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Copyright

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The Government of Peru deposited, on May 20, 1988, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

Peru has not heretofore been a member of the International Union for the Protection of Literary and Artistic Works ("Berne Union"), founded by the Berne Convention.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, will enter into force, with respect to Peru, on August 20, 1988.

Peru will belong to Class VII for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 120, of May 20, 1988.

TRINIDAD AND TOBAGO

The Government of Trinidad and Tobago deposited, on May 16, 1988, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

Trinidad and Tobago has not heretofore been a member of the International Union for the Protection of Literary and Artistic Works ("Berne Union"), founded by the Berne Convention.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, will enter into force, with respect to Trinidad and Tobago, on August 16, 1988.

Trinidad and Tobago will belong to Class VII for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 119, of May 16, 1988.

Phonograms Convention

Accession

TRINIDAD AND TOBAGO

The Director General of the World Intellectual Property Organization (WIPO) has informed the Governments of the States invited to the Diplomatic Conference on the Protection of Phonograms that, according to the notification received from the Secretary-General of the United Nations, the Government of Trinidad and Tobago deposited, on June 27, 1988, its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

The said Convention will enter into force, with respect to Trinidad and Tobago, three months after the date of the notification given by the Director General of WIPO, that is on October 1, 1988.

Phonograms Notification No. 48, of July 1, 1988.

Activities of the International Bureau

The Centenary of the Publication of *Le Droit d'auteur*

This year of 1988 marks a hundred years of publication of *Le Droit d'auteur*, the original, French-language periodical journal published by the International Bureau, on matters concerning the Berne Union for the Protection of Literary and Artistic Works. Its counterpart in industrial property is the journal *La Propriété industrielle* established by the Paris Convention for the Protection of Industrial Property of 1883, and *Le Droit d'auteur* itself derives its mandate from the Convention which founded the Berne Union—the Berne Convention for the Protection of Literary and Artistic Works of 1886. The first issue of *Le Droit d'auteur* appeared in January 1888.

The Final Protocol of the Berne Convention laid down in 1886 that

> The International Bureau shall centralize information of every kind relating to the protection of the rights of authors over their literary and artistic works. It shall coordinate and publish such information. It shall undertake studies of general utility concerning the Union, and shall edit, with the help of documents supplied to it by the various Administrations, a periodical journal in French dealing with questions relating to the objects of the Union. The Governments of the countries of the Union reserve the right to authorize, by common agreement, the publication by the Bureau of an edition in one or more other languages if experience should show this to be necessary.

Experience increasingly pointed to the need to publish an English-language periodical. In 1961, the Permanent Committee of the International Union for the Protection of Literary and Artistic Works, at its tenth session held in Madrid, recommended that

> As regards the publication *Le Droit d'auteur*, while maintaining the principle of publication in French, the largest possible number of articles and texts in other languages should be included therein.

In application of this resolution, as from January 1962, an English-language insert was published within *Le Droit d'auteur*, entitled *Copyright*: it contained a part of what was printed in *Le Droit d'auteur* in the form of official legislative texts, articles or other items, in the original or in translation, but it remained an integral part of *Le Droit d'auteur*, and its contents were never quite identical with that of the journal itself. This arrangement continued until the end of 1964.

At its eleventh session held in New Delhi in December 1963, the said Permanent Committee of the International Union for the Protection of Literary and Artistic Works considered a report of the International Bureau on the conditions of publication of *Le Droit d'auteur*, and pursuant to the relevant article of the Berne Convention,

> ... requested the Swiss Government, as Supervisory Authority, to consult, as soon as possible, the Member Countries of the Berne Union with a view to authorizing the International Bureau to publish a separate edition of this review in the English language.

All the member countries of the Union either expressly or tacitly agreed, and as from January 1965, the English edition, *Copyright*, emerged as a parallel but separate publication with identical contents.

The following figures give an indication of the volume of material published. Between January 1888 and December 1987, there have been 1,188 issues of *Le Droit d'auteur*, amounting to over 22,000 pages, including all inserts and analytical tables. From January 1965 to December 1987, there have been 264 issues of *Copyright*, amounting to over 8,000 pages, also including inserts and analytical tables. These issues were invariably monthly until 1975, after which there was one exception, namely the single, combined July-August issue which was instituted in 1976. It is for that reason that the number of issues, during 100 years, is not 12 times one hundred, that is, 1,200, but only 1,188.

The first editor of *Le Droit d'auteur* was Ernest Röthlisberger, a Swiss national who served the International Bureau from 1888 to 1926, and rose to be its Director in 1921. His editorship lasted 29 years, and left an imprint which lasts to this day.

Broadly speaking, throughout the century of its existence, the publication can be divided into an official and unofficial part, although it has not always been specifically categorized as such.

The official part traditionally carried out the centralization of information directly of interest to member countries, as envisaged by the Berne Convention. It has progressively contained such material as studies of that Convention, notifications about relevant events and activities in member

countries, their adherence to international instruments administered by the International Bureau, information on those countries' relations within and outside the Union in the field of copyright, whether with organizations or with States, information on organizational questions within the International Bureau, and accounts of debates conducted and decisions taken in meetings held at an international level within the framework of the International Bureau's activities.

Naturally, these contents have expanded and changed with the passage of time, to reflect the evolution of the international scene: this evolution includes the enlarged membership of the Union, the emergence of developing countries as sovereign States, members of the Union, and a corresponding increase in international development cooperation activities, the greater complexity of copyright issues, resulting in new categories of rights and new conventions, and the organizational changes within the International Bureau as well as in member countries of the Union.

A large proportion of the reviews, initially in the official part, has always been devoted to the publication of legislative and related texts supplied by governments. Thus, bilateral agreements between countries on copyright matters, the national legislation of individual countries, and amendments to such legislations, together with administrative measures such as decrees, circulars and notifications concerning the application of the law, have been reproduced, in the original or in English or French translations, which are either supplied by the appropriate governmental authorities or effected by the International Bureau. Between January 1888 and December 1987, 1,917 such texts were published, of which 441 were in the original and 1,828 in translation, covering over 120 countries. Since 1980, readers of *Le Droit d'auteur* have been offered the possibility of detaching from the review the legislative texts, covering national laws and bilateral and multilateral treaties, and collecting them, duly arranged and indexed, in bound volumes entitled *Lois et traités de droit d'auteur et de droits voisins*. The readers of *Copyright* were offered the same facility in 1987, the title of the parallel volume being *Copyright and Neighboring Rights Laws and Treaties*.

However, editorial policy from the very beginning was to establish alongside the official part of the review

> ... an *unofficial* part, where ... studies and articles on subjects which give rise to differences of opinion in different countries, could find their place. This part could be a platform made available to the most eminent men, for the kind of calm, considered discussion which brings minds together and paves the way for the improvement of the system of the Union, as foreseen in Article 17 of the [Berne] Convention (*Le Droit d'auteur*, 1888).

This was to be a forum, set apart from "regular collaboration," and open to anyone who wished to contribute to the discussion of issues of interest to the Union, whether by erudite articles, comments on published material, or literally by correspondence. A man as eminent as Louis Ulbach, President of the International Literary and Artistic Association, was of the opinion in 1888 that

> You are quite right to feel that the International Bureau in Berne should not be a mere intermediary for [the publication of] official documents. It should *stimulate* writers and ask them to get together to make up a family which shows solidarity in defending its moral rights—which will strengthen the safeguard of material rights (*Le Droit d'auteur*, 1888).

The unofficial part fulfilled the role of being the voice of enlightened *interpretation* of established facts set out in the official part, as reflected in critical studies and articles on the copyright (and later neighboring rights) field—not only on the major issues, but on all kinds of subjects that stemmed from those issues. From 1888 to the end of 1987, 378 signed articles—not counting the "Letters" dealt with below—were published in *Le Droit d'auteur*, and the total of signed and unsigned articles is over 1,000. In the early years, this part also contained statistics, accounts of court proceedings and decisions of importance to the application of the law, and "*faits divers*" or miscellaneous items, ranging from opinions on specific points of law to accounts of relevant meetings held outside the framework of the International Bureau; the latter item still continues, and the unofficial part has progressively included information on treaties other than those administered by WIPO. Moreover, throughout the century under consideration, there has been a bibliography on copyright and related subjects, accompanied, in some cases, by reviews of selected books. There have also been obituaries of well-known personalities in the field of copyright and neighboring rights.

Perhaps the most original and distinctive form of article published in the reviews is the "Letter" from a correspondent of an individual country who signs the "Letter." Such "Letters" provide a framework for information about and discussion of developments in the field of copyright and neighboring rights, which was sought after by editors from 1888 right up to the present day. The "Letter" is an article written by an expert—a scholar, a government official in the appropriate sector, a lawyer or other practitioner with a sound knowledge of the field—on developments within his or her own country, or in a country well-known to the writer, in copyright and related matters. The subject matter naturally varies according to circumstance and country, but above all it is intended to be a reflec-

tion of the present situation. The first three "Letters" were respectively from France, covering recent case law (in the absence of legislative and diplomatic activity), from Belgium, commenting on the Belgian Copyright Law of 1886 and on certain difficulties in applying it, and from the United States of America, covering the passage of a copyright bill submitted by Senator Chace in the Senate. All three were published together in the issue of August 1888 , and are reproduced below as illustrations of the earliest "Letters." Some 567 "Letters" (as distinct from the other articles mentioned above), covering about 57 countries, have been published from August 1888 to December 1987.

