artisans of civilization's real progress, work, suffer and struggle, indeed also fall, as men fall at their desks as well as on the battlefields, in the agonizing fatigue of the unattained ideal.

This modest Article 6*bis* thus affirms that ideals are immanent conditions of progress, and that the rights of the intellectual hierarchies which effect that progress must be respected.

By thus completing and ennobling all our work, this recognition of moral rights dispels any doubts which might still remain regarding the results achieved by the Rome Conference, and enables us to assert that this Conference too marks a new phase of substantial importance in the international protection of works of the mind.

Rome, June 1, 1928.

E. Piola Caselli
Vice-Chairman and Rapporteur-General of the Conference

I should particularly like to express my warm thanks to Professor Gariel, Senior Deputy Director of the Berne Bureau and Secretary-General of the Conference, and also to Mr. Linant de Bellefonds, Royal Adviser to the Egyptian Government and a member of the Egyptian Delegation, who were kind enough to assist me in the final revision of the text of this report

Records of the Conference

Convened in Brussels June 5 to 26, 1948

General Report

on the Work of the Brussels Diplomatic Conference for the Revision of the Berne Convention

Presented by

Marcel Plaisant
Rapporteur-General
to the General Committee on June 25, 1948
and Approved in Plenary on June 26, 1948

Ladies and Gentlemen,

The importance of the Brussels Conference will have been the same as that of the Berlin and Rome Conferences. Thirty-five Union countries have participated in your deliberations. Bulgaria sent observers. The non-participating Union countries and participating non-Union countries were 18. And, finally, we benefited from the presence of Unesco.

You have held three meetings in plenary assembly, 27 General Committee meetings, 12 Drafting Committee meetings and, finally, for the organization of your work, the officers of the meeting, to which posts Belgian personalities were appointed, thought that it was more expedient to set up sub-committees to consider specific subjects: thus it was that the Applied Art Sub-Committee held three meetings under the chairmanship of Mr. Coppieters de Gibson, that the Sub-Committee on Broadcasting and Mechanical Instruments held eight meetings under the chairmanship of Mr. Bolla, and that the Sub-Committee on Photography and Cinematography held five meetings under the chairmanship of Mr. Julio Dantas.

Finally, it became clear in the course of the discussions that the complexity of the problems was so acute that the General Committee had to set up a further six Sub-Committees: for the coordination of texts, on Article 4(4), on Article 6*bis*, on Articles 11 and 11*ter*, on Article 14(3) and on Article 23. More than 80 supporting documents have been presented in the course of these discussions, and you are all witnesses to the sheer hard work that has been done by all representatives in the course of the General Committee or Special Sub-Committee meetings.

The text that is proposed to you for final voting will not be the subject of any observations on our part except to the limited extent that it has undergone amendment.

The title of the Convention includes the mention of the revision that has just taken place at Brussels, but also recalls the Berlin

revision of November 13, 1908, and the Rome revision of June 2, 1928.

The introductory enumeration of Heads of State that precedes the preamble to a diplomatic instrument has undergone one change: on a proposal by the honourable Delegate of Ireland, the titles of the Heads of State have been replaced by the names of the contracting countries of the Convention: the Conference had no difficulty in acceding to that request in the light of recent treaties, notably the treaty between Italy and the Allied and Associated Powers signed in Paris on February 10, 1947, which itself gives only the names of the Contracting States. We shall therefore conform to this recent custom and give only the names of the States concerned.

The principle of the Union is stated by Article 1. This is the Article that governs protection under the Convention; it has not been changed in any way. Indeed the exchange of views that took place concerning it seems to have highlighted even more compellingly the essential vocation of the Union, which is to ensure the protection of the rights of authors.

The program, which is the result of the enlightened and alert collaboration of the International Bureau of Berne and the Belgian Government—to which we shall not revert, according to the theory of excess praise being prejudicial to value—proposed the introduction of cinematographic works in its enumeration of the works eligible for protection. It met with favourable proposals from the United Kingdom and France.

At the very first meeting it was unanimously agreed that protection of equal rank should be accorded to cinematographic works.

