-1887	—	7-X-1934	1-VIII-1951
4. **Brazil**	III	9-II-1922	—	1-VI-1933	9-VI-1952
5. **Bulgaria**	V	5-XII-1921	—	1-VIII-1931	—
6. **Cameroon**	VI	24-IX-1964 [a]	26-V-1930 [c]	22-XII-1933 [c]	22-V-1952 [c]
7. **Canada** [4]	II	10-IV-1928	5-XII-1887	1-VIII-1931	—
8. **Ceylon**	VI	20-VII-1959 [a]	1-X-1931 [c]	1-X-1931 [c]	—
9. **Congo (Brazzaville)**	VI	8-V-1962 [a]	26-V-1930 [c]	22-XII-1933 [c]	22-V-1952 [c]
10. **Congo (Leopoldville)**	VI	8-X-1963 [a]	20-XII-1948 [c]	20-XII-1948 [c]	14-II-1952 [c]
11. **Cyprus**	VI	24-II-1964 [a]	1-X-1931 [c]	1-X-1931 [c]	24-II-1964
12. **Czechoslovakia**	IV	22-II-1921	—	30-XI-1936	—
13. **Dahomey**	VI	3-I-1961 [a]	26-V-1930 [c]	22-XII-1933 [c]	22-V-1952 [c]
14. **Denmark**	IV	1-VII-1903	—	16-IX-1933	19-II-1962
15. **Finland**	IV	1-IV-1928	—	1-VIII-1931	28-I-1963
16. **France**	I	5-XII-1887	—	22-XII-1933 [5]	1-VIII-1951
Overseas Departments and Territories	—	—	26-V-1930	22-XII-1933	22-V-1952
17. **Gabon**	VI	26-III-1962 [b]	26-V-1930 [c]	22-XII-1933 [c]	26-III-1962 [b]
18. **Germany**	I	5-XII-1887	—	21-X-1933	—
19. **Greece**	VI	9-XI-1920	—	25-II-1932 [6]	6-I-1957
20. **Holy See (Vatican City)**	VI	12-IX-1935	—	12-IX-1935	1-VIII-1951
21. **Hungary**	VI	14-II-1922	—	1-VIII-1931	—
22. **Iceland**	VI	7-IX-1947	—	7-IX-1947 [7]	—
23. **India** [8]	IV	1-IV-1928	5-XII-1887	1-VIII-1931	21-X-1958
24. **Ireland** [9]	IV	5-X-1927	5-XII-1887	11-VI-1935	5-VII-1959
25. **Israel** [10]	V	24-III-1950	21-III-1924	24-III-1950	1-VIII-1951
26. **Italy**	I	5-XII-1887	—	1-VIII-1931	12-VII-1953
27. **Ivory Coast**	VI	1-I-1962 [b]	26-V-1930 [c]	22-XII-1933 [c]	1-I-1962 [b]

[1] Among the newly independent countries to which the Berne Convention was applied, by virtue of Article 26, there are only mentioned those which have so far made a declaration of continued adherence or a formal notification of accession to the Swiss Government under Article 25 of the Convention. This list will be amended as and when declarations of continued adherence or notifications of accession are received by the Swiss Government from other countries.

[2] I. e. the date from which the notification made by virtue of Article 26 (1) began to take effect for the application of the Convention on the territory of the country concerned. After the latter's accession to independence, the application was confirmed by a declaration of continued adherence or accession.

[3] *Australia* belonged to the Union from the outset as a conntry for the international relations of which the United Kingdom was responsible. April 14, 1928, is the date on which Anstralia made a declaration of accession, as a contracting conntry of the Union, in conformity with Article 25.

[4] Same observation as in note [3], for *Canada*, which acceded with effect from April 10, 1928.

[5] Reservation concerning works of applied art: Article 2 (4) of the Rome Text had been replaced by Article 4 of the original Convention of 1886.

[6] Articles 8 and 11 of the Rome Text had been replaced by Articles 5 and 9 of the original Convention of 1886; but, as from January 6, 1957, *Greece* renounced these reservations in favour of all countries of the Union.

[7] Reservation concerning the right of translation: Article 8 of the Rome Text has been replaced by Article 5 of the original Convention of 1886, in the version of the Additional Act of 1896.

[8] Same observation as in note [3], for *India*, which acceded with effect from April 1, 1928.

[9] The new free State of *Ireland*, which was constituted by the Treaty signed with Great Britain on December 6, 1921, acceded, as such, with effect from October 5, 1927.

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28. **Japan**	III	15-VII-1899	—	1-VIII-1931 [7]	—
29. **Lebanon**	VI	1-VIII-1924	—	24-XII-1933	—
30. **Liechtenstein**	VI	30-VII-1931	—	30-VIII-1931	1-VIII-1951
31. **Luxembourg**	VI	20-VI-1888	—	4-II-1932	1-VIII-1951
32. **Mali**	VI	8-V-1962 [a]	26-V-1930 [c]	22-XII-1933 [c]	22-V-1952 [c]
33. **Monaco**	VI	30-V-1889	—	9-VI-1933	1-VIII-1951
34. **Morocco**	VI	16-VI-1917	—	25-XI-1934	22-V-1952
35. **Netherlands** Surinam and Netherlands Antilles	III —	1-XI-1912 —	— 1-IV-1913	1-VIII-1931 1-VIII-1931	— —
36. **New Zealand** [11]	IV	24-IV-1928	5-XII-1887	4-XII-1947	—
37. **Niger**	VI	2-V-1962 [a]	26-V-1930 [c]	22-XII-1933 [c]	22-V-1952 [c]
38. **Norway**	IV	13-IV-1896	—	1-VIII-1931	28-I-1963
39. **Pakistan** [12]	VI	5-VII-1948	5-XII-1887	5-VII-1948	—
40. **Philippines**	VI	1-VIII-1951	—	—	1-VIII-1951
41. **Poland**	V	28-I-1920	—	21-XI-1935	—
42. **Portugal** [13]	III	29-III-1911	—	29-VII-1937	1-VIII-1951
43. **Rumania**	V	1-I-1927	—	6-VIII-1936	—
44. **Senegal**	VI	25-VIII-1962 [b]	26-V-1930 [c]	22-XII-1933 [c]	25-VIII-1962 [b]
45. **South Africa** [14] South West Africa [15]	IV —	3-X-1928 28-X-1931	5-XII-1887 5-XII-1887	27-V-1935 —	1-VIII-1951 —
46. **Spain**	II	5-XII-1887	—	23-IV-1933	1-VIII-1951
47. **Sweden**	III	1-VIII-1904	—	1-VIII-1931	1-VII-1961
48. **Switzerland**	III	5-XII-1887	—	1-VIII-1931	2-I-1956
49. **Thailand**	VI	17-VII-1931	—	—	—
50. **Tunisia**	VI	5-XII-1887	—	22-XII-1933 [5]	22-V-1952
51. **Turkey**	VI	1-I-1952	—	—	1-I-1952
52. **United Kingdom** [16] Colonies, Possessions and certain Protectorate Territories	I —	5-XII-1887 —	— various dates	1-VIII-1931 various dates	15-XII-1957 various dates [17]
53. **Upper Volta**	VI	19-VIII-1963 [b]	26-V-1930 [c]	22-XII-1933 [c]	19-VIII-1963 [b]
54. **Yugoslavia**	IV	17-VI-1930	—	1-VIII-1931 [7]	1-VIII-1951 [7]

10) The accession of *Palestine*, as a territory under British mandate, took effect from March 21, 1924. After its accession to independence (May 15, 1948), *Israel* acceded with effect from March 24, 1950.

11) Same observation as in note 3), for *New Zealand*, which acceded with effect from April 24, 1928.

12) When *Pakistan* formed part of India, it belonged *ipso facto* to the Union as from the outset [see note 8)]; subsequently, Pakistan became a separate State from India and, on July 5, 1948, made a declaration of accession to the Berne Convention as revised at Rome in 1928.

13) The former colonies have become "Portuguese Overseas Provinces". The Brussels Text has been applicable to these provinces since August 3, 1956.

14) Same observation as in note 3), for the *Union of South Africa*, which acceded with effect from October 3, 1928.

15) The *Union of South Africa* later made a declaration of accession for *South West Africa*, a territory under mandate, and fixed the date of accession at Octoher 28, 1931.

16) United Kingdom of Great Britain and Northern Ireland.

17) Application of the Convention to the Isle of Man, Fiji, Gihraltar and Sarawak (see *Le Droit d'Auteur-Copyright*, 1962, p. 32); to Zanzibar, Bermudas and North Borneo (*ibid.*, 1963, p. 8); to Bahamas and Virgin Islands (*ibid.*, 1963, p. 144); to Falkland Islands, Kenya, St. Helena and Seychelles (*ibid.*, 1963, p. 180); to Mauritius (*ibid.*, 1964, p. 192). The Republic of the Philippines, however, reserved its position as regards the application to Sarawak.

a) Date of the despatch of the declaration of continued adherence after the accession of this country to independence.

b) Date of the entry into force of the accession, by virtue of Article 25 (3) of the Convention.

c) As a colony (date of the application resulting from the notice made by the colonising power or the power exercising trusteeship or being responsible for the international relations of a country, by virtue of Article 26 (1) of the Convention).

GENERAL STUDIES

Considerations on Certain Aspects of the « de facto » Monopoly in the field of Music Publishing

Partly in connection with the work and studies which have heen carried out on various sides in view of the future revision of the Berne Convention, a somewhat complex question has been raised, among other problems, concerning the availahility of printed matter *(materiali grafici)* for the performance of musical works and the faithfulness of the matter itself to the originals.

There is no doubt indeed that the ease or otherwise of tracing the necessary scores on the market and having them at one's disposal, at reasonable conditions and price, has a notable importance for the circulation of musical works and thus for the wider knowledge of such works and their penetration to a vast worldwide puhlic.

From the discussion which has arisen on this subject [1]) a numher of facts have emerged as certain and beyond dispute, namely:

— the puhlishers tend no longer to put the musical scores which they puhlish on sale, offering them only for hire on conditions and at prices which cannot ohjectively be considered generally acceptable;
— the number of copies is often so limited that at certain times it may happen that the necessary scores are not available, thus rendering impossihle the performance of the work;
— hence, it is very difficult even for musicologists, orchestral conductors, etc., to be able to own in their personal lihraries certain musical scores which are indispensable for the thorough study of the works to be performed and, ahove all, for preserving the annotations which they all make on the scores themselves, to fix their ideas on interpretation resulting from these studies.

This situation, accepted as true even by the puhlishers themselves, can only give rise to drawhacks and limitations which unfavourahly affect a better and wider knowledge of musical works not only on the part of conductors and performers in general but, as a result, also on the part of the public. There is thus reason to admit that a problem really exists on the subject and, if it is not perhaps of the scope suggested hy some, it nevertheless deserves, because of its effects and repercussions on the utilisation of musical works, to be borne in mind and to be properly studied and examined, also under its juridical aspect: in the light, that is, of provisions which might he advisahle and useful, juridically speaking, in avoiding the real damage which the situation under discussion can cause to the wider and hetter diffusion of musical works and, hence, of culture itself.

It will he as well to examine closely and separately the individual elements of fact which the discussion itself has shown to be incontestable.

In the first place, consideration must be given to the increasingly strong and widespread tendency of the puhlishers not to sell musical scores and to offer them only for hire. This is not the place to dwell on all the practical disadvantages which such commercial practices can present in the field of musical performances. Other more competent people have done this and, in other more qualified places, their concern and their comments have had an attentive and favourahle reaction [2]).