Since it has always been the aim of this part of the reviews to cover matters of topical interest, it is no accident that the subject matter of these signed articles and "Letters" is no less than a reflection of the historical evolution of the entire range of issues in the field of copyright and neighboring rights since the foundation of the Berne Union.

There has never been an absolute division of subject matter for articles in general on the one hand, and "Letters" on the other hand. Broadly speaking, however, the first type traditionally dealt with wider issues with international implications, even where it covered a particular country or region. The "Letters" almost always (with the exception of a few regional forays, notably Latin America) dealt with a single country per "Letter."

Perhaps the most distinguishing feature of the "Letters" is the considerable space given to detailed accounts and analyses of case law: here is a rich mine of information and conclusions on international and national law as they affect real people and institutions in given situations, bringing alive the actual workings of what governments signed on paper. How can the avid reader resist recalling for editorial constancy a case lasting over 20 years, the progress of which was conscientiously reported in the reviews for as long as until 1928, in all its ramifications? How can he help remembering the unusual, even macabre cases, such as, in 1929, the question of ownership of rights in a manuscript purportedly dictated by a spirit through a medium, of which the contributor stated, either drily or primly, "If we are correctly informed, the case was decided not on the basis of copyright, but according to provisions governing real rights, since it concerned ownership of the manuscript"?

The contents of both types of articles from 1888 to about 1920 illustrate generally, the effects of the Berne Convention on the legislation of Unionist countries. A major problem was encountered in defining categories of works to be protected. The original Convention did not, for example, include photographs, architectural works in themselves or choreography in dumb shows among the categories of specifically protected works; such inclusion had to await the refinement of the revision effected in the Berlin Act in 1908. More particularly, the case law and legislation written about in the "Letters" echoed this concern with categories, on which there is a wealth of detail, such as perforated cartons for pianistas, teachers' lectures, train timetables, directories, geographical time zones, translations, couturiers' fashion creations, art applied to industry in the cases of lace, porcelain and even corset hooks. Some of this litigation or legislation naturally raised issues which seem ephemeral to us today: such were the cases and laws which determined the freedom of a married woman to administer her intellectual property rights without her husband's authorization. Other issues will always remain with us, such as the contracts drawn up between creators and the exploiters of their works, with an appeal for just rewards on both sides.

Special characteristics of the international copyright scene were most particularly reflected in both articles and legislation published during the two world wars of 1914 to 1918 and 1939 to 1945. It is noteworthy that the International Bureau, doubtless aided by being located in neutral Switzerland, published the reviews normally and without interruptions throughout those years, and moreover, far from shrinking from wartime issues, exposed and analyzed them. The reader was informed of the effects of political hostilities on international copyright relations, the consequences of the disruption of communications on copyright procedures, and the interim arrangements made both during the war to try to keep international copyright functioning, and after the war to restore and reinvigorate dislocated rights and obligations.

The post–war years between 1946 to 1960 are among the most interesting in *Le Droit d'auteur*, as is appropriate for years which very substantially paved the way for the modern era of international copyright and neighboring rights. In these mere 15 years are to be found, in the articles and "Letters," the beginnings of almost all the major questions in this field which confront us today.

Symptomatic of the post–war explosion of thought and activity is the definitive increase in the number of signed articles, especially in the 1950s, when their number in the course of a year for the first time exceeded half a dozen and even reached 11 in 1952. The most basic concepts of copyright were reexamined. The articles of these years covered subjects such as the evolution of the editorial concept (1950) and the concept of publication (1951 and 1952), moral rights (1951, 1952, 1953, 1955, 1956, 1959, 1964 and 1965), reproduction for private use (1950 and 1952), copyright questions concerning the cinema (1950, 1951, 1952, 1953, 1961, 1962, 1963, 1964 and 1965), the need

for adequate protection of neighboring rights (1952, 1954, 1955, 1957, 1961, 1962 and 1965), ephemeral recordings (1951 and 1955), and issues raised by the Berne Convention as it stood (1946, 1949, 1951, 1955, 1961 and 1964). From the later 1950s onwards, there was increasing coverage of copyright in the framework of decolonization (1956, 1960, 1962, 1963 and 1965), new or reformed national legislations and in some cases their international repercussions (1956, 1957, 1958, 1959, 1961, 1962, 1963, 1964 and 1965), television broadcasting (1959, 1960 and 1962), and the newer technology of reprography (1959 and 1964).

The "Letters" of the period reflected the institutional developments arising from the problems of administering rights in increasingly complex and widespread copyright and copyright-related relationships. Both private enterprise and public authorities fostered the existence of collecting bodies or societies, which operated for the benefit of authors, performers, recording companies and broadcasting organizations, as well as operating for the benefit of the national cultural heritage, in the case of the use of folklore and other kinds of works in the public domain. In turn, the enormous demand occasioned by the greater volume of creation and its improved dissemination, led to problems such as piracy on a commercial and international scale, and to all kinds of unauthorized uses of works, assisted by reproductive equipment which produced tape recordings, microfilm and photocopies.

Le Droit d'auteur, joined by the English-language *Copyright* in 1965, reported on the continuation and amplification of all these trends of the 1950s through the 1960s to the present day. The move towards improved national, bilateral and multilateral legislation continued to be fruitful; in the way of international instruments, apart from the Rome Convention of 1961, the Geneva Convention of 1971, protecting the producers of phonograms against unauthorized duplication of their phonograms, confirmed the need for stronger measures against piracy, and in 1974 the "Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite," bore witness to the increasing sophistication of broadcasting techniques. The articles themselves dealt very fully with the contents of these Conventions and their application (as in 1972, 1976, 1978, 1981 and 1985), as well as with a number of other important subjects; examples are the implications of reprography for the revision of the Berne Convention (1976 and 1978), its more widespread use for both private copying and public uses such as education (1973, 1974, 1975, 1977, 1982, 1983 and 1987), copyright problems in the film industry (as in 1970, 1983 and 1987), in the diffusion of television by cable distribution systems (1974 and 1976), and the problems of publishing in developing countries (1980 and 1983).

An international instrument of political and administrative significance to the workings of the International Bureau should also be mentioned: in 1967, the "Convention Establishing the World Intellectual Property Organization" was instituted in Stockholm, concurrently with a revision of, *inter alia*, the Berne Convention. If this did not figure largely in the parts of the reviews devoted to discussion and interpretation, it is nevertheless of great importance to the reviews as a whole. It transformed not merely the title but also the institutional framework of the International Bureau, so that the Bureau was no longer supervised by the Swiss Confederation, but was given Governing Bodies composed of the member States of its Unions. This institutional reform, adapting the old Organization to the new status and workings of international organizations, was completed by its entry into the United Nations System as a Specialized Agency in December 1974.

The consequences of the latter political and administrative measures for developing countries were not slow to appear. It is noteworthy that in 1967 the Stockholm Act of the Berne Convention contained, for the first time, a separate Protocol Regarding Developing Countries. Through the 1970s and 1980s, WIPO and the Berne Union acquired a steady stream of new member States. On January 1, 1988, 77 States were party to the Berne Convention, over half of which were developing countries, as compared with 10 member States which signed the original Berne Convention, of which only three belonged to what would be called today the developing world. The "Letters" in the reviews have increasingly covered countries outside the industrialized world.

The efforts of WIPO to maintain a balance between developing countries and industrialized countries is mainly attested in the official part of the reviews which reflect the meetings, seminars and training courses held within the framework of WIPO's activities. Those forums offer nationals of developing countries with present or future responsibilities in the copyright and neighboring rights fields, information and training opportunities at all levels. Also reflected in the reviews is the advice given to developing countries by WIPO staff and other experts employed by WIPO, or by experts convened by WIPO to international meetings.

As for the technological progress of the 1970s and 1980s, as reflected in the articles of the reviews, among the major preoccupations of international copyright and neighboring rights are the problems created by cable and satellite broadcasting. It is appropriate that the first special issue of the reviews in 1984 dealt almost exclusively with

the distribution of programs by cable. Satellite broadcasting has been covered in articles concerning authors', performers' and broadcasters' rights in the case of broadcasting by satellite, and concerning legal provisions governing the protection of works transmitted by direct broadcasting satellites, particularly in 1981, 1985 and 1986.

Alongside past discussions on reprography, which the columns of the reviews continue, the reviews have also justifiably given more attention to the newer video technology increasingly used for reproduction. Copyright aspects of this technology have been discussed in various articles in the reviews, as in 1972, 1979, 1981 and 1982.