At the request of France, which had already made the same appeal at Rome, the General Committee gave favourable consideration to the principle of incorporating photographic works, which thus have also reached the supreme rank of general protection.

In both cases the mention is completed with the clause 'and works produced by a process analogous to cinematography' or 'analogous to photography,' which has the virtue of encompassing all the possible derived forms of these two arts that the inventive mind may engender and which our present minds are powerless to anticipate.

You have not considered it necessary to specify that those works constitute intellectual creations because, as the Delegate of Hungary pointed out, if we are speaking of literary and artistic works, we are already using a term which means that we are talking about personal creation or about an intellectual creation within the sphere of letters and the arts.

Works of applied art have also been given promotion to the general enumeration in Article 2. That is the result of a protracted effort of mutual understanding; they already featured in the Berlin programme; at Rome the eloquence of Mr. Georges Maillard won them a considerable number of votes. They are henceforth assured of equal protection, as works of applied art have been written into the frontispiece of the Brussels Act of the Convention.

Nevertheless, paragraph (5) leaves it to national legislation to determine the scope of the laws concerning works of applied art and industrial designs, and also the conditions governing the protection of those works.

The first sentence of paragraph (2) of Article 2, on translations and alterations, has been amended on a matter of form. The meaning of the second sentence, on translations of official texts of a legislative, administrative and legal nature, is that such works of common interest do not, according to the wish of the United Kingdom and of a certain number of other countries, enjoy Convention protection. It is on the contrary a matter for the legislation of individual States to arrange for such distribution as will ensure their efficacy.

Collective works and anthologies, which were merely mentioned in the Rome text, were the subject of a program proposal. They now appear in Article 2(3). The discussion on them served to make it clear that protection was assured whenever the selection and arrangement of the contents of the works had the character of an intellectual creation. While newspapers, magazines and periodicals are not actually specified, as the United Kingdom Delegation had originally proposed, they are nevertheless included in so far as they constitute artistic creations by reason of the distribution and presentation of their subject matter.

These rights in the collective work could not be recognized without a mention of the rights

of the authors in each of the works that form part of the collection, and that was done on a suggestion by the Danish Delegation.

The new paragraph (1) of Article 2 of the Convention affords protection directly based on the Convention itself. In proposing this text the programme rightly indicated that many Convention requirements that established rights directly, without any intervention being necessary on the part of national legislation, already existed; thereupon, by giving only a purely indicative list, it sought to make it clear that the rights in Articles 4, 5, 6*bis*, 7, 8, 9, 10, 11*bis*, 12, 13, 14, 15 and 18 already made up the body of a sort of treaty code.

Of course in all States the implementation of a treaty requires first the ratification of a diplomatic instrument and its legislative promulgation. In a certain number of countries, even before ratification may take place, laws will have to be passed to adapt the provisions of ordinary national law to the Convention. That will be true of the United Kingdom, Sweden, Norway and many other countries that remain true to such constitutional safeguards. Yet those countries have no problem of contradiction with their basic provisions in accepting the now paragraph (4), which introduces direct protection. The Delegates of Norway, the United Kingdom, Canada and Sweden have therefore been able to give their agreement to this very comprehensive formula, which should not offend their principles in any way.

The fact remains that the text of this paragraph (4) bespeaks striking progress in treaty law in the space of just 20 years, and we are the artisans responsible for it. The nationals of all those countries which accept the principle of immediate application of a treaty will be wise to seek the direct protection of their interests in treaty law, which is to take its appointed place in domestic legislation and increase the latter's authority by virtue of the new provisions thereby introduced.

Even though we have always regarded the protection of the rights of authors proclaimed by the Convention as including successors in title, and even though Article 6*bis*, by mentioning rights that survive transfer, recognizes the transferees by implication, there was nevertheless a discussion on the express mention of the rights of successors in title.

As the United Kingdom Delegation had insisted in very emphatic terms on the inclusion of those rights somewhere in the Convention, they are now the subject of the second sentence of paragraph (4), which assumes general scope. The term 'successors in title' refers to all those who for one reason or another are invested with the author's rights, and the United Kingdom Delegation has thus secured the equivalent of the new Article 2*ter* which it was itself advocating.