Here, when dealing with the economic and juridical aspect, it is sufficient to underline how the music publishers, by this attitude, not only tend to evade what is, must he, and must remain, the true function of the industrial entrepreneur (which is what they are), that is, to put on the market and sell their products and not to offer them only for hire on extremely restrictive and onerous conditions. With such a system, businessmen in this sector in effect distort and voluntarily change the economic purposes to which their own business, like any other business of its kind, must naturally tend; that is, the production of material goods, which, by hecoming the property of the purchasers, can assure to these purchasers a full and continuous use of the goods themselves. This happens, for example (to remain in the same sort of sector), in the field of book puhlishing where no one could envisage or accept as in keeping with either cultural purposes or the objects of the firms themselves a situation in which copies of the printed works were not put on sale, thus impeding — hy preventing sales — the permanent conservation of copies in individual puhlic or private libraries and, consequently, free consultation for the thorough study of the works which they produce.

The same can he said for the position in another sector close to puhlishing; that of gramophone records. What would be the results for the diffusion of music if the makers of gramophone records decided for their own particular reasons to follow the commercial policy of the music publishers and not to sell their records to the public, giving them out instead only on a temporary basis in the form of hiring?

What is still more serious on this economic and juridical plane is that, hehaving in this way, the puhlishers of printed musical scores have created for themselves in effect a monopolistic position of full and insuperable exclusive rights over the materials themselves and consequently over the use of

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1) Cf. the clash of opinions between D. Vaughan and E. Roth which emerges from the articles published in the *EBU Review*, Part B, No. 86, of July 1964, and No. 89, of January 1965.

2) Cf. Vaughan, "The availability of musical scores" — "Denis Vaughan replies", in *EBU Review* (numbers quoted). Reports IGC/VII/5 and CP/XI/6 for the work of the Unesco and Berne Union Committees at New Delhi.

the works which they reproduce. They are not content in fact to enjoy the protection of common law which obviously safeguards them against any act of servile imitation or of unfair competition, and which can recompense them, like all other businessmen, for any damage; nor do they limit themselves to seeking, for an effective protection on the international level, recognition of their rights against copying and other improper, illicit exploitations of their products, as have the makers of gramophone records. They mean, on the contrary, to assure to themselves, in effect, the full and absolute monopoly of the copies of the musical works published by them and thus, in practice, a position analogous to that of the authors and even superior to that, in as much as it is obviously not possible either to perform a work or make any sort of reproduction of it without having the musical scores available for the purpose as well as the necessary printed matter relating to them.

And that things are so cannot be doubted. An authoritative representative of the publishers has expressly recognised the fact, declaring that " it is necessary for the publisher today to keep control of his materials " [3]).

The justifications given do not seem highly pertinent, and they even bring to mind what one would sooner exclude — that it is the intention of the music publishers to place themselves in a position of strength and of absolute control regarding their products and the utilisation of them.

It has been said in fact that all this is indispensable in order to ensure to the composers and their heirs — in other words to the authors of musical works or to their successors in title — full control over the handling of the works themselves, particularly regarding the contracts of exclusivity which they subscribe to in the field of mechanical reproduction of their works, or for the synchronisation of the music with a film. In connection with such arrangements — still according to the view of the eminent representative of the publishers already quoted — they must make sure that the music remains inaccessible to the users in order to safeguard exclusive rights, in the case of mechanical reproduction, or until the agreement of the composer has been obtained for synchronisation with a film.

But it is easy to object that these arguments cannot in any way justify the distortion of commercial conduct which has occurred in the field of music publishing; in fact, for the purpose of ensuring all that is directly connected with the safeguard of the interests of the composers of musical works, the system of exclusive rights which international juridical precepts and the domestic laws of all civilised countries recognise to the authors of intellectual works *(opere dell'ingegno)*, and in particular to those of musical works, is more than sufficient and at the same time more than in keeping with juridical requirements.

The justification put forward by the publishers would only have meaning in situations where legislation left the author completely defenceless in the face of the economic exploitation of his work. In other cases, the author himself has all the power and the means to enforce respect for his will and for the exclusive rights which he may possibly have assumed, and to impose all the conditions which he regards most useful or corresponding best to his interests for the utilisation of his work. The " control " by the publishers not only fails to add anything to this protection but predominates over the interests of the authors, and can also, in conflict with such interests, nullify or render ineffective the will of the author.

Another justification put forward refers to the industrial user of patents and tends to compare him to the publisher of printed musical materials. It is not difficult to see how specious this argument is: the analogy with the industrialist who exploits a patent, if correctly put, does not in fact bring one to a justification of the present commercial conduct of music publishers. In fact, the publisher exploits immaterial goods which are subjected to a protection even stronger and wider than that of the patent: but if he wants to dispose of all or of a part of the rights which this protection accords, he must obtain the transfer through the forms of law. Thus also for the rights inherent in patents; the industrialist either buys them from the owner or legally is granted the exploitation of them, in the cases in which they have been obtained within the orbit of his firm or by its own means or for its own ends; rather like what happens in the case of the film producer who, although not being considered the author of the work, is granted, for example, according to the Italian law [4]), the right of exploitation, in so far as the work itself has been organised and created within his economic sphere.

The same can be done by the publisher, who can legitimately subordinate the edition of a musical work to the total or partial transfer of those rights of economic utilisation which interest him most, as, for example, that of public performance, broadcasting, reproduction, either printed or mechanical, and so on. This transfer, as has been said, can be total, even in economic terms, or the publisher can associate the author in the proceeds from his activities and in the exploitation of the work in terms of the percentage which he considers most appropriate (as has happened and is happening in a number of cases on the part of important musical publishing houses).

In this way economic questions as well as juridical questions are overcome and it is not to be regarded as likely that authors would find conditions of this kind extravagant and exorbitant and would refuse them as mean.

Any composer knows that publishing in general, and musical publishing in particular, is a costly activity; he is aware of the great interest he has in finding for himself a publisher who will not only look to the publication of the printed materials of his work but who will also provide for its launching and for placing it in the best position with regard to its utilisation. He also knows that, for every utilisation, sums will have to be paid which the holder of the relative rights can freely contract to fix at the most appropriate level. He will moreover see nothing arbitrary or strange in the fact that the publisher of his music should ask him, in the most advantageous conditions for both, to transfer the

3) Cf. Roth, *EBU Review*, quoted above.

4) Cf. Article 46 of the Copyright Law of April 22, 1941, No. 633.

rights of economic utilisation of the work which can be of most interest, not only in the field of publishing but also in that of editorial activities in general, and that he should in return associate him, in terms of the fairest percentage, in the proceeds which can be obtained from utilisation of the work. Finally he knows that, if it were otherwise, the publisher would have difficulty in meeting the expense of the preparation and of the printing of the materials.

Therefore any more or less valid justification, or rather any pretext, collapses as to why the publisher evades what should be the correct aim of his business activities, namely, to put into commercial circulation, and more precisely on sale, copies of the printed musical materials produced, as happens and indeed must happen in the case of book publishers and all other industries. The association of the author with the publisher in the proceeds derived from the use of the work assures as much to the one as to the other a just return for the joint utilisation of the work itself and of the materials which refer to it.

Nor is it valid to object that the proceeds from an edition might be lacking or insufficient because of the infrequent performances of the musical work itself. Even in the case of hiring, if the work is not successful, the requests will be scarce or even non-existent for the scores which serve no other purpose than the study and preparation of the work for performance.

Deciding whether an edition of a musical work will be successful or not depends on the ability of a publisher to estimate the value and the interest of the work itself and on the welcome which is accorded it by musicologists, students and the public in general. The problem does not seem different from that which in general faces the industrialist and his product and, in particular, the publisher.

Anyone who sets about printing or trying to sell a book must ponder the value of the literary work and the chances of selling it, because in the event of little success he will certainly not get back the costs of the edition, which even in this field are not unimportant, just as the author will not obtain the benefits hoped for from his work.

It is certainly not intended to affirm that this is the only possible solution and that there are not practical difficulties to consider and to overcome. The intention is only to point out that the road chosen by the music publishers — that of no longer selling their printed products but only of hiring them on conditions which are rather special and complex and at prices imposed with no reference to the ordinary economic mechanism of their formation — is certainly not the only one which can solve the problem, while it is undoubtedly in conflict both with the normal, correct purposes of an industrial undertaking, and with the requirements of the users and the cultural aims which they indubitably set themselves.

In reality then this road has been chosen by the publishers with the aim of conserving their " control " over their products, in order to assure themselves, by indirect means, of exclusive rights as wide in scope and as solid as those of the authors but more extensive in time because they are not subject to the limit of the term of protection which, in the overwhelming majority of laws in force, strikes at a given moment at the protection of the author, and annuls it.

And it is this specific result, admitted by the publishers themselves as the principal object of their attitude, which is unacceptable both on economic terms (the struggle these days is against the forming of monopolies and exclusive private agreements tending to dominate an entire sector of production and its market) and on the juridical plane, in so far as an orderly system cannot permit that, by means of a distortion of the ends of an industrial concern, the concern itself should take in effect what is recognised in law as belonging only to the creator of the literary or artistic work which the publisher, in the performance of his proper function, should arrange to have reproduced and put on sale so that it can be distributed and become known.

To have a practical notion of how relations between user and publisher have become difficult and complicated as far as musical materials are concerned, it is sufficient to record that the hiring contract relative to broadcasting lays down so many individual cases of limitations, restraints, special conditions, obligations of notification and declarations, as to require for their exact application an " authentic interpretation " agreed between the two sides, consisting of a document of a substantial number of pages! This example provides evidence of how this system, for a user as important as the radio, has become so complex that it is not easy for the services and officials who must daily ensure the observance of such numerous and complex contractual agreements to apply it.

* * *

Another problem which has been raised in connection with the availability of printed materials for the performance of musical works concerns the constantly growing difficulty of being able to get to know, at first hand, the original texts of works long fallen into the public domain, because the printed materials of the works themselves, especially 17th and 18th century works, which can he found on the market, are for the most part elaborations and transcriptions of the original text [5]).

The impossibility of being able to carry out a direct comparison between the original text and that of the elaborated or transcribed work thus places the user, like the scholar, in the position of being unahle to know the original version of the work and above all of not being in a position to judge whether the elaborations or transcriptions done later have in themselves the indispensahle creative elements to place them in the class of works able to claim protection.

It is clear in fact that not all the modifications of a pre-existent work can juridically be judged as a derived work or, in other words, as an adaptation or arrangement with a claim to protection. For this to be so, it is necessary, as has heen said already, that the adaptation or arrangement should in itself have the creative elements indispensable to a work of art.

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5) For the technical aspect of the question and its details, cf. the report of Denis Vaughan quoted in footnote 2).

Should the modifications lack this creative character, they will be able to have a purely technical or interpretative value but will never confer on the person who has carried them out the title of author with its corresponding rights. And so it seems opportune that the grave obstacle complained of should be given due consideration on the juridical plane on the occasion of the revision of the international conventions and of the national laws on copyright, in order to find a way for solving the problem in the interests not only of the user but of students, who must be in a position to compare all the various adaptations and the various arrangements of old musical works with the original texts.

Perhaps the solution will not be easy to find because of the strong tendency against admitting any " formality " in the protection of works of the mind or, in other words, subjecting the protection of such works to particular conditions established by law. But if the requirements of culture and respect for the undeniable and legitimate interests of the user call for it, there is nothing to prevent, in this particular case, imposing an obligation for the protection of a work elaborated by means of adaptation or revision to deposit the original text of the work itself with the State offices for literary and artistic property or with the public libraries.