But the reviews will always have yet newer challenges to report and discuss. The 1970s and 1980s have seen the rise of computer technology, which poses old questions of definition, protectability and type of protection in new forms. This revolution, too, has spread on an international scale, and similarly concerns not only individual creators or would-be creators, but also organization-wide, nationwide, or worldwide information, documentation and other systems, created with equipment and materials whose potential was largely unforeseen by a past generation. Numerous have been the articles reflecting these developments: they cover the general issue of legal protection of computer programs and other software (as in 1972, 1977, 1985, 1986 and 1987), computer storage and the retrieval of protected works (as in 1972 and 1979), problems in the use of copyright materials in automatic information and documentation systems (1978), the use of computers for the creation of works (1979), and copyright questions in connection with data bases (1981 and 1987).

If this account of the contents of *Le Droit d'auteur*, and later also of *Copyright*, and most particularly of their articles, reads like a historical outline, it is certainly no coincidence. For by performing conscientiously and with erudition the function of topical reporting and interpretation month by month, the reviews do no less than reflect all the major events, issues and discussions of the past century in the fields of copyright and neighboring rights. A.S.

CORRESPONDENCE

We have the pleasure to publish in this issue three letters, one from France, one from Belgium and one from America.

As you will be aware, we have introduced an *unofficial* part in *Le Droit d'Auteur* in order to provide space for literary studies and articles on questions that are viewed differently in the various countries.

Our contributors therefore express their views quite freely, without their being necessarily those of the editor nor implying the liability of our Bureau.

Letter from France

Paris, August 4, 1888.

I should normally, in this first letter, comply strictly with the program set out by *Le Droit d'Auteur* for its contributors and review in turn legislative, diplomatic and judicial developments in my country as they concern artistic and literary property; unfortunately, there is nothing to report, as regards the first two aspects at least, and I have no option therefore, this time, but to concentrate on an examination of case law.

We may first mention a decision by the Chamber of Pleas of the Court of Cassation on July 25, 1887, reported by the *Gazette du Palais* in its issue of November last, which is of the greatest interest from the point of view of international literary law. The Supreme Court held that, in view of the fact that the Decree of March 28, 1852, limited itself, by affording protection under French law to the authors of works published abroad, to repressing infringement in France of such works or the introduction of foreign infringing copies, the introduction of copies claimed to be infringing copies of a work published abroad could not be held an offense unless at the time of their introduction into France such copies were subject, in the country in which publication was effected, to an exclusive right belonging to the author or his successors in title.

The same solution is indeed to be found, in explicit terms moreover, in the Treaty concluded between France and Italy on June 29, 1862. The introduction into France of copies of a musical score (in the case in point, that of Donizetti's opera, Lucia di Lammermoor) published in Italy is therefore perfectly lawful since at the time it took place, the author's rights in those copies had expired under Italian law. Although this decision complies with the views of Mr. Pataille, it conflicts with the opinion supported by a number of writers, including Messrs. Fliniaux, Calmels, Renault and, above all, by my eminent colleague, Maître Pouillet. These matters are highly sensitive and, as you see, we are far from being in agreement; it is to be hoped that the necessity of the work undertaken by the Bureau of the International Union will soon be recognized.

The First Chamber of the Civil Court of the Seine has also recently stated a principle that will be acclaimed by all of us: it held that the fact that an opera libretto had been taken from a French novel did not preclude the owner of the opera, although a foreigner, from asserting in respect of his assignee and the latter's successors in title his property in the adaptation of the subject to a musical composition.

Our major Parisian dailies, *Le Figaro*, *Le Temps*, *Le Siècle*, have taken to including in their columns what is referred to as a "*review of the reviews*"; this is a most interesting digest of both serious studies and sensational articles: the reader is able to fly over, one could say, the literary, philosophical and scientific happenings of the month or of the week. Mostly, the journalist does not simply give a barren analysis, but borrows extensively from the authors he quotes. What can be the attitude of

the *Société des gens de lettres* towards these newspapers? It is doubtlessly the duty of this Society which, in the final count, has a mandate from the writers who have accepted its statutes, to ensure respect for the property of its members and to determine by what right newpapers reproduce their works. The courts have been called upon, more than once, to pronounce on this matter and have never hesitated in proclaiming the same principle; a judgment of this kind was given by the Civil Court of the Seine on November 12, 1886, and reported in *Annales de la propriété littéraire et artistique* (January 1888 issue), in which it was stated that the Society was not exceeding its mission by requiring the newspapers to prove that they were properly entitled.

On July 25 last, the Paris Court (Minor Offenses Chamber) took a decision of concern to both journalists and publishers; I may quote the following grounds:

"Whereas a newspaper article constitutes literary property; whereas the absence of a signature at the foot of the article does not prevent such property from existing; whereas, although the identity of the author remains uncertain, the publisher of the journal is known and, for as long as the author has not announced himself, the publisher is entitled to exercise the rights deriving from that property without having to produce justification other than the publication he has undertaken."

To conclude, I may finally mention an altogether recent judgment by the Court of the Seine, of July 20, 1888, in proceedings opposing the widow of Paul Baudry and Ambroise Baudry, Ephrussi and Baschet. The Court held that when a writer or an artist had authorized a third party to publish his correspondence within a given biographical framework, together with drawings appropriate to the work, the death of the author in no way changed the rights of that third party, who remained entitled to make use of the correspondence handed to him, and the heirs could neither oppose publication of the work nor lay claim to the correspondence and drawings handed to the publisher.

This decision has achieved considerable notoriety in France since the names of the parties attracted public attention; it is for that reason, above all, that I felt it should be mentioned in this letter.

GEORGES TOUCHARD.
Attorney of the Paris Bar.

Letter from Belgium

Brussels, August 2, 1888.

In a preceding issue, *Le Droit d'Auteur* published the text of the Belgian Copyright Law of March 22, 1886. Without wishing to anticipate the reasoned, legal commentary that will be made on this Law, I felt that it could be useful to point out some of the problems of application that have arisen so far, together with some elements of case law that are still uncertain in several important aspects.

The Belgian Copyright Law, as we know, is once again the work of the *International Literary and Artistic Association*. Demands had long been voiced, in vain, for an effective law to protect letters and art in Belgium. The country remained a hotbed of the wildest literary piracy. Despite the fact that the Literary and Artistic Convention of 1852, imposed on Belgium by France, put an end to the highly lucrative reprinting industry, all the other abuses of the counterfeiters continued their existence and on a number of occasions provoked public indignation and at the same time prepared opinion for the reform demanded by reason, equity and justice.

A simple description of the facts as they existed would be too lengthy to be set out here, but to show the extent of the abuse of which we complained we may mention that case law in artistic matters had adopted the following position, that is to say that the copy of a painting and the imitation of the artist's signature were perfectly lawful; indeed, an artist who proceeded against a counterfeiter or the merchant putting up for sale a painting reproduced with a false signature was ordered to pay the costs and his action dismissed.

It was in such a context that the *International Literary and Artistic Association* held its Congress in Brussels in September 1884 under the honorary presidency of Mr. Beernaert, *chef du cabinet*, who, at the opening session of the Congress, solemnly undertook to use the discussions that would take place at this literary and artistic forum as the basis for a draft law to be submitted to the Belgian legislature within the short term.

The Brussels Congress was a brilliant one. All the great principles of this field were studied and debated. The solutions arrived at by the Congress were adopted in their principle by the Government and the following year the text of a draft law drawn up by the Government was submitted to the Association, which was holding its annual congress in Antwerp and had included on its agenda the proposed draft law. This new Congress proved worthy of its predecessor; the Belgian Government adopted all the resolutions voted by the Congress and instructed the eminent rapporteur and Chairman of the Study Committee of the Congress, Mr. Pouillet, to draft in legislative form the resolutions that had been adopted. This was done and, as a result, the Belgian Copyright Law has quite justifiably been referred to as the *Pouillet Law*. This is a fitting tribute to the talents, dedication and learning of this great French lawyer.

The Copyright Law was then submitted to the Belgian legislature and we must acknowledge that, under the influence of the broad-mindedness and the generosity that had reigned during its elaboration, the debates in the House of Representatives were dictated by a quite remarkable elevation of thought and nobility of sentiment. From these debates emerged Article 1 which constitutes the true frontispiece to the Law and contains the most inspiring and the most complete definition of the rights of Man in respect of his ideas: "The author of a literary and artistic work shall alone have the right to reproduce it or to authorize its reproduction in any manner and in any form whatsoever."

Unfortunately, here again events took the course they inevitably take when discussions become drawn out: the great and beautiful principles were rapidly left behind and discussions lost and befogged by regulatory details.

In the case of Article 16, relating to the performance of musical works in public, truly bizarre distinctions were made. One could witness lawmakers, professors of law at the universities of the State, committing deplorable confusions between the various applications of copyright, supporting antijuridical causes and, forgetting that they were dealing with the interests of artists, having concern solely for the interests of the musical societies that were seeking to deprive of their rights the authors whose works they performed or had performed. Such is the obliteration of morality that results from these abuses that have become indurated, so to say, in the habits of certain populations.

As a result, therefore, of the efforts of those members of Parliament who are presidents of musical societies, the Belgian House of Representatives adopted an Article 16 which contradicted Article 1 by stipulating that authors would have no rights in the performance of their works where such performance did not involve special remuneration.