It should be noted, however, that Article 6*bis* refers to the author alone, and that Article 14*bis*(1) considers persons or institutions who may be different front successors in title. The same comment applies to paragraph (2) of Article 6*bis*.

Article 2*bis*, on oral works, has not changed in relation to the Rome text with respect to its first two paragraphs, which make it a matter for national legislation to determine both the protection of political speeches and speeches delivered in the course of legal proceedings, and also the protection of lectures, addresses, sermons and other works of the same nature.

With the exception of political speeches, the reproduction of which should be free out of a supreme respect for liberty, the French Delegation would have liked to have all other oral works, namely lectures, addresses and sermons, placed under the aegis of the Convention.

The United Kingdom, Netherlands, Czechoslovak, Swiss, Portuguese, Danish, Finnish, Norwegian and Swedish Delegations felt unable to accept this.

Greece, Italy and Spain supported the French proposal, however.

It remains for us to hope that the seed of this concept, sown in such a propitious environment, will one day germinate and flourish.

The right reserved for the author alone to make a collection of his works mentioned in the preceding paragraphs is the subject of a third paragraph, in order to establish quite clearly that the right belongs not only to the political speaker and attorney, but also to the lecturer, the writer and the preacher.

The clarifications effected by the observations of the United Kingdom Delegation have

made it possible to state that this right of the author is in no way an obstacle to the traditional uses of the legal records that contain accounts of pleadings and deliberations.

Article 4, the purpose of which is to establish the basis of protection on which authors may rely for the assertion of their rights, caused some of the most arduous discussions of the Conference.

Paragraph (1) retains the form it had in the Berlin text, as confirmed at Rome. It establishes the principle that Union nationals may expect to enjoy two kinds of rights in the countries of the Union:

(i) the rights of nationals by virtue of the respect for acquired rights and the assimilation of Union members to nationals;
(ii) the special rights of Convention origin.

Paragraph (2) is also unchanged.

Paragraph (3) defines the country of origin of the work, which, as you know, underlies the whole concept of copyright. It does this by distinguishing between published works, with regard to the place of first publication, and works published simultaneously in countries granting different terms of protection, which calls for a comparison of terms and the adoption of the shorter, and finally works published in countries outside the Union.

In this respect a liberal provision was accepted that regarded as published simultaneously any work having appeared in two or more countries within 30 days of its first publication.

As you will remember, almost insurmountable difficulties were to arise in connection with paragraph (4), when a definition of published works had to be given.

Not wishing to evade discussion, the programme declared that there was no reason not to assimilate the recording of a work on apparatus intended for mechanical reproduction or on cinematographic film to publication by printing; it was for that reason that it proposed adding, after the words 'published works,' the words 'whatever may be the manner or form of publication: by printing, on a disc or on film.'

The United Kingdom Delegation could not accept either that formula or that conception, and it was unable to grasp the distinction between the two French terms *'publication'* and *'édition.'* In spite of the persuasive eloquence of Mr. Forns, the honorable Delegate of Spain, and the efforts of the French Delegation, no compromise seemed possible.

The Conference had to resort to the assistance of a special Sub-Committee to attempt to reconcile these opposing views. Mr. Forns pointed out very rightly that, in addition to printing, the multiplication of copies of discs deserved to be considered equivalent to publication.

There then remained the removal from the expression of the idea of those words that offended the clarity of understanding of our learned colleague from the British Delegation, Mr. Crewe.

It was in the process of following the ins and outs of the various reasonings that the honourable Belgian Delegate, Mr. Walckiers, and our French colleague, Mr. Puget, succeeded in working out a formula for accommodation by giving the published work the meaning of any work 'whatever may be the means of manufacture of the copies, and which have been made available in sufficient quantities to the public.'

This definition is sufficiently expletive to be understood by all: what is more, it is completed with the following negative affirmations: 'The performance of a dramatic, dramatico-musical or cinematographic work, of a musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.'