This is perhaps a formality, but certainly not a formality too complex or burdensome, while at the same time it will put the vast field of scholars and users in the position of being able to know the original text, to take a copy if required for the printed materials needed for its performance, to carry out any study or examination and to create new elaborations.

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The brief considerations put forward above and suggested by the vast debate taking place on the subject meet the objective and sincere preoccupation which the jurist must have of not overlooking and in fact of taking into consideration, for any possible solution, all the controversial cases which occur in actual fact and which give rise undeniably to situations prejudicial not only to the spread of culture but to the authors themselves, who certainly cannot avoid experiencing all the difficulties and the hindrances put in their way by the drawbacks marking this sector.

As the problem exists, it should seem neither futile nor excessive to draw attention to it in its real terms and bring it to the notice of all who are called to the important function of revising arrangements in this matter, both in the international and national fields.

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Lawyer

"The Narrow Gate„

Commentary on Article 16, paragraph 1 (a) of the Rome Convention of October 26, 1961

1. One of the most controversial questions which arose at the Rome Conference in October 1961 on measures to provide international protection for performers, producers of phonograms and broadcasting organizations was whether or not to extend to performers and record manufacturers the right to equitable remuneration in the case of the broadcasting of commercial records or of their communication to the public by any other means [1]).

After lengthy discussion a small majority decided in the affirmative. The arrangement adopted is contained in Article 12 of the Convention, which reads:

> " If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration. "

In substance, the principle was adopted that " secondary uses " of a commercial record entitle the performers, the manufacturers, or both, whose record is communicated to the public by whatever means (broadcasting, loud speakers, etc.), to equitable remuneration [2]).

2. Nevertheless, in view of the sustained opposition of some delegates, who asserted that, if Article 12 were adopted in its present form, their respective Governments would never agree to ratify the Convention, it proved absolutely necessary to include in the diplomatic instrument the power to make reservations, with a choice of different methods. This is covered by Article 16, paragraph 1 *(a)*. Its purpose is to facilitate as far as possible the " adherence " of States to the Convention [3]), while preserving the principle, accepted not without difficulty, that performers and record manufacturers may in future claim the right to equitable remuneration in the event of secondary uses of commercial records.

3. After 35 years of struggle and effort performers and record manufacturers are in sight of their goal. They have

1) For simplicity, the term " record manufacturers " will be used to designate producers of phonograms.

2) In practice, such uses are known as " secondary uses ".

3) The term " adherence " will serve to signify " ratification " or " accession " without distinction.

travelled a long way, but they have still to pass through the narrow gate of Article 16; in other words, although at international level the principle is established of equitable remuneration for performers and record manufacturers whose performance has become the subject of secondary use, this principle has still to be incorporated into the various domestic legislations. States may refuse to apply these provisions, or subject them to more or less restrictive conditions.

Article 12 may be subject to reservations which, at the will of Governments, are liable considerably to lessen its scope. Such reservations are covered by Article 16, paragraph 1 *(a)*, which states:

> " Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:
>
> *(a)* as regards Article 12:
>
> (i) it will not apply the provisions of that Article;
>
> (ii) it will not apply the provisions of that Article in respect of certain uses;
>
> (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;
>
> (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection. "

4. It may be noted at once that, apart from Mexico and Ecuador, whose declarations are not yet known, all other countries which have ratified or acceded to the Rome Convention have made use of the reservations of Article 16 on various grounds. When interpreting the various provisions of Article 16, paragraph 1 *(a)*, we shall at the same time consider what practical application has been made of them by Member States of the Convention.

Article 16, paragraph 1 *(a)*, allows a present or future Member State of the Rome Convention to restrict or refuse the application on its territory of the provisions of Article 12. The logical effect of this power of reservation is to introduce into the diplomatic instrument the concept of material reciprocity in the field of secondary uses of commercial records.

We shall consider in Part I the powers of reservation contained in Article 16, paragraph 1 *(a)*, and in Part II the field of application of the material reciprocity clause.

I. The reservations covered by Article 16, paragraph 1 (a)

On becoming party to the Convention a State may declare that it will not apply any of the provisions of Article 12. It will then make a total reservation *(a)*; but it may limit itself to setting aside the provisions of this Article in respect of certain forms of secondary use *(b)*, or in cases where producers of phonograms are nationals of non-Contracting States *(c)*.

(a) Total reservation under paragraph 1 (a) (i)

A commercial record which will be the subject of secondary uses in the territory of a State which has made a total reservation will not qualify for equitable remuneration to the manufacturer and the performers who have participated in its production.

On adhering to the Convention, Niger and the Congo (Brazzaville) excluded the application of Article 12. It is probable that, if the United States adheres to the Convention, it will avail itself of this reservation; in America it is very often the producers of phonograms who pay the broadcasting organizations a royalty for the broadcast of their records, rather than vice versa.

(b) Partial reservations under paragraph 1 (a) (ii)

A State may declare that it will not apply the provisions of Article 12 in respect of certain uses [Article 16, paragraph 1 *(a)* (ii)].

It may declare that it will pay equitable remuneration only, for instance, in the case of the broadcasting of commercial records. Another State may take into account only the idea of communication to the public of phonograms, or certain forms of broadcasting or communication to the public.

On its ratification Sweden declared that the provisions of Article 12 would be applied only to the use of records by broadcasting. For its part, the United Kingdom declared that it would not grant equitable remuneration to performers and manufacturers of foreign records if the records were communicated to the public:

— in premises where persons reside or sleep and to which the public has access without having to pay a special charge for admission;

— in non-profit-making clubs and organizations, irrespective of whether a charge is made for admission, provided it is used for the purposes of the organization.

In other words, Article 12 applies in Great Britain, as regards communication to the public, only when a charge for pecuniary gain is made on admission.

It is probable that many States will exclude the right of equitable remuneration in the case of communication to the public of phonograms for reasons of practical difficulty in the collection and sharing of funds, particularly in view of the opposition of users (hotel and café proprietors, etc.) and of authors.

(c) Partial reservation under paragraph 1 (a) (iii)

There is a further reservation, which may also be described as partial, but in a different sense to the preceding ones:

a Contracting State may declare that it will not apply the provisions of Article 12 should the producer not be a national of another Contracting State.

The equitable remuneration mentioned in Article 12 may be refused even if the phonogram was first fixed or published in the territory of a Contracting State, since the manufacturer is not a national of a State party to the Convention. The latter will therefore be protected only in respect of any reproduction of his phonogram undertaken without his consent, in accordance with Article 5 on the criteria of eligibility.

Although they are not designated by name, it must be acknowledged that performers whose work is incorporated on the phonograms referred to in paragraph 1 *(a)* (iii) of Article 16 cannot claim the right to equitable remuneration when the manufacturer who is a national of a non-Contracting State will forfeit it.

The Chairman of the Working Group appointed in Rome to examine this provision pointed out that paragraph 1 *(a)* (iii) does not concern the beneficiaries of remuneration but the actual principle of remuneration [4]).

The United Kingdom declared that it would not grant equitable remuneration under the terms of Article 12 in respect of phonograms the producers of which were not nationals of another Contracting State. Czechoslovakia made a similar reservation on ratifying the diplomatic instrument. Hitherto, of the seven States which have adhered to the Convention, only Sweden protects phonograms the producer of which is not a national of a Contracting State and which are the subject of secondary uses in its territory [5]).

This reservation mentioned in paragraph 1 *(a)* (iii) of Article 16 was adopted in the name of equity. It would be unjust, it was said, for producers who were nationals of non-Contracting States to be protected by *ius conventionis* when such States might not protect producers who were nationals of States parties to the Convention. In actual fact, this provision in paragraph 1 *(a)* (iii) represents in part a derogation from the rules laid down in Article 5 on criteria of eligibility.

In future it will be possible for a State to refuse any protection when the producer is a national of a non-Contracting State, even if the record has been first fixed or published in the territory of a State party to the Convention. This provision of paragraph 1 *(a)* (iii) in our view ignores a fundamental aspect of the phonographic industry: its international character. It is to be feared that this power of reservation will redound to the disadvantage of record manufacturers who are nationals of Contracting States. Will they be protected in non-Contracting States whose producers have been excluded from the protection of the Convention, even when the entire output of such producers has been first fixed or published in the territory of a Contracting State? It is true that one man's meat is another man's poison and that this provision in its restrictive application will receive the approbation of authors and broadcasting organizations.

4) Reply by the Chairman of Working Group No. II to the speech by Professor Bodenhausen (Netherlands), 8th meeting (CDR/WG.II/SR8 prov.).

5) We reserve the right to revert to the very qualified declaration by the United Kingdom.

Further advances in the study of Article 16 of the Rome Convention increasingly reveal the precarious nature of the right of equitable remuneration extended to performers and record manufacturers under Article 12. That Article marks an important stage on the road travelled for many years by those concerned. Article 16, however, constitutes both a new obstacle on which one is liable to come to grief and a narrow gateway through which one can only pass by reducing one's stature.

The scope of Article 12 is further diminished by a new provision, a logical complement to the earlier ones; it is contained in paragraph 1 *(a)* (iv) of Article 16, which introduces into the Rome Convention a material reciprocity clause.

II. The field of application of the material reciprocity clause

The delegates to the Conference did not wish to establish a general principle of material reciprocity in international relations. Accordingly, they did not adopt the Czechoslovakian proposal that a State which grants other rights than the minimum provided for in the Convention would not be obliged to extend them to nationals of other States which did not accord such rights to the nationals of the first State.

Nevertheless, in order to avoid injustices, two reciprocity clauses were inserted into Article 16, paragraph 1 *(a)* (iv) and *(b)*. We shall here examine only the first clause, which relates to Article 12:

1. On becoming party to the Rome Convention any State may declare that:

> " as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; "

In other words, if a State, by reason of its domestic legislation, extends protection in the case of secondary uses of phonograms (Article 12), it may, if the phonogram has been fixed by a national of another Contracting State, limit the protection of the latter to that extended by such other State in the same case.

The obvious aim of such a provision is to avoid disadvantage to a State which accepted the tenor of Article 12 in relation to another State which expressed total or partial reservations. Hence, it is probable that most States, whether making reservations or not, will take advantage of this reciprocity clause to prevent their nationals being placed at a disadvantage in other Contracting States which grant a lesser protection.

We will take two examples, in which it is supposed that France, Germany and Italy are Contracting States. In the first hypothetical case, France *has declared* that it intended to operate the reciprocity clause of Article 16, paragraph 1 *(a)* (iv), and Italy has made a total reservation as permitted under Article 16, paragraph 1 *(a)* (i). If two records, one German the other Italian, are broadcast in France, the German producer

(assumed to be a national of a State which applies Article 12) may claim equitable remuneration from the French transmitting station; his Italian colleague cannot do likewise because, as his Government has made a declaration concerning Article 12, the reciprocity clause operated by France is in his disfavour.

In the second hypothetical case, France makes no reservation and *does not declare* that it intends to avail itself of the reciprocity clause. Italy declares that it will grant equitable remuneration only for records broadcast over its territory (but not for records communicated to the public by any other means). The French performers and producers will collect royalties in Italy only for the broadcasting of their works, but France will be required to pay equitable remuneration for phonograms of Italian producers, whether broadcast or communicated to the public by some other means. In that case French nationals are less well protected in Italy than the Italians are in France, which is regrettable.