Let us rapidly add that this text was rejected by the Belgian Senate which refused to confirm such an anomaly and adopted the current text of Article 16 which was subsequently passed by the House of Representatives after being referred back to it.

If we make much of this point, it is to show that indeed, in this field, one should abide by the general principles of law and adopt texts that are as concise as possible without wishing to enter into the details of their application. This matter is moreover of great importance since it likewise concerns the majority of the countries of Europe where it has led to heated discussion.

The fact is that, despite this new Law, the former activities still continue in a number of towns of Belgium. Well-known persons who direct musical societies have not hesitated to break the law in defiance of the prohibitions and have contested the most lawful rights of authors whose works they have borrowed. They claim the private nature of the meetings and festivities organized by the circles to which they nevertheless invite hundreds of outsiders and strangely invoke as a reason the fact that having bought a copy from the publisher they have thereby acquired the right to make any use inherent therein. What is even more peculiar, certain courts have accepted this defense in order to acquit the offenders. However, in other instances, the proceedings have been followed by effect and the Court of Cassation is currently hearing a related case. We would express the wish that the eventual decision will put a stop to a situation that is neither just nor worthy.

It is appropriate here to repeat that eloquent protest made by Lakanal, who called out to the Convention almost a century ago:

"That this abuse may have crept in and that it took hold for lack of the means of resisting it, that entertainment promoters considered their usurpation as a right for the simple reason that it had never been disturbed, that one may well imagine. However, could one believe that they would be unreasonable to the point of maintaining that the acquisition of one copy, of one stage play would afford to the person who buys it the right to give performances for his sole use against the will of the author and without involving him in the profit?"

What an edifying spectacle to discover one century later that the difficulties are still the same and the resistance also!

Apart from the Belgian interests that are at stake, one should also not forget that their international aspect is extremely interesting. It in fact concerns the interpretation of the Belgian Copyright Law of March 22, 1886. If the case law that will emerge were to have a restrictive impact and reduce the rights of authors even further than under the previous legislation, one would be tempted to ask whether this was not also an infringement of the situation of foreigners belonging to the various countries with which Belgium has concluded international conventions.

As you know, prior to the 1886 Law, this field was governed in Belgium by the French legislation dating from between 1791 and 1815. That legislation indeed contained the most complete provisions, still applied in France and on the basis of which a consistent body of case law has grown up.

It is certain that the resistance now expressed in Belgium towards authors could not have been legally tolerated under the 1791 and 1795 Laws and the 1816 Penal Code, and consequently the French, the Germans, the Italians, etc., who have concluded with Belgium conventions that afford them all the advantages of the legislation that was in force at the time the treaties were concluded could well refuse to accept a situation less favorable than that they had obtained under the rule of the said legislation.

This reasoning also applies to a further Article in the Belgian Law, to which we would draw the attention of lawyers. It concerns Article 26 which lays down that "infringements of this Law shall be actionable only on a complaint by the person claiming to have suffered damages."

The outcome of this provision is to constitute a veritable derogation from the general principles of law and a real danger from the point of view of reciprocity which is one of the bases of the international conventions. If a "complaint by the person claiming to have suffered damages" were needed in all cases, the result would frequently be a kind of negation of those rights for foreigners, since being at a distance they are likely to be unaware of the infringement of their rights and of the damages they have suffered.

It is inacceptable for a law to modify and restrict established rights during the course of validity of international conventions that had been recognized under legislation existing at the time the treaties were concluded.

These treaties are law in the contracting countries; they are furthermore true bilateral contracts which cannot be amended or restricted without the consent of both parties.

The legal nature of the literary conventions has been recognized and it has been declared that the state of the legislation guaranteed at the time the treaties were concluded constituted a minimum and, by virtue of the very wording of the conventions, it has been proclaimed that any privilege or any advantage subsequently afforded either to nationals or to other countries would be immediately and automatically acquired. Under the legislation preceding the Law of March 22, 1886, infringements of copyright were to be prosecuted, in compliance with the

Law of 1791 and Articles 425 to 429 of the Penal Code of 1810, *ex officio* as offenses of ordinary law.

Today, faced with the exception derived from Article 26 of the Belgian Copyright Law, we feel that great reserve should be exercised, if indeed that exception can be prejudicial to rights acquired under international conventions.

L. CATTREUX.

Letter from the United States

We have received the following correspondence from the competent pen of Mr. Thorwald Solberg, Assistant Librarian of the Library of Congress in Washington.

The article published elsewhere in this issue under the title "The Chace Bill in the United States" had already been composed when we received this letter. As the reader will see, our expectations are singularly confirmed by our honorable correspondent.

Mr. Solberg, whom most of our readers will know as the author of the most complete bibliographic monograph of publications concerning literary property[1]—a work which demonstrates the learning and tenacity of his scholarship and which is the outcome of many years of study—writes to us as follows:

Washington, July 30, 1888.

In the field of literary protection, we are in a period of expectative calm, awaiting the day on which the House of Representatives decides to debate the Bill on International Literary Protection adopted by the Senate on May 9 last. This Bill was tabled on December 12, 1887, by Senator Chace and forwarded to the Patents Committee which, on March 19 of this year, submitted to the Senate a favorable report. On that same date, a second copy of the Bill was sent to the House of Representatives and transmitted to the Legal Affairs Committee. There again, a favorable report was deposited on April 21. However, since the draft had already undergone certain amendments following the debates in the Senate, the text finalized on May 9 was presented to the House on May 11, given two readings and forwarded to the Legal Affairs Committee; the latter submitted a second report on May 24 which was remarkable for its brevity, since it simply stated: "The Committee utters a favorable opinion on the Senate Bill and recommends its acceptance." The Bill was then entered on the House Calendar where it is now awaiting its turn to be discussed.

The two months that have elapsed since then have been almost entirely devoted to detailed discussion of a most opportune and most important draft for the reform of tariffs. However, attentive study paragraph by paragraph of a bill which contains more than fifteen thousand words and of which each special provision has been heftily contested by the adversaries of this legislative measure, together with the fact that the debates took place during the warm season in Washington, meant that the members of Congress were so fatigued that a large number of them left town immediately after the passing of the Act on Tariffs to seek rest and recreation at the seaside or in the mountains. Very few of the legislators have stayed, and as it is almost axiomatic that August weather in Washington is unpleasant and unhealthy, it is highly unlikely that for the rest of the Congress session there will be sufficient members willing to place on the agenda a measure facing opposition. But even if such were not the case, a further problem would arise: between one thousand and two thousand bills are already, it would appear, entered in the Calendar, of which several—highly important ones—will pass before the Chace Bill. In order for it to enjoy priority over the other bills, it would have to obtain a majority of advocates to ensure that it was "heard" out of turn and given a vote without debate during the two to five weeks that remain for the present session; a session extending beyond the first few days of September would be without precedent. In these circumstances, one may hardly nurture the illusion that the House of Representatives may yet promulgate within the current session of Congress a law on the international protection of literary property.

As to the opposition that has emerged against the Bill, it is of a complex nature. To begin with, there is one faction that it would be foolish to ignore; it is opposed to the international protection of authors' rights under any form whatsoever. Nevertheless, it is no longer as bold and overt as before, thus pointing to considerable progress in the right direction. Indeed, public opinion is now so well informed that any argument in favor of the old, inveterate system of piracy exercised on foreign books is now branded as an apology for theft; thus, even those who still wish to continue with this system are in no way tempted to support it openly. Nevertheless, we have this year been witness to the sad spectacle of men of the church (who would seem "possessed" by anarchical tendencies) defending literary theft in articles published in religious newspapers.

Although this opposition to just any legislative measure aiming to ensure honest remuneration to foreign authors is silent, it is nonetheless active under cover and that action may have unfortunate consequences on a reform which, by reason of its specific nature, will certainly not be of interest to all the members of Congress.

Secondly, we may mention recent active opposition that is attributed to the English publishers. Men whose competence makes them authorities in this field accord their voices to say that the practical outcome of the current Bill, once it has become an Act, will be the printing in the United States of a large number of books by English authors to the obvious disadvantage of British publishers. Although one cannot expect these publishers to contemplate such a situation with no displeasure whatsoever, it is nevertheless to be feared that their hefty opposition will worsen their position, since Congress is hardly willing to weigh up the effects of legislation for their convenience; on the contrary, it is certain that members who would have been reluctant to vote for a Law that had found favor abroad would be tempted to give their votes to a Bill that was opposed by British subjects.

[1] *Copyright, its law and its literature*, by R.R. Bowker, with a bibliography of literary property by Thorwald Solberg. London, Sampson Low, Marston, Searle & Rivington and New-York, office of the "Publishers' Weekly", 1886.