The country of origin, in the case of unpublished works, is in principle that to which the author belongs; that is what paragraph (5) provides. However, with works of architecture and works of graphic or three-dimensional art incorporated in a building—on a proposal by the Italian and Portuguese Delegations—practical experience has dictated to us a more equitable solution which consists in locating origin in the country in which the works have been built or incorporated in a building. Article 5, which introduces the equivalence of rights between nationals of Union countries who publish their works for the first time in another country of the Union and the nationals of the latter country, has been retained in the same wording as at Berlin and Rome.

Article 6, which sets out the restrictions susceptible of being imposed on the works of a non-Union author published for the first time in a country of the Union, has not been amended with respect to its general arrangement. However, the program did propose specifying the possibility available to the other countries of the Union of adopting the same penalties as could have been inflicted in the country of first publication. This provision adopted by the Conference is thus added to paragraph (2), so that the sanction is capable of spreading its effect throughout the territory of the Union, which is as it were prevailed upon as a whole in the interest of the broader protection of the rights of authors.

It is to the Italian Delegation, at Rome, that we owe the writing of Article 6*bis* into the Convention, which provides for the moral rights of the author in his work. The first wish expressed by France had at once received enthusiastic support from the Polish, Czechoslovak and Belgian Delegations, and the effect of that had been to generate a favourable atmosphere among all their counterparts.

The omens were equally good for the Brussels debate. In addition to the Delegations already mentioned, Austria, Hungary, Norway, Spain and Switzerland proposed amendments worthy of consideration.

After a general discussion, which was no lower in tone on the part of those who had reservations than on the part of those who proposed extension, the General Committee appointed a special Sub-Committee to reconcile the various viewpoints. It was presided over by Mr. Piloti with uncommon skill.

The Delegation of France was asking for moral rights to be inalienable, for them to allow the author to defend the integrity of his work to the extent of causing all infringements to cease in an appropriate manner. While it failed to secure the actual terms of its request, it did at least win acceptance for an extendable conception of moral rights, which in fact was in the minds of all the delegates on condition that it did not go beyond the generally accepted basic notion of copyright.

It is henceforth provided in paragraph (1) that the author retains throughout his lifetime, notwithstanding any transfer, the right to claim authorship of the work and to object to any distortion.

The author will have the right to bring action against any acts prejudicial to his honour or reputation, and the scale of the discussion revealed that the author has to be protected not only in his capacity as a writer, but also in the role that he plays on the literary stage: it is for that reason that you have added that he could object to any other derogatory action, that being understood to mean any action that would be liable to harm the person through distortion of his work.

Paragraph (2) establishes the continuation of moral rights after the author's death, at least until the expiry of the economic rights: this formula, without actually introducing a compulsory correlation between moral rights and economic rights, will enable national legislation to have a free hand in introducing, if it wishes, a longer or even perpetual duration of moral rights after death. Whereas the Rome text reserved to national legislation the right to determine the conditions for the exercise of moral rights in general, the Brussels text provides this faculty only for moral rights *post mortem*.

If there was to be some sort of public action to ensure respect for moral rights, it was natural for national legislation to be entrusted with specifying the persons or institutions eligible to bring such action, and also with laying down the conditions for the exercise of the right. Finally, paragraph (3) provides that the means of redress for safeguarding their rights are governed by the legislation of the country where protection is claimed.

Certain delegations, responding to an eminently respectable concern, seem to have feared that the concept of this personal right might be an obstacle, in the future, to accession to our Convention on the part of certain countries that have a conception of copyright more closely attached to the exploitation of the work. The care with which we have drafted the provision leads us to believe that such fears are groundless. The Delegation of Finland made a very apposite intervention in which it pointed out that, in the United States of America, the courts gave a degree of recognition to the author's moral right to protect the work against any mutilation, namely by the operation of the principle of equity.

While the destruction of the work has not been expressly made punishable, as the Delegate of Hungary requested by virtue of a logical deduction, it at least emerged from the subsequent discussion that the Conference was of a mind to protect the work efficaciously against all violations.