2. There is, however, a restriction on the operation of the reciprocity clause. While the State which makes the reservation can compare the extent and duration of the protection it grants with those of the protection it receives, this comparison does not apply as regards the beneficiaries. In the words of Article 16, paragraph 1 *(a)* (iv):

> " ... however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection. "

In other words, when one State declares that it will protect only performers (in respect of secondary uses of commercial records), another State that it will pay equitable remuneration solely to producers of phonograms, and a third State that it will take into consideration performers and producers, the Conference considered that no difference exists between these three countries as regards the extent of the protection. The material reciprocity clause will not operate. The solution may perhaps not be perfectly equitable, but it has at least the virtue of simplicity. In our view, the object is to facilitate the distribution of phonograms between one country and another. Moreover, the refusal to extend the principle of material reciprocity to the beneficiaries is justified by practical reasons; even in States where the law grants remuneration only to producers, the latter are in general required by agreement to extend the benefit to the performers, and it is probable that, as a result of social evolution, this situation will become increasingly widespread[6]).

This provision of Article 16, paragraph 1 *(a)* (iv), calls for certain *comments:*

1. In the first place reference should be made to an ambiguity in the wording of (iv), which provides that a State may declare that:

> " as regards phonograms the producer of which is a national of another Contracting State, *it will limit* the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration ... ".

2. The words " will limit ... to the extent ... and to the term " convey the impression that partial reciprocity only is allowed, whereas actually a State which grants to foreigners in its territory the benefit of Article 12 may, at its discretion, " limit " the protection it extends to the point where it becomes non-existent. Despite some difficulty in reading, it appears that the reciprocity clause may operate in its entirety between two States, one of which has made a total reservation concerning Article 12 and the other has made no declaration.

2. Paragraph 1 *(a)* (iv) makes reference to phonograms " first fixed ". The reciprocity clause might be thought not to operate as regards phonograms " first published " by a national of the State which has made the declaration [by reason of Article 16, paragraph 1 *(a)* (iv)]. Throughout the Convention the terms " fixed " and " first published " are defined and contrasted. However, the term used is " first fixed ", without any indication whether the fixation takes place in the territory of a Contracting State or not. In this case, therefore, it is not the idea of territoriality which must be considered, but solely the idea of " realization " of a phonogram by a producer who is a national of a Contracting State. The latter interpretation seems to us to accord with the spirit of paragraph 1 *(a)* (iv) of Article 16. It takes into account the provisions of Article 5, which states that the criterion of nationality is obligatory on Contracting States.

Summing up, the reciprocity clause applies to all phonograms the producers of which are nationals of Contracting States, because they have been first fixed, that is to say they have material existence, even though fixation or publication may have occurred in the territory of a non-Contracting State.

3. Nevertheless, paragraph 1 *(a)* (iv) thus understood is not immune from all criticism. We must enquire whether the reciprocity clause operates in all cases where it should, so as to conform to the spirit of the Convention.

The text of paragraph 1 *(a)* (iv) mentions phonograms " the producer of which is a national of another Contracting State ", which conversely means that the reciprocity clause cannot be invoked when the record manufacturer is a national of a non-Contracting State. It has been noted that the reciprocity clause was envisaged as applying only between Contracting States; a non-Contracting State could not be expected to apply the provisions of the Convention. Nevertheless, the fact remains that the limitative formula of paragraph 1 *(a)* (iv) omits a hypothetical case in which it might be logical to make use of the reciprocity clause: when phonograms the producers of which are not nationals of another Contracting State were first fixed or published in the territory of a Contracting State.

It is our view that a State which has not declared that it would not apply the provisions of Article 12 as regards phonograms the producer of which is not a national of a Contracting State, by using the reservation under (iii), but which intends to give effect to the reciprocity clause in connection

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[6]) Observation by the Chairman of Working Group No. II, 9th Meeting (CDR/WG.II/SR9).

with phonograms the producer of which is a national of another Contracting State (iv) cannot limit the extent and term of protection granted in respect of phonograms first fixed or published in another Contracting State by a producer who is a national of a non-Contracting State, to the extent and term of the protection which the latter State extends to producers who are nationals of the first State.

In theory this limitative provision of Article 16, paragraph 1 *(a)* (iv), operates in favour of performers and record manufacturers in general, since the reciprocity clause appears to have a relatively limited field of application; it can apply only to manufacturers who are " nationals " of another Contracting State and leaves intact the rights of other manufacturers; in reality, however, it is probable that a number of States will, at the time of adherence, declare that they intend to apply (iii) and (iv) conjointly. On this assumption, phonograms of producers who are nationals of non-Contracting States will not qualify for equitable remuneration and the reciprocity clause will operate in respect of producers who are nationals of States parties to the Convention.

Czechoslovakia and, to some extent, the United Kingdom have combined the two provisions of (iii) and (iv).

4. Be it noted that Article 17 of the Convention, which authorizes any State whose domestic legislation came into effect on October 26, 1961, and which applies solely the criterion of fixation (to the exclusion of the criterion of nationality) in conformity with Article 5, also allows these same States to substitute the criterion of fixation for that of nationality for the purposes of paragraph 1 *(a)* (iii) and (iv) of Article 16.

Consequently, a country which, with reliance on Article 17, declares that it will apply the criterion of fixation alone, may refuse to pay equitable remuneration for secondary uses of phonograms, even if the producer is a national of a State party to the Convention, or if the phonogram was first published in the territory of a Contracting State, since the first fixation occurred in a non-Contracting State.

5. Although this has not been clearly defined, it is improbable that performers will be protected in the event of protection being refused to producers of phonograms under any provision of Article 16. An argument *a contrario*, derived from Article 4 of the Convention, may be invoked to the following effect: according to this Article, the performance is protected particularly when it is " incorporated in a phonogram which is protected under Article 5 of this Convention ", that is to say, when the phonogram is itself protected. In laying down this principle, the delegates to the Rome Conference wished to avoid any possible disparity of treatment as between performers and producers who have participated in the making of one and the same record. This principle of equity must therefore apply in both senses: if the producers are not protected, neither can the performers whose work has been fixed be protected. If the condition of the performers is tied to that of the producers of phonograms (and not the reverse), this is done for practical reasons. It is always possible to establish who is the producer of the record the protection of which is sought, whereas it is not always easy to know for certain the names of all the performers whose work is incorporated on the same record, especially if they are of different nationalities.

Of the States which have so far adhered to the Convention, Sweden, Czechoslovakia and the United Kingdom have declared that they would apply the material reciprocity clause of paragraph 1 *(a)* (iv).

The declaration by the United Kingdom on this subject requires some further explanation:

> " *(b)* As regards phonograms the producer of which is not a national of another Contracting State or as regards phonograms the producer of which is a national of a Contracting State which has made a declaration under Article 16 (1) *(a)* (i) stating that it will not apply the provisions of Article 12, the United Kingdom will not grant the protection provided for by Article 12 *unless, in either event, the phonogram has been first published in a Contracting State which has made no such declaration.* "

The idea expressed is as follows: secondary uses of a record in Great Britain qualify for equitable remuneration if that record was first published in a Contracting State, and this State has not made a declaration in conformity with Article 16, paragraph 1 *(a)* (i), concerning total reservation. The producer's nationality is of little consequence.

This declaration has a twofold aspect. In the first place it constitutes a restriction on the reservation of paragraph 1 *(a)* (iii). It would perhaps have seemed more logical to deal with the question at the same time as the interpretation of paragraph 1 *(a)* (iii); in actual fact, however, the United Kingdom declaration is formulated in such a way that it is preferable, from the point of view of clarity, not to divide into two parts a paragraph which equally concerns (iii) and (iv).

In critically examining (iv) we observed that the only means of overcoming the disadvantage of this reciprocity clause was to use it in conjunction with the reservation covered by (iii). We also noted, however, that, if a regard for equity was the basis of the text of (iii), this provision might nevertheless involve regrettable consequences if it deprived of protection producers who were nationals of States which had not adhered to the Convention and whose production, in whole or in part, was first fixed or published in the territory of a Contracting State. On this assumption it does not seem to us wrong to affirm that the Convention is liable to remove with one hand [through the agency of (iii)] what it gives with the other under Article 5.

This application of paragraph 1 *(a)* (iii) by the United Kingdom seems to us to accord in every respect with the spirit of the Convention, without on that account contradicting the letter. It avoids a first injustice by refusing to protect producers who are not nationals of a Conctracting State and who have not first fixed or published phonograms in the territory of a Contracting State. This intention was unquestionably the one which inspired the drafters of paragraph 1 *(a)* (iii). It repairs a second injustice and, without conflicting with the text, lays down that when a phonogram is first published in the territory of a Contracting State it is protected.

There is, nevertheless, some limitation on the restriction mentioned above. While it is true that phonograms of nationals of non-contracting countries may be protected in United Kingdom territory when they have been first published in the territory of a Contracting State, this latter State must not have availed itself of the total reservation under paragraph 1 *(a)* (i). Without infringing either the text or the spirit of the Convention, the United Kingdom Government has found a skilful means of widening the field of application of Article 12, despite the use of paragraph 1 *(a)* (iii) of Article 16, without on that account sacrificing the interests of producers who are nationals of the United Kingdom.

From another point of view, the United Kingdom's declaration imposes a restiction on the application of the reciprocity clause covered by (iv) in that it envisages circumstances where, although the producer is a national of another Contracting State and that State has made a total reservation concerning Article 12, the reciprocity clause will not operate if the phonogram was first published in the territory of another Contracting State which has not made such a declaration. This provision is noteworthy for the fact that it affirms and establishes in concrete form the primacy of the criterion of first publication over that of nationality. The provision is all the more interesting because, by contrast, Article 5 puts the emphasis on the nationality of the holder of the right and allows an optional power only as regards the criteria of territoriality (fixation or first publication).

This restrictive application of the reciprocity clause goes even further. Under the Convention a State may, for instance, declare that it will not protect records in conformity with Article 12 if the State the producer of which is a national has itself made a total reservation concerning this Article. But can it declare that, even so, it will protect records the producer of which is a national of a third Contracting State, if these have been first published in the territory of a Contracting State which has not made use of the power of total reservation under paragraph 1 *(a)* (i)?

The text of the Convention is silent on this point. Is this due to an oversight, or rather to a deliberate intent to restrict the protection of producers of phonograms? Must the reciprocity clause operate in all cases, or is its field of application left to the discretion of domestic legislations? Although the answer to this question is difficult, it would seem that the provision adopted on this point by the United Kingdom is not contrary to the text of the Convention but represents a free and legitimate interpretation.

To examine and justify the merit of such a declaration the spirit of the Convention must be sought. The diplomatic instrument was drafted not without difficulty, in order to provide protection for performers and producers by awarding them certain rights, including the right to equitable remuneration covered by Article 12. Reservations are provided for under Article 16 but are not subject to extension, as stipulated under Article 31. As we have seen, for reasons of equity, a material reciprocity clause was permitted, but it must be interpreted strictly, since it introduces the idea of retaliation, which it is difficult to reconcile with a spirit of international cooperation. The United Kingdom Government has followed the adage: " Who can do the greater can do the lesser "; the reservations permitted under the Convention fix a limit which must not be exceeded, but subject to these reservations each country may arrange the protection of the rights extended to performers and record manufacturers at its own discretion. This original application of the criterion of territoriality, together with the restriction contained in the reciprocity clause, so far from contravening the spirit of the Convention, seems to us proof of a remarkable understanding of the texts and a true appreciation of the facts.

In a State such as the United Kingdom, where the phonographic industry has a dominating position, it was to be expected that emphasis would be placed on the criterion of territoriality, and, more concretely, on the criterion of first publication. The record industry is international in character, as we have stressed, and would be ill-suited to limited protection, owing to the internal overlapping of the phonographic companies and their close mutual relationship throughout the world.