Thirdly, it is a highly significant fact that the truest and most convinced advocates of international literary protection have openly voiced their disapproval of the Bill under discussion; this is the thinking of all those Americans who would be pleased to see their country set out on a path enabling it to walk in step with Europe in its resolute and honorable progress and which would lead, if not to direct and definitive entry to the International Union for the Protection of Literary and Artistic Works, then at least indirectly towards the cooperation foreseen in the final outcome. The fact is that the current measure *hardly* implies the recognition of statutory protection in our country for the literary and artistic property of foreigners; it moreover contains restrictions and limitations imposed on the successors in title to such protection, in favor of those categories that have continuously and obstinately fought against recognition of those rights.

The Bill in question only left the Senate after lengthy and serious debates which filled up sittings of several hours throughout four days. It tells well of the future that two or three senators only emerged as determined opponents to international literary protection; for the rest, opposition came from those senators who, whilst stating in clear and solemn terms that they were advocates of the doctrine that a foreigner should enjoy in the United States full protection for his literary and artistic property, explained that their attitude derived from the fact that the specific Bill under discussion was narrow and prejudicial; in their view, the Bill in fact limited those privileges that had to be extended to foreign authors and artists and imposed clauses, for the benefit of American publishers, that were frankly prejudicial to the purchasers of books. Their arguments were therefore not aimed against the international protection of authors' rights, but indeed to the search for amendments that would suppress those provisions making it a requirement of protection that books be entirely made in the United States and establishing prohibition on the import of any work published abroad. Scrutiny of the votes cast on the Bill shows that, in addition to the thirty-four senators that voted in favor, two at least of those who voted "nay" would be willing to adopt a more liberal measure in favor of foreign authors, and of the thirty-two senators absent at the time of voting at least ten are in favor of a law on the international protection of the rights of authors, meaning that some fifty of the seventy-six members comprising the Senate may be considered as favorable to such a measure. This strong majority justifies the view that, should the House of Representatives finally refer back to the Senate an amended Bill eliminating those restrictions, such as the prohibition on introducing into the United States original foreign publications, etc., this latter legislative body would accept more liberal provisions. Is the House of Representatives likely to take up such a position? That is what we do not know. On the one hand, the fact that the Bill to reduce tariffs was adopted by a clear majority would seem a good portent; on the other hand, the signs are less favorable when one considers that the legislators held it impossible to make even a simple proposal to enable entry of books into the United States without duties and that the House solely adopted the proposal not to impose entry duties on books printed abroad and published in a language other than English.

THORWALD SOLBERG.

We have since then received the following new letter:

Washington, August 3, 1888.

I am truly grieved to announce to you that my prediction that there was little hope of seeing the Chace Bill pass in this session of Congress came true almost as soon as it was made. On the very day on which my letter left here, an attempt was made in the House to fix and appoint one of the first days of the forthcoming winter session of Congress for the discussion and consideration of the Bill relating to literary protection; but even this modest request was opposed and rejected. The Congressmen who had introduced the Bill before the House of Representatives subsequently told me that as a result of the rejection they held it quite pointless to make a further attempt during this session and that it appeared to them better to wait until the month of December, during which the approval given to the Bill by the Senate would still be valid, so that it would simply require a favorable opinion by the House for the Bill to become law.

THORWALD SOLBERG.

Studies

Copyright and the Illustrator of Children's Books

Hildebrando PONTES NETO*

Contents: 1. Introduction.– 2. The artistic aspect of illustration.– 3. Illustration and Law No. 5.988 of December 14, 1973.– 4. The legal nature of illustration.– 5. The economic exploitation of illustration.– 6. Types of contract.– 7. Sanctions laid down for infringement of authors' rights.– 8. Conclusions.

"There exists no people rich and resolute without roots in the heart and in the imagination."

José Martí

1. Introduction

Nothing or almost nothing has been written so far in Brazil as regards the rights of the illustrator in his work of artistic creation.

Although this question is a most important one, it has long been ignored by the specialists and has ended up—abandoned and forgotten—in the limbo of copyright where it still, today, endures painful and unwarranted trials.

However, the time has come to repair the injustice, to proclaim the importance of this question, to rehabilitate it.

The task I propose to carry out here starts with a reflection on the bases of a doctrine whose comprehension is a sure means of creating a new awareness of copyright, enabling illustrators, once their rights and obligations have been set out, to defend more effectively—as a result of legal clarity—their works of intellectual creation.

Practice has shown that this approach is lacking in the authors of this form of expression of intellectual creation and it is indeed for that reason that they have not as yet set out their basic claims nor obtained equitable treatment from the graphic arts industry, commensurate with the artistic work they accomplish.

This study will propose means capable of filling in those gaps or will, at least, present the legal instruments which the legislator has made available to illustrators in the field of copyright to enable them to avoid undesirable one-sided exploitation of their work in the publishing market.

In view of their closely related forms I do not intend to extend this analysis of the work of creation of illustrators to its multitude of expressions.

I will therefore simply deal with illustration in children's literature, a fertile field with a considerable production in Brazil, in which each creator of drawings has succeeded—by dint of his sensitivity and the magic of lines and colors—to enter into the hearts of our children with the most beautiful of images and dreams.

2. The Artistic Aspect of Illustration

On asking what it meant to illustrate a text, Georges Charbonnier received the following reply from Henri Matisse[1]:

> To illustrate a text is not to supplement it. If a writer has need of an artist to explain what he has said, then the writer is inadequate. I have come across writers for whom I could do nothing: they had already said it all. The illustration of a book may also be its embellishment, enrichment by means of arabesques, conforming to the point of view of the writer. Illustrations can also be made by decorative means: quality paper, etc. Illustration is useful, but it does not add much to the essential literature. Writers have no need of painters to explain what they want to say. They should have sufficient resources within themselves to express that.

However, Maurice Sendak[2] replied to Walter Louraine, in an interview, when asked his opinion on the illustration of a work:

> It may constitute the decoration or the extension of a text. It is the version which the illustrator gives of the text, his own interpretation of the writing. That is why an illustrator is an active participant and not a simple reflection of the author. To be an illustrator is to participate, it is to be someone whose form of expression is as important—and sometimes even more important—than that of the author, but it is surely not a reflection of the author.

Confronting the views uttered by these two outstanding artists, I realize the importance assumed

* Vice-president of the National Copyright Council, member of the Interamerican Copyright Institute and of the Institute of Lawyers of the State of Minas Gerais, Brazil.

[1] Matisse, Henri, *Ecrits et propos sur l'art*, éditions Hermann, Paris, 1972, p. 215.

[2] Sendak, Maurice, interview published in the Venezuelan periodical *Parapara* and reproduced in *Boletim dos Ilustradores*. 1st year, No. 0, July 1984, Rio de Janeiro.

by this form of artistic creation as regards literature in general and books for children in particular.

When Matisse speaks of his situation as an illustrator, I gain the impression that to illustrate a poetic text by Mallarmé, or perhaps poems by Charles d'Orléans, or even *Ulysses* by James Joyce, places him in a situation of subjection.

I feel his deep respect for the author who, as he himself states, has no need of painters to explain what he wants to say.

If I have well understood the thinking of this extraordinary painter, his view embraces literature as a whole and is in no way concerned with drawings for children.

The position adopted by Sendak would seem just the opposite.

Indeed, this artist places the illustrator and the author of a work on the same footing.

He in fact goes so far as to afford, on occasion, more importance to the former than to the latter, since for him the illustrator is never a simple reflection of the author.

For Sendak, an illustration is always a way of thinking. Matisse and Sendak help me to understand the true meaning of illustration, particularly in children's books.

Without doubt, these influences have contributed to shaping the thinking of Brazilian illustrators, draftsmen who believe in what they are doing for our children and whose talents are gradually extending beyond the frontiers of this country.

I may call to mind here Angela Lago[3] who, at the first Colloquium on Reading and Books for Children, held at FAFI in Belo Horizonte in 1985, had the following appropriate words to say in a lecture entitled "Some Thoughts on the Graphical Conception of Picture Books," that she submitted during the debate following a talk by Paulo Bernardo:

> [I would like] to reinstate the word illumination, which is already a pleasure in itself, and give to it a new meaning. To illustrate is to illuminate. It is to illuminate a text by means of the light that is proper to the illustration. It is to reveal the story through the brightness of the image.

Marisa Mokarzel[4] wrote in the *Confessions of an Authoress*:

> My creation is multiple. My trade is writing, illustration. However, I have a wish to turn to music, to write scripts for the cinema, for the theater or television. I cannot and will not deny these various aspects of myself.
>
> With them I indulge in the play of imagination, I speak the language of life.

When dealing with the topic "Illustration: Proposed Reading" as part of the project "Sifting Books" at SESC in Nova Friburgo in July 1985, Denise Fraifeld and Fernando José Alzuguir Azevedo[5] clearly stated that: "An image has the magical power to shake our emotions before we even have a rational perception of what is before our eyes."

In dealing with "analysis of images" at the Fourth Latin American Seminar on Children's and Adolescents' Books, Luiz Camargo[6] claimed that:

> ... an innocent vision does not exist—we continuously are subject to the constraints of our past. For the illustrator, this means that he is always working on the basis of a wide variety of images of various kinds which he has absorbed and transformed throughout the years of his life. For the child, this means that he will associate with his reading of the illustration all his preceding inner images—and therefore this reading will not always be objective.