A final comment on United Kingdom legislation concerns the silence observed by this State as to the provisions of paragraph 1 *(a)* (ii) of Article 16. It is affirmed that the reciprocity clause will operate only for phonograms the producer of which is a national of a Contracting State which, " under Article 16 (1) *(a)* (i) has made a declaration stating that it will not apply Article 12 ". Accordingly, foreign records will be protected in Great Britain in the same way as national records, even if in their country of origin the protection afforded is inferior, provided however that a minimum of protection does exist in the country of origin.

Swedish records, for instance, will qualify for equitable remuneration, as Sweden has made only a partial reservation. The same will not be the case as regards Niger and the Congo, which have made a total reservation.

On consideration, although Great Britain appears to show generosity in refusing protection only to performers and producers who are nationals of States which have made a total reservation, it should be borne in mind that States which have made no reservations, for example, will not for that reason enjoy full and complete protection in Great Britain. This State, having clearly defined the conditions to be fulfilled in order to enjoy the right to equitable remuneration under Article 12, will not protect foreigners more than its own nationals.

A preliminary assessment of the present application of Article 12 in the States which have adhered to the Convention brings out a significant fact: all Governments whose declarations are so far known have availed themselves of the power of reservation offered to them under Article 16. Niger and the Congo have made full reservation and it seems probable that all the young African States will follow their lead in view of the large importation of foreign records into the territory of these new States and their Governments' concern to prevent too large an outflow of foreign currency. It is not certain that this categorical attitude reflects the actual facts and serves the real interests of the African States. The other States, i. e. Sweden, the United Kingdom and Czechoslovakia,

are operating the reciprocal clause of paragraph 1 *(a)* (iv). Finally, it appears from the Swedish and United Kingdom declarations that communication to the public of records in premises where no charge is made for admission for pecuniary advantage will not entitle them to equitable remuneration. Numerous States, on adhering to the Convention, will very probably adopt this solution for wise opportunist reasons, and to protect the interests of both authors and " small users ".

Will Article 12 stand the test of time? And under what conditions? It is as yet premature to express an opinion. The power of reservation under Article 16, paragraph 1 *(a)*, imposes a serious threat on the future of a right which has only recently been created. It is to be hoped that future States Members of the Convention will show the same ingenuity as the United Kingdom and, having regard to their domestic economic state, will be able to make use of the reservations of the Article without thereby depriving of its substance the right to equitable remuneration.

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Note by the Editor

Mr. Pierre Recht, author of the article entitled " Should the Berne Convention include a Definition of the Right of Reproduction? " (see *Copyright*, 1965, pages 82 *et seq.*), has asked us to amend the beginning of paragraph 3, column 1, on page 86, to read as follows:

" Contrary to the claim made in the title of an article by Hirsch-Ballin . . . ".

CORRESPONDENCE

Letter from Argentina *)

1. — The prospect of a revision of the Berne Convention, as revised at Brussels in 1948, hy the Stockholm Diplomatic Conference, planned for 1965 hut then postponed until 1967, decided the Argentine General Society of Authors (ARGENTORES) to consult the Pan-American Council of CISAC as to the desirability of the Argentine Societies of Authors taking steps to promote the accession of Argentina to this international agreement. One of the concerns of ARGENTORES, for reasons which will be explained later, is the fear of a possible modification of Article 14 of the Berne Convention. If Argentina attended this Conference, it could help to scotch any such proposal hy adding its vote to those of the countries opposed to the modification in question.

2. — *Importance and significance of the Berne Convention as revised at Brussels.*

The Berne Convention is a very advanced multilateral instrument hy which was created, for the purpose of protecting literary and artistic works, a Union of States to which belong the majority of those countries throughout the world which have achieved the highest cultural level, including all the European countries (except the USSR and a number of other countries hehind the " Iron Curtain "). A great deal of experience has also heen acquired regarding the application of this instrument.

Its extension to the American continent has heen very limited seeing that the only memhers there are Brazil, since 1922, and Canada, since 1928. That is due in the first place to the difference in criteria in the matter of formalities for the protection of works. The Berne Convention, Article 4, paragraph (2), requires no registration formality as a compulsory condition for the protection of the interests of authors. On the other hand, the trend of legislation in the American countries, including the United States, has been towards a different policy in this matter. That is due to the mistaken theory which confuses intellectual creation, which is the foundation of protection, with the means of proving such creation. The American countries have accordingly estahlished their own system through a series of Pan-American conventions, of which the Buenos Aires Convention of 1910 and the Washington Convention of 1946 have secured the greatest numher of ratifications (17 for the former and 14 for the latter).

The putting into force of these two systems and the existence of countries which did not belong to either of them conflicted with the necessity for universality of intellectual works, in view of the uhiquity and infinite possihilities of reproduction and utilization, *urbi et orbi*, presented by intellectual works, possibilities which had heen increased hy the latest inventions and the latest processes for diffusion. As is laid down in the " Charter of the Authors' Right ", adopted in 1956 hy the International Confederation of Societies of Authors and Composers (CISAC): " A work of the mind has a universal character; the sum total of such works constitutes a cultural inheritance common to humanity as a whole ". And it goes on to say: " A work of the mind is not attached to the possession of a material ohject in a specific country. Consequently, it easily crosses frontiers.".

The existence of these different systems gave rise to a movement to make protection universal, which was promoted by Unesco and culminated in 1952 in the adoption of an international instrument of a *compromise* nature known as the " Universal Copyright Convention " which lays down *minimum standards* for the protection of creations of the intellect, and which respects the higher level achievements realized through the Berne Convention, as revised, and the American conventions. Argentina ratified the Universal Convention in 1958.

3. — *History of Argentina's attitude to the Berne Convention.*

The Argentine Republic took part in the International Conference which met at Paris in 1896 for the revision of the Berne Convention. Its delegate was the Argentine Minister in Paris, the eminent writer Miguel Cané. He suhmitted a report which was published in the " Memorandum hy the Ministry of Foreign Affairs" suhmitted to the National Congress in 1897 (pages 174 *et seq.*) and was reproduced as an appendix in the work of Ernesto Quesada, pages 183 *et seq.* Argentina did not on this occasion ratify the Berne Convention (see C. Mouchet and S. Radaelli, *Derechos Intelectuales sobre las obras literarias y artisticas*, Buenos Aires, 1948, volume 1, page 48, note 35).

At its meeting on August 1, 1933, the Argentine Senate approved a motion addressed to the executive authority inviting it to accede to the Berne Convention, as revised at Berlin and at Rome. The same desire was again expressed in the course of a parliamentary dehate in the Senate (meeting of September 18, 1933) on Law Nr. 11,723. The same view was expressed hy the 14th International Congress of PEN Cluhs at its meeting at Buenos Aires in Septemher 1936, when it stated that it was desirahle that " for the achievement of universal copyright protection, those countries which have not yet done so should accede to the Berne Convention ". (See C. Mouchet and S. Radaelli, *op. cit.*, volume 1, page 336.)

A recommendation to the same effect was made hy the Congress of CISAC which met at Buenos Aires in 1948.

*) This " Letter " contains the text of a memorandum submitted to the Pan-American Council of CISAC; it is reproduced here by kind permission of the author and of the Secretary-General of CISAC.

It should he added that the Inter-American Seminar on Copyright, organized hy the Pan-American Council of CISAC, which met at Lima in May 1963, in its statement No. 11 expressed the opinion that: " The Berne Convention, as revised at Brussels in 1948, is one of the most advanced and most complete legal instruments for international copyright protection "; and went on to recommend that the Governments of the American countries should appoint committees composed of jurists, officials and representatives of interested groups to consider the possibility of acceding to the said Convention in the light of the requirements and the position of each country.

4. — *Desirability and utility of accession by Argentina to the Berne Convention as revised at Brussels.*

As we have already said, the Berne Convention is a text which sets the seal on the greatest conquests achieved in the field of copyright, as for example the protection of what is called " the author's moral right ", that is to say, the right of the author, independently of his copyright, to claim authorship of his work and to ohject to any distortion, mutilation or other alteration thereof, which would he prejudicial to his honour or reputation (Article 6bis). At the successive revisions it has undergone, the Convention has taken account of the latest techniques for the reproduction and diffusion of intellectual works (for example, cinematography, in Articles 2 and 14; mechanical recording rights, in Article 13; " *droit de suite* ", in Article 14bis, etc.). Accession hy Argentina to the said Convention is now of considerahle importance in order that Argentina may take part in the Conference for the revision of the Berne Convention which is to meet at Stockholm, Sweden, in the course of the year 1967 (it was due to meet in 1965 hut has heen postponed). One of the provisions of the Berne Convention, as revised at Brussels, which might he the suhject of a modification prejudicial to authors is Article 14 on the protection of cinematographic rights.

Article 14 of the Berne Convention, as revised at Brussels, lays down that:

> " (1) Authors of literary, scientific or artistic works shall have the exclusive right of authorising: i. the cinematographic adaptation and reproduction of these works, and the distrihution of the works thus adapted or reproduced; ii. the puhlic presentation and performance of the works thus adapted or reproduced.
>
> (2) Without prejudice to the rights of the author of the work adapted or reproduced, a cinematographic work shall be protected as an original work.
>
> (3) The adaptation under any other artistic form of cinematographic productions derived from literary, scientific or artistic works shall, without prejudice to the authorisation of their authors, remain suhject to the authorisation of the author of the original work.
>
> (4) Cinematographic adaptations of literary, scientific or artistic works shall not he suhject to the reservations and conditions contained in Article 13, paragraph (2).
>
> (5) The provisions of this Article shall apply to reproduction or production effected hy any other process analogous to cinematography. "

The danger for authors is that, under the influence of big countries which are major film producers and of the industrial interests which have developed round cinematographic work, Article 14 may he suhjected to a modification which will diminish authors' rights hy estahlishing a " presumption of assignment " in favour of film makers which would give them the same rights as authors. This trend has already heen noticed in the Study Group composed of representatives of Sweden and of the International Bureau for the Protection of Literary and Artistic Works (BIRPI).

The question assumes exceptional importance where *television* is concerned hecause of the use of films specially taken for this method of diffusion. Powerful interests are in evidence here, even more powerful than those involved in cinematographic production.

The International Confederation of Societies of Authors and Composers, through the intermediary of its Legislative Committee at its meeting in Paris in Fehruary 1964, drew attention to the fact that " the only hodies really interested in modifications to Article 14 are the television hodies. The real aim which these hodies are trying to achieve is not to promote the international circulation of films, hecause that can easily he done with the Convention as it is, hut to hecome ahsolute masters of the work while paying the minimum sum in copyright fees to the intellectual creators ".

Apart from this opinion put forward hy CISAC, the idea that has prevailed in the Latin American countries, thanks to the policy of the Societies of Authors, is that the author is the ahsolute proprietor of the work and that any assignment of rights is limited and specific; consequently, the author does not renounce any right deriving from future utilizations which may develop from the use of new techniques, so that each new utilization would require a fresh authorization from the author. The Anglo-Saxon countries, headed hy the United States and England, have taken a contrary line, and hold to the theory of " presumption of assignment " wherehy the film maker is granted the character of " co-author " and it is presumed that the first assignment carries with it rights for later non-specific utilizations along with and over and ahove the original authorized utilization, so that the maker therehy hecomes the principal and almost ahsolute owner of the work.

If Argentina acceded to the Berne Convention, its vote at the next meeting at Stockholm would help to support the champions of authors' rights. The protection of the interests of Argentine literature and art in other countries must not he neglected.

5. — *Relationship between the Universal Convention and the Berne Convention as revised at Brussels.*

Article 25, paragraph (3), of the Berne Convention, as revised at Brussels, lays down that accession to the Convention " shall imply full acceptance of all the clauses and *admission to all the advantages provided by this Convention* . . .".

In turn, Article XVIII of the Universal Convention provides that:

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

Furthermore, Article XVII, paragraph 1, of the Universal Convention 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* ".

By sub-paragraph *(b)* of the Appendix Declaration relating to Article XVII, it is agreed that: " The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention ".

These rules provide for absolute respect, by countries subsequently becoming parties to the Universal Convention, for the obligations laid down in the Berne Convention, but no provision is made for the reverse situation, that is to say, accession to the Berne Convention subsequently to the Universal Convention.

The problem is of particular interest in connection with two fundamental innovations contained in the Universal Convention which represent a compromise between the Berne system and the American system. I refer to questions relating to *formalities* and to *translations.*

Article 4, paragraph (2), of the Berne Convention (Brussels text) provides that the enjoyment and the exercise of authors' rights shall not be subject to any *formality;* such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Article III of the Universal Convention, on the other hand, and as a compromise, limits the existing formalities to be complied with in the majority of American countries (deposit, registration, etc.), for the purposes of the protection of a work published for the first time outside the territory of the State where the protection is claimed, to the requirement to ensure that from the time of the first publication all copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication. That is a practical kind of solution.

With regard to the exercise of the right of *translation,* under the Berne Convention, as revised at Brussels, it is made subject absolutely and exclusively to the authorization of the holder of the copyright in the original work. Indeed, Article 8 prescribes that: " Authors of literary and artistic works protected by the Convention shall have the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works ".

The Universal Convention, on the other hand, in its desire to reconcile the interests of authors with those of the diffusion of culture, affirms the same principle in Article V, paragraph 1, but in the next paragraph contemplates the possibility of each Contracting State restricting this right, as follows:

" If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive license from the competent authority thereof to translate the work and publish the work so translated in any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A license may also be granted on the same conditions if all previous editions of a translation in such language are out of print. "

In the remainder of this paragraph will be found enumerated a series of measures and safeguards for the exercise of this legal license which restrict the author's exclusive rights. The Argentine Republic established this principle by Decree No. 1155 of January 31, 1958.

It is clear that Argentina's accession to the Berne Convention, as revised at Brussels, would imply, according to Article 25, paragraph (3), the acceptance of all the clauses of the Convention and the non-application, in its relations with States members of the Berne Union, of those provisions of the Universal Convention which cannot be reconciled with those of the Berne Convention. Among the provisions of the Universal Convention which would be affected are those already mentioned on the subject of formalities and the legal translation licenses. It must be added that, even without provisions such as that already mentioned, the legal maxim *lex posterior derogat priori* would always apply, unless expressly provided to the contrary.

6. — *Procedure for accession. Contribution to the expenses of the Berne Union.*

The procedure for accession is laid down in Article 25 of the Berne Convention, as revised at Brussels. Accession should be notified in writing to the Swiss Government which, in turn, will communicate it to the Governments of the other countries members of the Berne Union.

Admission to the Berne Union carries with it the obligation of paying a share of the expenses of the Union. Article 23 lays down the procedure for determining the contribution of each country.

7. — *Before undertaking representations to the Argentine Government for accession to the Berne Convention, it is necessary to know the opinion of the Societies of Authors.*

There is no legal obstacle to Argentina's accession to the Berne Convention as revised at Brussels, but before this is undertaken there must be a consultation of the Societies of Authors in order to decide whether, from the point of view of their collective interests, it is desirable to abandon the compromise principles, listed above, of the Universal Convention and to adopt in exchange those of the Berne Convention as revised at Brussels.

Carlos MOUCHET
Lawyer

NEWS ITEMS

State of Ratifications and Accessions to the Conventions and Agreements affecting Copyright on July 1, 1965

1. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations

(Rome, October 26, 1961)

Contracting States	Deposit of Instrument	Coming into Force	Ratification (R) or Accession (A)
Congo (Brazzaville) [1]	June 29, 1962	May 18, 1964	A
Czechoslovakia [1]	May 13, 1964	August 14, 1964	A
Denmark [1]	March 11, 1965	June 12, 1965	R
Ecuador	December 19, 1963	May 18, 1964	R
Mexico	February 17, 1964	May 18, 1964	R
Niger [1]	April 5, 1963	May 18, 1964	A
Sweden [1]	July 13, 1962	May 18, 1964	R
United Kingdom [1]	October 30, 1963	May 18, 1964	R

[1]) The instruments of ratification or accession deposited with the Secretary-General of the United Nations were accompanied by "declarations". As to Congo (Brazzaville), see *Le Droit d'Auteur (Copyright)*, 1964, p. 127; as to Czechoslovakia, see *ibid.*, 1964, p. 110; as to Denmark, see *Copyright*, 1965, p. 119; as to Niger, see *Le Droit d'Auteur (Copyright)*, 1963, p. 155; as to Sweden, see *ibid.*, 1962, p. 138; as to United Kingdom, see *ibid.*, 1963, p. 244.

2. Universal Copyright Convention

(Geneva, September 6, 1952)

Contracting States	Deposit of Instrument	Coming into Force	Ratification (R) or Accession (A)	Protocols adopted
Andorra	30 XII 1952 [1] 22 I 1953 [2]	16 IX 1955	R	2, 3 1, 2, 3
Argentina	13 XI 1957	13 II 1958	R	1, 2
Austria	2 IV 1957	2 VII 1957	R	1, 2, 3
Belgium [3]	31 V 1960	31 VIII 1960	R	1, 2, 3
Brazil	13 X 1959	13 I 1960	R	1, 2, 3
Camhodia	3 VIII 1953	16 IX 1955	A	1, 2, 3
Canada	10 V 1962	10 VIII 1962	R	3
Chile	18 I 1955	16 IX 1955	R	2
Costa Rica	7 XII 1954	16 IX 1955	A	1, 2, 3
Cuha	18 III 1957	18 VI 1957	R	1, 2
Czechoslovakia	6 X 1959	6 I 1960	A	2, 3
Denmark	9 XI 1961	9 II 1962	R	1, 2, 3
Ecnador	5 III 1957	5 VI 1957	A	1, 2
Finland	16 I 1963	16 IV 1963	R	1, 2, 3
France [4]	14 X 1955	14 I 1956	R	1, 2, 3
Germany (Fed. Rep.) [5]	3 VI 1955	16 IX 1955	R	1, 2, 3
Ghana	22 V 1962	22 VIII 1962	A	1, 2, 3
Greece	24 V 1963	24 VIII 1963	A	1, 2, 3
Guatemala	28 VII 1964	28 X 1964	R	1, 2, 3
Haiti	1 IX 1954	16 IX 1955	R	1, 2, 3
Holy See	5 VII 1955	5 X 1955	R	1, 2, 3
Iceland	18 IX 1956	18 XII 1956	A	
India	21 X 1957	21 I 1958	R	1, 2, 3
Ireland	20 X 1958	20 I 1959	R	1, 2, 3
Israel	6 IV 1955	16 IX 1955	R	1, 2, 3
Italy	24 X 1956	24 I 1957	R	2, 3
Japan	28 I 1956	28 IV 1956	R	1, 2, 3
Laos	19 VIII 1954	16 IX 1955	A	1, 2, 3
Lehanon	17 VII 1959	17 X 1959	A	1, 2, 3
Liberia	27 IV 1956	27 VII 1956	R	1, 2
Liechtenstein	22 X 1958	22 I 1959	A	1, 2
Luxembonrg	15 VII 1955	15 X 1955	R	1, 2, 3
Mexico	12 II 1957	12 V 1957	R	2
Monaco	16 VI 1955	16 IX 1955	R	1, 2
New Zealand	11 VI 1964	11 IX 1964	A	1, 2, 3
Nicaragna	16 V 1961	16 VIII 1961	R	1, 2, 3
Nigeria	14 XI 1961	14 II 1962	A	
Norway	23 X 1962	23 I 1963	R	1, 2, 3
Pakistan	28 IV 1954	16 IX 1955	A	1, 2, 3
Panama	17 VII 1962	17 X 1962	A	1, 2, 3
Paraguay	11 XII 1961	11 III 1962	A	1, 2, 3
Pern	16 VII 1963	16 X 1963	R	1, 2, 3
Philippines [6]	19 VIII 1955	19 XI 1955	A	1, 2, 3
Portugal	25 IX 1956	25 XII 1956	R	1, 2, 3
Spain [7]	27 X 1954	16 IX 1955	R	1, 2, 3
Sweden	1 IV 1961	1 VII 1961	R	1, 2, 3
Switzerland	30 XII 1955	30 III 1956	R	1, 2
United Kingdom [8]	27 VI 1957	27 IX 1957	R	1, 2, 3
United States of America [9]	6 XII 1954	16 IX 1955	R	1, 2, 3
Zambia	1 III 1965	1 VI 1965	A	

Total: 50 States

[1]) Date upon which an instrument of ratification of the Convention and of Protocols 2 and 3 was deposited on behalf of the Bishop of Urgel, co-Prince of Andorra.

[2]) Date npon which an instrument of ratification of the Convention and of Protocols 1, 2 and 3 was deposited on behalf of the President of the French Republic, co-Prince of Andorra.

[3]) The Director-General of Unesco received from the Belgian Government a notification of application of the Convention and Protocols 1, 2 and 3 to the Trust Territory of Rnanda-Urundi, effective from April 24, 1961.

[4]) On November 16, 1955, France notified the Director-General of Unesco that the Convention and the three Protocols apply, as from the date of their entry into force in respect of France, to Metropolitan France and to the Departments of Algeria, Guadeloupe, Martinique, Gniana and Réunion.

[5]) Following the deposit of the instrument of ratification, a statement was made on June 3, 1955, on hehalf of the Federal Republic of Germany: "The Government of the Federal Repnblic of Germany reserves the right, after complying with the preliminary formalities, to make a statement regarding the implementation of the Universal Copyright Convention and the additional Protocols 1, 2 and 3 so far as the *Land* of Berlin is concerned". On Septemher 12, 1955, the Director-General of Unesco received the following declaration made on hehalf of the Federal Repnblic of Germany on Septemher 8, 1955: "The Universal Copyright Convention and Protocols 1, 2 and 3 annexed shall likewise he applied in *Land* Berlin as soon as the Convention and the annexed Protocols come into force in respect of the Federal Republic of Germany".

[6]) On Novemher 14, 1955, the following commnnication was addressed to the Director-General of Unesco on behalf of the Repnblic of the Philippines: "... His Excellency the President of the Repnblic of the Philippines has directed the withdrawal of the instrument of accession of the Republic of the Philippines to the Universal Copyright Convention prior to the date of November 19, 1955, at which the Convention wonld become effective in respect of the Philippines". This communication was received on November 16, 1955. By circnlar letter of Jannary 11, 1956, the Director-General of Unesco transmitted it to the Contracting States of the Convention as well as to the Signatory States. Observations received from Governments were communicated to the Repnhlic of the Philippines and to other States concerned by circular letter of April 16, 1957.

[7]) The instrument of ratification deposited on hehalf of Spain on Octoher 27, 1954, related to the Convention and the three Protocols. Sincc Protocols 1 and 3 had not been signed on hehalf of Spain, the Director-General of Unesco, by letter of Novemher 12, 1954, drew the attention of the Government of Spain to this fact. In reply, the following commnnication was addressed to the Director-General of Unesco on Jannary 27, 1955: "I am ... instructed hy the Minister of Foreign Affairs to inform you that the Spanish ratification of the Universal Copyright Convention applies solely to the docnments in fact signed, viz., the Convention and Protocol Nº 2...". The States concerned were informed of this commnnication by circnlar letter of March 25, 1955.