In her work entitled *Fairy Tales: To Illustrate or Not?* Ana Raquel[7] speaks of the great challenge by which she is fascinated: "to travel through the story, to attempt to take along the reader, to lose all notion of the limits of paper."

I am convinced that the work of an illustrator of children's books consists in fixing imagination by means of colored drawings with simple forms.

It is as if these were transfers, small characters that children cut out with their eyes and glue with love in the everlasting album of their memory!

Reinaldo Alfonso[8] sets out, quite rightly, the final dimension of illustration: "At any level, an illustration must be a work of art."

3. Illustration and Law No. 5.988 of December 14, 1973[9]

The Brazilian illustrator does not enjoy that legal protection of which he has need.

Law No. 5.988 of December 14, 1973, does not place sufficient emphasis on this type of creation.

The fact that works of drawing and illustrations

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[3] Lago, Angela, *Algumas Reflexões sobre o Planejamento Gráfico do Livro de Imagens* (document in the possession of the author).

[4] Mokarzel, Marisa, *Confissões de uma Autora* (document sent to the author).

[5] Fraifeld, Denise, Alzuguir Azevedo, Fernando José, *Ilustração: uma proposta de leitura* (document in the possession of the author).

[6] Camargo, Luiz, *Análise de Imagem* (document in the possession of the author).

[7] Raquel, Ana, *Contos de Fadas: ilustrar ou não?* (work in the possession of the author).

[8] Solego, Alfonso–Emilia, "En Julio como Enero", *Revista Editorial Gente Nueva*, Havana, *El Anima Encantada de la Literatura Infantil: Esa otra dimensión.*

[9] Law on the Rights of Authors and Other Provisions, see *Copyright*, 1974, pp. 181 to 191.

are recognized in items (viii) and (ix) of Article 6 of the Law as protected works of the mind does not necessarily reflect any depth of thought on the part of our legislator as to their significance and their importance.

When examining the Law, what is to be noted is the absence of specific provisions dealing with this type of creation in the most appropriate way and governing in detail their effects of an economic nature.

The list of works of the mind given in Article 6 of Law No. 5.988 was not included at the request of the various categories of creators involved since that Article is in fact an almost faithful reproduction of Article 2(1) of the Berne Convention.

However that may be, since works of drawing and illustrations are considered protected works, it follows that their creators enjoy the corresponding moral and economic rights.

The moral rights (Article 25 of the Law) comprise a whole series of purely personal prerogatives that are inalienable and may not be renounced by the beneficiary; these prerogatives extend to recognition of the authorship of the work, the right to withhold publication, that of ensuring its integrity, the possibility of modifying it or of maintaining it in circulation or not.

As far as the economic rights are concerned, Law No. 5.988 lays down the author's right to use, profit by and dispose of his work and to authorize others to use it or profit by it.

One of the forms of utilization mentioned by Article 30 of Law No. 5.988, under item (i), is that of publication.

When analyzing the provisions on publication of literary, artistic or scientific works dealt with in Articles 57 to 72 of Chapter I of Part IV of the Law, it will be ascertained that the legislator showed more concern for the publisher than for the author.

Indeed, the Law on the Rights of Authors does much more to strengthen the position of the publishing industry than that of the creator who serves it.

Since such is already the case of the author of a literary work, what will happen to the illustrator of a work for children?

It is therefore important to reflect on the relationship existing between the illustrator and the publisher in order to determine, from a practical point of view, the resultant distorsions and the possible remedies.

4. The Legal Nature of Illustration

To begin with, we must define the legal nature of the relationship existing between the author of a text and the creator who interprets that text in a work for children.

In most cases, the illustrator works on the text handed to him by the publisher.

Occasionally, the text and the illustrations—where they are the work of a single creator—originate at the same time.

Sometimes also, the author of the text specifies which illustrator he prefers.

Such are the conditions under which this artistic work may be carried out.

What is important to underline is the fact that the writing of the text and the illustration of that text constitute a work of collaboration.

Two separate authors, two creators of different kinds, cooperate in its achievement: the author who writes a story and the creator who brings it to life by means of drawings.

Once published in the graphical form of a children's book, these two creations, although separate, become indissociable as a literary work for children.

Of course, nothing prevents the text or the illustration from being used for a purpose other than that for which it was created, assuming of course that one of the authors gives his consent.

This is laid down by Article 24 of the Law:

> When the contribution of each of the co-authors is of a different kind, each shall be entitled to exploit his own personal contribution separately, on condition that this does not prejudice the exploitation of the joint work.

And Article 23 lays down that the co-authors shall exercise their rights by common consent, unless otherwise agreed.

In its sole paragraph, it stipulates that, in the event of disagreement, the National Copyright Council shall make a ruling at the request of either of the co-authors.

Article 31, governing works of joint authorship, uses the word "collaborator." In fact, it concerns the notion of "co-author" which is confused with that of "collaborator."**

In his comments on this Article 31, José de Oliveira Ascensão[10] states: "When looking for a difference, it may be observed that Article 23 speaks of 'co-author' and Article 31, of 'work of joint authorship.'" And he concludes: "It is nevertheless the situation of a 'co-author' that is governed by Article 31."

** This comment is relevant only to the original text in Portuguese; the English translation (see footnote 9 above) uses the term "co-author" instead of "collaborator" in the Article concerned (*Editor's note*).

[10] Ascensão Oliveira, José, *Direito Autoral*, Forense, 59.

Although this synonymity has been accepted by eminent legal writers, both at home and abroad, it appears incorrect and most unfortunate.

From the point of view of creation, a collaborator takes a back seat compared with the author of a work. However, what is a co–author if not the author of a work of artistic creation?

On the other hand, anyone collaborating in the creation of a work will have to play the secondary part of a collaborator. If he creates, he will be an author, or a co–author in the case of an association.

As said by Antônio Chaves[11]:

> For cooperation to lead to the quality of authorship, it is necessary for it to assume a certain dimension and to bear witness to a certain intellectual dignity; indeed, a person who simply contributes, by his advice, to the achievement of a work or an artist who, on the instructions of the sculptor, has struck a first blow on a block of marble from which will emerge a statue, cannot be considered a co–author.

Someone who simply collaborates in the creation of a given work does not mark it with his personality. If he does so, he is then no longer a collaborator but an author.

Authors' rights derive from the act of creation of which the inner substance is formed by originality and novelty.

It is possible that collaboration has always played an important part in creation.

However, it will certainly lack that intellectual majesty which would lift it to the same level as artistic creation.

5. The Economic Exploitation of Illustration

In view of the fact that the author and the illustrator work together, it is necessary to analyze the practical conditions of economic exploitation of the illustrator's work of artistic creation.

In the case of children's literature, the author receives as remuneration a percentage on the price—generally known as the "bookshop price"—of each work sold.

This percentage results from negotiation between the parties, that is to say the author and the publisher.

In the case of the illustrator, things are rather different: when he hands in his drawings he receives remuneration for his work and nothing else.

That is the usual situation, but in fact certain illustrators, as we know, enjoy a share in the sales revenue of the books involved and participate with the author of the text in the amount of the above–mentioned percentage.

What is unacceptable in the relationship between the illustrator and the publisher is that there should be confusion between authors' rights and the remuneration paid for delivery of the illustrations. Authors' rights do not constitute a salary.

An illustrator should not and cannot waive participation in the monetary profit resulting from the economic exploitation of his work.

These constitute economic rights guaranteed to him by the law.

What justification exists, therefore, to refuse the payment of a percentage on each book sold?

According to the publishers, the cost of manufacturing children's books precludes any increase in the remuneration above the amount paid on delivery of the work.

What happens therefore in the case of subsequent editions of the work if the illustrator and the publisher have not concluded a contract stipulating payment of remuneration in addition to that paid for the commissioning of the work in question?

In such case, there is indeed reutilization of the illustrations to the detriment of the creator's economic rights.

The absence of written contracts laying down for the benefit of the illustrator a further form of monetary profit in respect of the exploitation of his work is a practice in this field that must be condemned.

What happens in those cases where the children's book is comprised exclusively of illustrations and contains no text?

Does the illustrator receive from the publisher remuneration at the time he hands in his drawings and then nothing else?

The illustrators should take a close look at this serious distorsion of their economic rights that has become a practice.

When an illustrator asks the publisher to involve him in the sales revenue of each copy, the latter usually offers to pay him an amount which represents one half of the percentage received by the author of the text.

This is absolutely absurd!

Since a principle of the Constitution (Article 153(25) of the Federal Constitution) says that the author alone may set the amount of remuneration for the work he has created, it is inadmissible that such remuneration may be conceived as divided into two.

The author cannot be deprived of part of his rights with the excuse that they must be shared with a co–author.

The economic relationship involved (illustrator – publisher) cannot be transferred to another level.

This matter must be examined attentively to ensure that the very bad habit does not arise of selling children's books below their legitimate price, at the cost of the work of creation, which is the true guarantee of profit for the publishing world.

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[11] Chaves, Antônio, *Direito de Autor*, Forense, 95.