[8]) The Director-General of Unesco received notifications from the Government of the United Kingdom concerning the application of the Convention to the Isle of Man, Fiji Islands, Gihraltar and Sarawak (coming into force on March 1, 1962), to Zanzihar, to the Bermudas and North Borneo (coming into force on May 4, 1963), to the Bahamas and the Virgin Islands (coming into force on Jnly 24, 1963), to the Falkland Islands, Kenya, St. Helena and Seychelles (coming into force on January 29, 1964), to Manritius (coming into force on January 6, 1965).

[9]) On Decemher 6, 1954, the United States of America notified the Director-General of Unesco that the Convention shall apply, in addition to continental United States, to Alaska, Hawaii, the Panama Canal Zone, Puerto Rico and the Virgin Islands. On May 14, 1957, the United States of America further notified the Director-General of Unesco that the Convention shall apply to Guam. Notification was received on May 17, 1957.

By letter of Novemher 21, 1957, the Government of Panama contested the right of the Government of the United States of America to extend the application of the Convention to the Panama Canal Zone. By letter of Jannary 31, 1958, the Government of the United States of America asserted that such extension of the Convention was proper under Article 3 of its 1903 treaty with Panama. Copies of the two letters have been communicated hy the Director-General to all States concerned.

3. European Agreement concerning Programme Exchanges by Means of Television Films

(Paris, December 15, 1958)

Contracting States	Deposit of Instrumeof	Coming into Force	Signature without Reservation in respect of Ratification (S) or Ratification (R)
Belgium	March 9, 1962	April 8, 1962	R
Denmark	Octoher 26, 1961	Novemher 25, 1961	R
France	Decemher 15, 1958	July 1, 1961	S
Greece	January 10, 1962	Fehruary 9, 1962	R
Ireland	March 5, 1965	April 4, 1965	S
Luxemhourg	Octoher 1, 1963	Octoher 31, 1963	R
Norway	Fehruary 13, 1963	March 15, 1963	R
Sweden	May 31, 1961	July 1, 1961	R
Turkey	Fehruary 27, 1964	March 28, 1964	R
United Kingdom	Decemher 15, 1958	July 1, 1961	S

4. European Agreement on the Protection of Television Broadcasts

(Strasbourg, June 22, 1960)

Contracting States	Deposit of Instrument	Coming into Force	Signatura without Reservation in respect of Ratification (S) or Ratification (R)
Denmark [1])	Octoher 26, 1961	Novemher 27, 1961	R
France	June 22, 1960	July 1, 1961	S
Sweden	May 31, 1961	July 1, 1961	R
United Kingdom [1])	March 9, 1961	July 1, 1961	R

[1]) The instruments of ratification were accompanied hy "options" in accordance with Article 3, paragraph 1, of the Agreement. As to Denmark, see *Le Droit d'Auteur*, 1961, p. 360; as to United Kingdom, see *ibid.*, 1961, p. 152.

Protocol to the said Agreement

(Strasbourg, January 22, 1965)

Contracting States	Deposit of Instrument	Coming into Force	Signature without Réservation in respect of Ratification (S) or Ratification (R)
Denmark	January 22, 1965	March 24, 1965	S
France	January 22, 1965	March 24, 1965	S
Sweden	January 22, 1965	March 24, 1965	S
United Kingdom	Fehruary 23, 1965	March 24, 1965	S

ZAMBIA

Accession to the Universal Copyright Convention (with effect from June 1, 1965)

In a letter dated May 28, 1965, the Director-General of Unesco informed us that, on March 1, 1965, Zamhia deposited with Unesco its instrument of accession to the Universal Copyright Convention.

In conformity with the provisions of Article IX, paragraph 2, of the Convention, the latter came into force, in respect of Zamhia, three months after the deposit of its instrument of accession, i. e, on June 1, 1965.

BOOK REVIEWS

L'oggetto del diritto di autore [The subject of copyright], by *Mario Are*. One volume of 503 pages, 17 × 25 cm. A. Giuffrè, Milan, 1963.

Professor Are begins his searching study by determining the field of application of copyright. He defines the scope of the protected work, rather than its nature, and the elements which must either be reserved to the author or freely used by other persons.

The writer submits solutions to a great number of legal problems, under three headings: the intellectual work in general (Part I, pages 7-213); the intellectual work as the subject of rights (Part II, pages 217-306); the different categories of protected works (Part III, pages 309-503).

The principal characteristic of works protected by copyright — Professor Are observes — is their aesthetic function. The intellectual work, which is the subject of copyright, maintains its objective attitude for the direct satisfaction of purely intellectual requirements; the attribution of an economic value only intervenes indirectly when the amount of the remuneration is to be determined, remuneration whose purpose is to provide the necessary material means to satisfy intellectual requirements.

The aesthetic function assumes concrete significance only in relation to a form of intellectual production and the means of exteriorization by which it is expressed. It is possible to distinguish between the formal and the substantial elements of the intellectual work. Such works may be protected as objective entities when they constitute a noteworthy contribution, the requisite qualities of which are novelty and originality. "Creativity" and "originality" are corresponding but not identical concepts. They are concerned with two different viewpoints of the unitarian phenomenon constituted by the work of art and its creation. Creativity may be identified with the specific qualification of "objective novelty", that is, with the existence of a new contribution distinguished by a minimum amount of the value required for the enjoyment of protection. Originality, on the other hand, is the quality in a work which distinguishes it from other works by reason of the elements of which it is composed. It is an effect which is distinct from the cause — the creative character — from which it originates. The writer confers an objective significance on these terms. He comes out against the prevailing view which regards "personality" as a requisite condition. For a number of reasons, protection cannot be confined to the relatively rare examples of works which present specific characteristics making it possible to individualize the author.

After examining the different ways of distinguishing between the subject of expression and expression itself, the writer concludes that expression must be considered in the widest sense of the term and not just as a mere external representation. It must be regarded as the result of the particular constitution and perception of the subject with a view to making it known and communicating it to other persons. The border-line between subject and expression coincides with that existing between non-creative and creative elements. It is therefore useful to make a distinction between subject and expression.

The form of expression is protected when it is exteriorized by the author in such a manner that it can be apprehended and determined by other persons. It must be incorporated in a material support capable of enabling perception by the senses. Nevertheless, the intellectual work, particularly the literary work, has an internal form which cannot be grasped without understanding the entire thought of the author, the significance of the whole of which the words are merely the instrument. There is a distinction between the internal and the external forms of the work.

The internal form is the result of a coordinating activity of the mind; it is different from the content.

In the writer's view, composition, considered as internal form, constitutes an element of expression which cannot admit of the opposition made by French doctrine between the two concepts. An examination of form as elaborated by Anglo-Saxon doctrine and case law brings the writer to the conclusion that, in practice, apart from the order of the words, or the arrangement of the lines, colours, and notes, constituting the external form of the work, the choice and the coordination of the pre-existing elements are also protected. Thus, protection is extended to the internal form.

Any relationship, link, or element of form which is not perceptible by the senses but demands a higher activity of the intellect constitutes an integral component of the internal form. When these elements are new, they concern the organic originality of the intellectual work.

The method, the system, and the scheme, establish relations with the basis of the expression but they can adapt themselves to any subject: they constitute rules. The subject of protection is the expression and the organic construction which are the application of these rules protected indirectly; and this is very important for scientific works. The writer arrives at similar conclusions with regard to style and manner, even if these elements bear the imprint of the author who first adopts them.

The external form is that which is immediately perceptible by the organs of sight and hearing; it cannot always be identified with the form of the medium of expression, as in literary works where the external form is not the writing but the meaning. The working out of the medium of expression and of the original copy of the work of figurative art is identified with the creation of the external form and, as such, is a moment of expression, and its result is therefore worthy of protection. The making of a copy of a work of figurative art belonging to another person, no matter how perfect, is not expression, for it is devoid of creative character and cannot be protected.

The intellectual work is therefore composed as a whole of an external and an internal form, one presupposing the other, but capable of being created by different authors. Furthermore, several external forms may correspond to one internal form. The change in the external form may have determining effects when it includes a change of internal form making it so different from the original work that the latter is merely an element of inspiration.

One of the most interesting aspects of this book is the section devoted to the evaluation of the creative contribution (Chapter 3 of Part I). Professor Are departs from the classical theories envisaging the "protection of intellectual works independent of their merit or their purpose". The reason for the opposition to evaluation — the writer observes — lies in the confusion which has been made between evaluation in general and aesthetic appreciation. The work, according to the recent theories of German jurists, should have a "*Schaffenshöhe*" (level of creation) analogous to the "*Erfindungshöhe*" (level of discovery) of inventions. The subject of protection should not be the mere communication of thought but the perfected representation, abstracted from the normal framework of every-day life. Judgment should be based on "the depth of the creative performance" and not on the difference between "creation" and "performance", or on the medium and content of the work, or on the aesthetic effect, or on the quantity of work done.

Professor Are considers that such a judgment should be based directly on the attitude of the formal expression, to satisfy purely intellectual requirements. He enumerates evaluation criteria which, being founded on an objective basis, permit a certain latitude of application. Judgment is left to the prudent estimation of the interpreter. And, finally, it rests with case law to determine whether the work should in reality be classified among productions protected by copyright. Reference is made here to an actual judgment (Italian Supreme Court, April 27, 1961).

The intellectual work as the subject of copyright gives rise to several problems which are examined and provided with solutions by Professor Are. Among them mention should be made of the problem posed by the nature of such works. The intellectual work constitutes a

real entity even in its intangible aspect, a "vital property" before an "economic property" or a "legal property". Human thought circulates freely until it is given specific application in a work which constitutes an entity complete with objective individuality and, as such, protected in its relationsbip to a given subject.

The intellectual work is both an economic and a legal property, but this situation — the writer observes — does not flow from a right of monopoly. In the present system, the exploitation of intellectual works or inventions is in general lawful, like any other commercial activity, and its only limits are the preclusion of acts which affect the legal sphere of other persons. Professor Are criticises the theory of copyright as a personality right. The term "intellectual property" must be understood as the right of the individual over what he has created, without however equating the discipline of copyright with that of property in tangible objects. The term "property" is used to strenghten or to defend copyright, in order to include therein, apart from the purely economic factors, all the prerogatives concerning the interests of the personality of the author as an individual, as well as his freedom of creation and of expression. The writer examines all the different theories based on unwritten law, the law of labour, the law of remuneration, and other laws.

Once it is realized — the author states — that the intellectual work constitutes an objective property and that property rights have an economic character and are distinct from the prerogatives which, while concerned with the creation and the existence of the work, are designed for the defence of the author's personality, the author's economic right can he defined as "a real right over intangible property".

Copyright is absolute and unitarian, although it has sufficient specific characteristics to place it in an autonomous category. The writer considers, therefore, that the real right constitutes the "*genus*" and property in general is a "species" containing the two sub-species of rights in tangible property and rights in intangible property.

The different categories of intellectual works (Part III) are divided by the writer into works whose form is communicated hy symhols — literary works — and works without symbolic means of expression, i. e. musical works and figurative works. A third category of works has a mixed character because the symholism of the word and the corresponding substantial meaning are associated with purely figurative and musical elements: these are cinematographic works.

Figurative works include works of an artistic character and those of a scientific character (anatomical tables, illustrations of phenomena, geographical maps, etc.).

Among the legal prohlems concerning certain works of art, the writer examines the difference hetween the work of art applied to industry and ornamental designs and models, in view of their practical importance in relation to the divergence between the extent of protection.

As regards the objective distinction between the different works of figurative art and the various systems of protection, the writer considers that the criterion of divisihility may satisfactorily solve this prohlem. Dissociability must not he understood in the material sense as the possihility of separating physically the copy of an intellectual work from the tangihle whole constituting the product. In such cases, it is not a question of a work of art applied to industry hut of a work of pure art incorporated in an industrial product. Divisihility must be understood in the abstract sense as dissociahility of the various attitudes of the same form imprinted upon matter. Article 2 of the Italian Copyright Law speaks of the divisibility not of the "work" hut of the "artistic value" of the product with which it is associated. Evaluation, in the writer's view, should be concerned more with the autonomy of the aesthetic fnnction of the work than with its artistic quality.

This has heen an attempt to summarize the most important arguments advanced by Professor Are in his highly significant contribution to the study of the subject of copyright, in which no legal or other aspect of the problem has been omitted from his penetrating and exhaustive analysis. G. R.

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Zum Rom-Abkommen vom 26. Oktober 1961, zugleich ein Beitrag zur Urheberrechtsreform [Reflections on the Rome Convention of October 26, 1961, and a contribution to the German copyright revision], hy Professor *Ernst Hirsch-Ballin*. "*Schriftenreihe der internationalen Gesellschaft für Urheberrecht*", Volume 35, 28 pages. Published hy Verlag Franz Vahlen GmbH., Berlin and Frankfurt/Main, 1964. Price: DM 5.—.

The author starts with a criticism of the solution adopted in Article 33 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which provides that the texts of the Convention drawn up in English, French and Spanish shall he equally authentic. He compares this clause with Article 31 of the Berne Convention (Brussels text), where provision is made for equivalent authoritative texts in several languages, one of which, however — in this case, French — "shall always prevail". In the author's view, this is the only acceptahle solution.

After a critical examination of some of the Articles of the Rome Convention, Professor Hirsch-Ballin comes out strongly against the tendency to treat the performer, who is a creative artist, in the same way as producers of phonograms and broadcasting organizations. He puts up a spirited defence of the thesis that the new German Copyright Act, now heing studied, should not deal with the question of neighhouring rights. R. W.

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Urheberrechtsreform im Spannungsfeld von Recht - Kultur - Ethik [Copyright reform in relation to law, culture and ethics], hy *Fried Wunsiedler*, Doctor of Theology. "*Schriftenreihe der internationalen Gesellschaft*", Volume 34, 112 pages, 23 cm. Published hy Verlag Franz Vahlen GmbH., Berlin and Frankfurt/Main, 1964. Price: DM 12.50.

Significant studies have already heen published, from the Catholic viewpoint, on the prohlems involved in the revision of the German Copyright Act. Dr. Fried Wunsiedler has now undertaken to put forward the views of a protestant theologian on the various questions which the present revision is designed to settle. The author points out in his introduction that the ideas expressed in his work do not reflect the official opinion of the German Evangelical Church and are his own personal views based on considerations of a social and cultural order.

His opinion on the current copyright reform may he summed up under the following four beadings:

1. The Copyright Act should he made primarily for authors, with a view to the protection of their rights and their works.

2. The complex of copyright is composed essentially of three components which are closely hound up with each other: law, culture and ethics.

3. The task of suhstantive law in the field of copyright is to discover the requirements of these three components and to balance them so that each is given due weight.

4. In drafting rules for copyright, the legislator cannot allow himself to he guided exclusively — or even mainly — hy considerations of legal formalism, legislative technique or opportunism; and still less by the desire to satisfy the interests of individual groups. He must give careful consideration hoth to the genuine demands of culture and to the legal and ethical principles of justice and equality. R. W.

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Book List

From January 1 to June 30, 1965, the BIRPI Library has entered the following works in its catalogues:

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BOGSCH (Arpad). *Law of Copyright under the Universal Convention (The).* Leyden/New York, A. W. Sijthoff/R. R. Bowker, 1964. - XXIX-591 p.

COTTINET (Marie). *Conventions de Berne et de Genève dans leurs rapports avec le droit international public (Les). Protection de la propriété artistique et littéraire.* Paris, Faculté de droit, 1960. - 242 p. Thesis.

ERMECKE (Gustav). *Soziale Bedeutung des geistigen Eigentums (Die) - Social Significance of Intellectual Property (The) - Signification sociale de la propriété intellectuelle (La) - Importancia social de la propiedad intelectual (La).* Berlin/Frankfurt, F. Vahlen, 1963. - 116 p. — Internationale Gesellschaft für Urheberrecht E. V. Schriftenreihe, Vol. 30.

FAUCHÈRE (Jacqueline). *Adaptation cinématographique des œuvres littéraires (L').* Paris, Faculté de droit, 1962. - 330 p. — Thesis.

FISHER (Arthur). *Studies on Copyright. Arthur Fisher Memorial Edition.* South Hackensack/Indianapolis, F. B. Rothman/Bobbs-Merrill Co., Inc., 1963. - 2 Vol. (XXV-1731 p.). — Pref. The Copyright Society of the U. S. A., Abraham L. Kaminstein, Alan Latman, Joseph C. O'Mahoney.

HIRSCH-BALLIN (Ernst D.). *Zum Rom-Abkommen vom 26. Oktober 1961, zugleich ein Beitrag zur Urheberrechtsreform.* Berlin/Frankfurt, F. Vahlen, 1964. - 28 p. — Internationale Gesellschaft für Urheberrecht, E. V. Schriftenreihe, Vol. 35.

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LACOSTE LAREYMONDIE (Philippe de). *Protection des œuvres littéraires et artistiques étrangères aux Etats-Unis dans le cadre de la Convention universelle.* Paris, Faculté de droit, 1962. - 224 p. Roneo. Thesis.

LESOURD (Guy). *Droit moral après la mort de l'auteur (Le).* Paris, Université de Paris, 1962. - 197 p. — Thesis.

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LOS ANGELES COPYRIGHT SOCIETY & UCLA SCHOOL OF LAW. *Copyright and Related Topics. A choice of articles.* Berkeley/Los Angeles, University of California Press, 1964. - XVI-609 p.

LUTZ (Martin J.). *Schranken des Urheberrechts nach schweizerischem Recht unter vergleichender Berücksichtigung der europäischen Urheberrechtsgesetze und der deutschen Entwürfe (Die).* Zurich, Schulthess, 1964. - XXVII-262 p. — Zürcher Beiträge zur Rechtswissenschaft, Heft 246.

NIZSALOVSZKY (E.). *Protection des artistes exécutants (La).* Budapest, Acta Juridica, 1964. - 33 p. — Extr. Acta Juridica Academiae Scientiarum Hungaricae, t. VI, fasc. 3-4, pp. 301-333.

RIEPENHAUSEN (Bernhard). *Arbeitsrecht der Bühne (Das). Systematische Darstellung der Rechtsprechung des Bühnenoberschiedsgerichts.* Berlin, W. de Gruyter, 1965. - XV-235 p.

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STRÖMHOLM (Stig). *Europeisk Upphovsrätt. En översikt över lagstiftningen i Frankrike, Tyskland och England* [European Copyright. A Survey of Legislation in France, Germany and England]. Stockholm, P. A. Norstedt, 1964. - 245 p.

TROLLER (Alois). *Zwiespältiges und mannigfaltiges Immaterialgüterrecht.* Basle, Helbing & Lichtenhahn, 1964. - 24 p. — Extr. Festschrift herausgegeben vom Schweizerischen Juristenverein zur Schweizerischen Landesausstellung. Lausanne, 1964, pp. 257-280.

— *Mehrseitigen völkerrechtlichen Verträge im internationalen gewerblichen Rechtsschutz und Urheberrecht (Die).* Basle, Verlag für Recht und Gesellschaft, 1965. - XX-226 p. — Studien zum Immaterialgüterrecht, Vol. 6.

UNITED STATES. Committee on the Judiciary. *Copyright Law Revision.* Washington, U. S. Government Printing Office. - Part 4 (December 1964; X-477 p.): Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law. - Part 6 (May 1965; XXVI-338 p.): Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law. - 1965 Revision Bill.

WEILLER (Danièle). *Abus du droit et propriété littéraire et artistique. Etude de droit français et comparé.* Strasbourg, Université de Strasbourg, s. d. - 241-IV p. — Thesis.

WUNDSIEDLER (Fried). *Urheberrechtsreform im Spannungsfeld von Recht - Kultur - Ethik.* Berlin/Frankfurt, F. Vahlen, 1964. - 113 p. — Pref. Hans Liermann. Internationale Gesellschaft für Urheberrecht, E. V. Schriftenreihe, Vol. 34.

ZWEIGERT (Konrad). *Private Werkvervielfältigung durch Magnettongeräte und verfassungsrechtliche Eigentumsgarantie.* Cologne, W. Kohlhammer, 1963. - 51 p.

CALENDAR

Meetings of BIRPI

Date and Place	Title	Object	Invitations to Participate	Observers Invited
July 5 to 14, 1965 Geneva	Committee of Governmental Experts preparatory to the Revision Conference of Stockholm (Copyright)	Examination of the amendments proposed by the Swedish/BIRPI Study Group for the revision of the Berne Convention	All Member States of the Berne Union	Certain Non-Member States of the Berne Union; interested international intergovernmental and non-governmental organizations
September 28 to October 1, 1965 Geneva	Interunion Coordination Committee (3rd Session)	Program and budget of BIRPI	Belgium, Brazil, Ceylon, Czechoslovakia, Denmark, France, Germany (Fed. Rep.), Hungary, India, Italy, Japan, Morocco, Netherlands, Nigeria, Portugal, Rumania, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia	All other Member States of the Paris Union or of the Berne Union; United Nations
September 29 to October 1, 1965 Geneva	Executive Committee of the Conference of Representatives of the Paris Union (1st Session)	Program and activities of the International Bureau of the Paris Union	Ceylon, Czechoslovakia, France, Germany (Fed. Rep.), Hungary, Italy, Japan, Morocco, Netherlands, Nigeria, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia	All other Member States of the Paris Union; United Nations
November 15 to 19, 1965 Paris	Twelfth Ordinary Session of the Permanent Committee of the Berne Union	Consideration of various questions concerning Copyright	Belgium, Brazil, Denmark, France, Germany (Fed. Rep.), India, Italy, Portugal, Rumania, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland	All other Member States of the Berne Union; interested international intergovernmental and non-governmental organizations
December 13 to 18, 1965 Geneva	*Ad hoc* Conference of the Directors of National Industrial Property Offices	Adaptation of the Regulations of the Madrid Agreement, Nice Text (Trademarks)	All Member States of the Madrid Agreement (Trademarks)	All other Member States of the Paris Union

Meetings of Other International Organizations concerned with Intellectual Property

Place	Date	Organization	Title
Stockholm	August 23 to 28, 1965	International Literary and Artistic Association (ALAI)	Congress
London	August 31 to September 10, 1965	Committee for International Cooperation in Information Retrieval among Examining Patent Offices (ICIREPAT)	Fifth Annual Meeting
Paris	October 25 to 30, 1965	International Confederation of Societies of Authors and Composers (CISAC)	Federal Bureaux, Legislative Committee and Confederal Council
Buenos Aires	November 6 to 11, 1965	Inter-American Association of Industrial Property (ASIPI)	Congress
Tokyo	April 11 to 16, 1966	International Association for the Protection of Industrial Property (IAPIP)	Congress
Prague	June 13 to 18, 1966	International Confederation of Societies of Authors and Composers (CISAC)	Congress