6. Types of Contract

The relations between illustrator and publisher are not only of an economic nature.

The former must take care to protect, together with the latter, the technical quality of the work of creation he has achieved.

As a result of this special feature, the negotiated conditions for using the artistic work of the illustrator should not imply assignment of rights under Articles 52 to 56 of Law No. 5.988 of 1973.

A publishing contract is quite different from a contract for the assignment of rights.

As explained by Fabio Maria de Mattia,[12] a publishing contract means that:

The author transmits to the publisher those faculties that compose his right to reproduce the work of his creation. This transmission enables the publisher to transform the original of the work into a book.

Finally, the author transmits those faculties that are indispensable to the exploitation of the future work by the publisher.

By means of an assignment contract, an owner transmits his rights to another person. For the totality of the rights, the assignee takes the place of the assignor who disappears from the relationship. It is an authentic sale that takes place. The work then escapes the control and the authority of the assignor.

Assignment of rights should be avoided in contractual relationships that commit a domestic creator, or indeed excluded from the text of the preliminary draft of the future Copyright Law currently under study and drafting within the National Copyright Council. Indeed, a publishing contract would not seem to me the optimum solution for the illustrator.

A licensing contract, on the other hand, would seem to constitute the most effective means for an illustrator to protect his work against any abusive utilization.

This type of contract gives him a right to supervise the drawings he has created and to grant licenses enabling them to be used under conditions he deems the most favorable.

As to the originals of his illustrations, these always remain his property.

Where a publisher wishes to make new reproductions, they will be made available to him, free of charge, without difficulty. The illustrations of each creator will always constitute his greatest asset, his artistic holding, and that should never be called into question.

This type of contract also enables an illustrator to grant licenses for his drawings and to maintain his right to supervise the production of the proofs and the quality of the photolithographic plate.

Where these do not comply with the elementary principles of quality, the creator concerned has the possibility of refusing them.

In addition, such licenses enable him to lay down the number of illustrations to be produced, the dimensions of each of them, the technique to produce them, and to prevent them being used separately by the publisher.

7. Sanctions Laid Down for Infringement of Authors' Rights

Under the system established by the Brazilian Law on the Rights of Authors, any infringement of those rights implies an irreversible economic prejudice which only compensation can repair.

Of the civil and administrative sanctions laid down by Law No. 5.988 of December 14, 1973, the civil sanction set out in Article 123 is the most important, albeit of a general nature:

> The author whose work has been unlawfully reproduced, disclosed or used in any way may, in so far as he is aware of the offense, apply for seizure of the copies produced or suspension of the disclosure or use of the work, without prejudice to his right to compensation for losses and damages suffered.

However, Law No. 5.988 is not the only law that lays down sanctions in respect of copyright.

For instance, Law No. 6.895 of December 17, 1980,[13] amends the wording of Articles 184 and 186 of the Penal Code, approved by the Decree–Law No. 2.848 of December 7, 1940.

This new wording reads as follows:

> *Article 184.* Violation of copyright: Penalty — detention for three months to one year, or a fine of 2.000 to 10.000 cruzeiros.
>
> (1) If the violation consists in the reproduction by any means of an intellectual work, in whole or in part, for commercial purposes, without the express authorization of the author or his representative, or consists in the reproduction of a phonogram or videophonogram without the authorization of the producer or his representative: Penalty — imprisonment for one to four years and a fine of 10.000 to 50.000 cruzeiros.
>
> . . . . . .
>
> *Article 186.* With regard to the crimes referred to in this Chapter, proceedings shall be instituted only by means of a complaint, except when they are brought against a government entity ...

Law No. 5.988, just as the Penal Code, therefore lay down sanctions for cases of abusive utilization of a work of artistic creation by an illustrator, that is to say without his prior and express consent.

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[12] Mattia Maria, Fabio. *O Autor e o Editor na Obra Gráfica*. edit. Saraiva, 98, 1975.

[13] See *Copyright*, 1981, p. 221.

8. Conclusions

I have endeavored to set out in this study those concerns that have arisen from my experience as a specialist in copyright.

I am quite aware of the difficulty of dealing with matters concerning the fascinating type of intellectual creation involved in the illustration of children's books, since neither the concepts nor the content are anchored in our minds. It is nevertheless easy to conceive that our national illustrators will no longer accept painful experiences such as that related by Regina Yolanda M. Werneck[14]: "I received the originals of my illustrations, except the main ones. When I asked for them, the person responsible at publisher S, who is a friend of mine, maintained that she had given them to me personally" or "I personally handed my originals to publisher R who claimed they had never been received." Or again the incredible situation in which she personally found herself:

> Some time ago, I illustrated the book of a friend. When I asked for the remuneration that had been agreed orally, I was given the following reply:
>
> — Ask your friend. She is the one to pay you.
>
> Of course, I have never received the slightest money for those illustrations.

Each case is a special one.

It is not enough for the law to simply make available to this important category of artists the machinery enabling them to defend their creations of the mind.

It is essential that illustrators set up a national association to defend and collect their authors' rights since union is the sole means of supporting intellectual work, of striking a balance in its relationship with money.

On the day this association is created, each case will happily stop being just one case more!

As said so appropriately by Angela Lago: to illustrate will be doubly to illuminate!

(WIPO translation)

[14] Yolanda M. Werneck, Regina (letter sent to the author).

Activities of Other Organizations

International Association for the Protection of Industrial Property (AIPPI)

Executive Committee

(Sydney, April 10 to 15, 1988)

NOTE*

Introduction

The Executive Committee of the International Association for the Protection of Industrial Property (AIPPI) met in Sydney, Australia, from April 10 to 15, 1988. There were some 200 participants from 40 countries.

The World Intellectual Property Organization (WIPO) was represented by Mr. François Curchod, Director, Office of the Director General, who addressed the meeting at the opening ceremony on April 10, 1988.

The matters examined by the Executive Committee included legal protection of software, the relationship between patent protection for biotechnological inventions and plant variety protection, the patentability of animal breeding, the use requirements for acquisition and maintenance of rights in registered trademarks, the protection of service marks and the harmonization of patent law. The Executive Committee adopted various resolutions on these matters, with the exception of the last-mentioned item. The text of the resolution on the legal protection of computer software is reproduced below. The texts of the other resolutions are published in the July/August issue of *Industrial Property*.

Resolution Adopted

QUESTION 57

Legal Protection of Computer Software

I. *Having reviewed* the question of protection of computer software in the light of legal developments and experience acquired since the resolution passed at Rio[1] in May 1985, AIPPI *observes* the following:

1. The countries which have adopted legislation have based the protection for software on copyright.

2. By using the copyright route, States can provide protection for software in general terms effectively and quickly; copyright has not hitherto given rise to major difficulties in its application to computer software.

3. Such protection by means of copyright may be supplemented by rules of unfair competition or by the law of contract.

4. It is immaterial as a matter of principle whether software is treated the same as other existing types of copyright works or as a separate species of copyright work.

5. But having regard to the specific nature of software, there may be a need for special rules on certain aspects of software protection and such rules should be harmonized internationally.

II. 1. AIPPI *confirms* the basic principles of the resolution passed at Rio (*Yearbook* 1985/III).

2. AIPPI further specifically *confirms* the following points thereof, namely:

translation (para. 3.*(c)*);
back-up copies (para. 3*(d)*(i));
moral rights (para. 4);
duration (para. 5);
deposit formalities (para. 6);

and also that the use, storing, storage, loading and running of an unauthorized copy of a program should be a prohibited act (cf. para. 3*(d)*(i));
and in addition that the international conventions on copyright are applicable.

3. According to the resolution passed at San Francisco (*Yearbook* 1975/III),[2] AIPPI *is of the opinion* that

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* Prepared by the International Bureau of WIPO.

[1] See *Copyright*, 1985, p. 354 and *Industrial Property*, 1985, p. 271.

[2] See *Industrial Property*, 1975, p. 324.

patent protection should be available for technological inventions incorporating software.

III. AIPPI further *affirms* as follows:

1. An effective regime for the enforcement of protection of computer software is essential.

2. For a program to qualify for copyright protection, it should not be necessary for a degree of non–obviousness (in the patent sense), or for technical improvement to be present.

3. The fact that a computer program is of its essence functional in nature should not preclude it from protection by copyright.

4. Whether by natural application of copyright law or by express provisions, the rental of a copy of a program, even if legally acquired, should require an express authorization from the copyright owner.

5. A screen display as such should be protectable by copyright to the same extent as any other graphic or textual work; the scope of protection should include the particular form of the display, but should not be so broad as to protect the content of the display as such.

6. Having regard to the fact that commercially successful software may define a "de facto" standard for interconnection with other equipment or for the user's convenience, AIPPI is of the opinion that such software should remain protectable subject to the normal national rules of copyright and that the ordinary antitrust or antimonopoly rules are the appropriate legal basis for preventing an abuse of the position so obtained.

7. Where copyright law provides that works made by an employee belong to the employer, such provision is equally applicable to the copyright in computer software.

8. The protection by copyright should clearly cover slavish copying, copying of a substantial part only of a program, and adaptation of a program. It should not cover the ideas embodied in a program, or algorithms as such.

9. The traditional distinction between ideas and expression should be applicable but special consideration should be given to where the line between ideas and expression should be drawn. Copyright should not prevent further development in programming, it being recognized that treating the program as a literary work may lead to protection which is too broad. In that respect, the analogy with scientific works is more suitable than with literary works. In the application of Article 1V*bis* of the Geneva Convention (UCC), the "recognition" test should not be applied too broadly, and should be limited to the expression and not extended to the ideas.

IV. AIPPI *considers* that it should in the context of its previous work continue study on the following points:

1. To seek to provide firmer guidelines for the application of the distinction between ideas and expression to computer software. It seems appropriate to consider that the scope of protection be proportional to the range of expression available to a programmer. The ideas should not be too broadly stated. Furthermore the mere fact that an alternative expression of the idea is possible should not imply that the chosen form of the expression of the idea must be protectable.

2. In order to enable further progress to take place in programming, consideration should be given to the possibility of decompiling a legally acquired copy of a program to examine its content, which has—perhaps inappropriately—been termed "reverse engineering," provided that this activity does not lead to a work which is itself infringing. A subsidiary question is whether the contractual exclusion of such an activity may be enforced.

3. On the definition of software, in particular as to whether it includes programmable logic devices (when programmed) which might otherwise appear to be unprotected. In defining computer software, consideration should be given to the borderline between copyright protection and chip protection.

4. Is the author of a computer–generated work (which may itself be a program) the person who initiates the creation of the work?

5. Are normal copyright rules relating to copying for private use applicable to computer software, or should special provisions apply as has been proposed in relation to reprographic copying? Also, should a legitimate owner of a program have the automatic right to translate, modify or adapt a program to run on different hardware, and if so should it be permissible to exclude this right by contract?

6. The so–called "shrink–wrap" license practice (under which a purchaser is assumed to agree with the terms of a contract by opening the package containing a program) in particular as to its enforcement by law and as to the scope of the rights which could thereby be retained.

7. The problem that arises when a software provider ceases to exist such as due to liquidation, in ensuring continuity of maintenance for the software user and to enable the user to develop the program further. It seems equitable that the interests of the software user should override the ordinary liquidation rules in this respect. Similar considerations can arise in cases of bankruptcy or reorganization.

V. AIPPI *recommends* to the special committee considering the GATT negotiations that it should take account of the need for efficient border controls, when appropriate and for preliminary injunctions, in relation to computer software.

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Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1988

September 12 to 19 (Geneva)

IPC (International Patent Classification) Committee of Experts (Seventeenth Session)

The Committee will adopt the final amendments, as well as the revised Guide, to the fourth edition of the International Patent Classification (IPC) and decide on the policy for the revision work during the next (sixth) revision period (1989–93).
Invitations: States members of the IPC Union and, as observers, certain organizations.

September 14 to 16 (Geneva)

WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property

The Forum will consider the impact of new technology on intellectual property law, with special emphasis on biotechnology, computer technology, the new technology for the recording of sounds and images, new broadcasting technology (for instance by direct broadcasting satellite) and new technology for transmission of programs by cable.
Invitations: States members of WIPO, the Paris Union or the Berne Union, certain organizations and the general public.

September 19 to 23 (Geneva)

Consultative Meeting on the Revision of the Paris Convention (Fifth Session)

The meeting will deal with Articles 5A (Patents and Utility Models: Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses), 5*quater* (Patents: Importation of Products Manufactured by a Process Patented in the Importing Country) and 10*quater* (Geographical Indications and Trademarks, etc.), and possibly other Articles on the program of the Diplomatic Conference.
Invitations: Selected governments. No observers.

September 22 and 23 (Geneva)

Permanent Committee on Industrial Property Information (PCIPI) (Second Session)

The Committee will review the work done on the tasks of the program during the first nine months of 1988. It will start to work on the elaboration of a medium-term program for the PCIPI and of a global policy for, and the orientation of, the work of the PCIPI during the 1990–91 biennium.
Invitations: States and organizations members of the Committee and, as observers, certain other States and organizations.

September 26 to October 3 (Geneva)

Governing Bodies of WIPO and of Some of the Unions Administered by WIPO (Nineteenth Series of Meetings)

The WIPO General Assembly will consider the establishment of an International Register of Audiovisual Works. The WIPO Coordination Committee and the Executive Committees of the Paris and Berne Unions will, *inter alia*, review and evaluate activities undertaken since July 1987 and prepare the draft agendas of the 1989 ordinary sessions of the WIPO General Assembly and the Assemblies of the Paris and Berne Unions.
Invitations: As members or observers (depending on the body), States members of WIPO, the Paris Union or the Berne Union and, as observers, certain organizations.

October 24 to 28 (Geneva)

Committee of Experts on Biotechnological Inventions and Industrial Property (Fourth Session)

The Committee will examine possible solutions concerning industrial property protection of biotechnological inventions.
Invitations: States members of WIPO or the United Nations and, as observers, certain organizations.

November 7 to 22 (Geneva)

Committee of Experts on Intellectual Property in Respect of Integrated Circuits (Fourth Session)

The Committee will examine a revised version of the draft Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits and studies on the specific points identified by developing countries.
Invitations: States members of WIPO or the Paris Union and, as observers, other States members of the Berne Union, as well as intergovernmental and non–governmental organizations.

November 7 to 22 (Geneva)

Preparatory Meeting for the Diplomatic Conference on the Adoption of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits

The Preparatory Meeting will decide what substantive documents should be submitted to the Diplomatic Conference—scheduled to be held in Washington, D.C. in May 1989—and which States and organizations should be invited to the Diplomatic Conference. The Preparatory Meeting will establish draft Rules of Procedure of the Diplomatic Conference.
Invitations: States members of WIPO or the Paris Union and, as observers, intergovernmental organizations.

December 5 to 9 (Geneva)

Madrid Union: Preparatory Committee for the Diplomatic Conference for the Adoption of Protocols to the Madrid Agreement

The Committee will make preparations for the diplomatic conference scheduled for 1989 (establishment of the list of States and organizations to be invited, the draft agenda, the draft rules of procedure, etc.).
Invitations: States members of the Madrid Union and Denmark, Greece, Ireland and the United Kingdom.

December 12 to 16 (Geneva)

Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Fifth Session; Second Part)

The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

December 12 to 16 (Geneva)

Executive Coordination Committee of the PCIPI (Permanent Committee on Industrial Property Information) (Third Session)

The Committee will review the progress made in carrying out tasks of the Permanent Program on Industrial Property Information for the 1988–89 biennium. It will consider the recommendations of the PCIPI Working Groups and review their mandates.
Invitations: States and organizations members of the Executive Coordination Committee and, as observers, certain organizations.

December 19 (Geneva)

Information Meeting for Non–Governmental Organizations on Intellectual Property

Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright and their comments on the same will be invited and heard.
Invitations: International non–governmental organizations having observer status with WIPO.

1989

February 20 to March 3 (Geneva)

Committee of Experts on Model Provisions for Legislations in the Field of Copyright

The Committee will work out standards in the field of literary and artistic works for the purposes of national legislation on the basis of the Berne Convention for the Protection of Literary and Artistic Works.
Invitations: States members of the Berne Union or WIPO and, as observers, certain organizations.

April 3 to 7 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (Eighth Session)

The Committee will review and evaluate the activities undertaken under the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights since the Committee's last session (March 1987) and make recommendations on the future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

May 1 to 5 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Industrial Property (Thirteenth Session)

The Committee will review and evaluate the activities undertaken under the WIPO Permanent Program for Development Cooperation Related to Industrial Property since the Committee's last session (May 1988) and make recommendations on the future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

May 8 to 26 (Washington, D.C.)

Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits

The Diplomatic Conference will negotiate and adopt a Treaty on the protection of layout-designs of integrated circuits. The negotiations will be based on a draft Treaty prepared by the International Bureau. The Treaty is intended to provide for national treatment and to establish certain standards in respect of the protection of layout-designs of integrated circuits.
Invitations: States members of WIPO or the Paris Union and, as observers, certain organizations.

UPOV Meetings

(Not all UPOV meetings are listed. Dates are subject to possible change.)

1988

October 17 (Geneva)

Consultative Committee (Thirty-eighth Session)

The Committee will prepare the twenty-second ordinary session of the Council.
Invitations: Member States of UPOV.

October 18 and 19 (Geneva)

Council (Twenty-second Ordinary Session)

The Council will examine the accounts of the 1986–87 biennium, the reports on the activities of UPOV in 1987 and the first part of 1988 and specify certain details of the work for 1989.
Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

Other Meetings in the Fields of Copyright and/or Neighboring Rights

Non-Governmental Organizations

1988

October 6 and 7 (Munich) — International Literary and Artistic Association (ALAI): Study Days

November 14 to 20 (Buenos Aires) — International Confederation of Societies of Authors and Composers (CISAC): Congress

1989

September 26 to 30 (Quebec) — International Literary and Artistic Association (ALAI): Congress