Thus the Brussels Conference, while it has increased copyright by surrounding it with new guarantees and by conferring more extensive scope on the operation of the law deriving from the author's moral rights, has succeeded in giving a testimony to the humanistic conception of the private person who is entitled to respect not only through the tribute paid by words, but also through the efficacy of conventions and laws.

The Brussels, Conference will be characterized by the new effort it has made toward, the unification of the normal term of protection. The uniform term of 50 years is considered a minimum, because at the same time Spain protects for 80 years, Brazil for 60 years *post mortem* and Portugal without any limitation in time.

In the face of the liberal declarations made by the United Kingdom concerning complete and unconditional protection, the International Bureau has been able to accept the removal of the new paragraph (3) from the programme, which it proposed in anticipation of the specific features of British legislation. For its part, the Swedish Government has renounced its term of less than 50 years after the author's death. The Swiss Delegation has declared that it is not opposed to the extension of the term of protection to 50 years.

The United Kingdom Delegation withdrew its amendment consisting in the insertion, in paragraph (1), of the words 'at least 50 years,' which seemed to have no further purpose inasmuch as reciprocity has not been abandoned with respect to the longest term of protection.

Paragraph (1) thus remains unchanged in relation to the Rome text.

Paragraph (2) was inspired by an Italian suggestion: it is the necessary consequence of the principle stated in paragraph (1), and requires a comparison of periods: where one or more countries of the Union grant a term longer than that provided in paragraph (1), the term is governed by the law of the country where protection is claimed, but may not exceed the term fixed in the country of origin of the work.

The new paragraph (3) sets the term of protection for cinematographic and photographic works, and also for works of applied art, which will be governed by the law of the country in which protection is claimed, provided that the term may not exceed that set in the country of origin of the work.

Anonymous or pseudonymous works will from now on enjoy protection set at 50 years following their publication. Two exceptional cases are contemplated, however: when the pseudonym leaves no doubt as to the author's identity, the term of protection is that of paragraph (1), namely 50 years following death; the same favorable solution has been adopted if the anonymous author discloses his identity.

Paragraph (5) accords to posthumous works a term of protection in favour of the heirs and other successors in title of the author that ends 50 years after the author's death. In this way the terms have been standardized for all categories of works.

The Conference has had the satisfaction of being able to settle on the most concise formula for the term of copyright belonging jointly to the co-authors of a work of joint authorship, which is calculated according to the date of the death of the last surviving co-author. Paragraphs (2) and (3) disappear.

Article 8, on the right of translation, has undergone little apart from drafting amendments. The Conference has been pleased to be able to lighten the form of this Article by establishing in favour of the author the exclusive right of making or authorizing the translation of his works.

The Convention does not contain a specific set of provisions governing the right of reproduction of authors in relation to the publication of their works by the daily and periodical press, and the French Delegation would gladly have filled the gap with its proposal for a complete set of provisions affording the most extensive protection and specifying the content of the rights of journalists: that is why it proposed an explicit text for Article 9.

However, a movement developed between the Delegations of the Scandinavian countries and those of Poland, the Netherlands and

Czechoslovakia that was against any restriction of the freedom of information, and they declared themselves opposed to all change.

Consequently we have had to content ourselves with the Berlin text, which was already substantially improved at Rome by the introduction of the reserved reproduction concept and by the requirement of a clear indication of source.

By retaining the former text, a number of delegations wanted to underline the fact that Convention protection does not extend to news of the day or to miscellaneous information having the character of mere items of news. Speaking on behalf of the Belgian, Netherlands, Luxembourg and Nordic Delegations, Mr. Walckiers even suggested that the Conference insert a note in the General Report. Pursuant to this suggestion, we therefore acknowledge that the recording of sounds or images carried out in the course of a photographic, cinematographic or radio news report at a public or patriotic ceremony is outside the purview of the Convention.

Such records are exceptional and fragmentary, and as such they will be tolerated. This text certainly does not correspond to the ideal that we had of the genuine literary work published in the press, or of the respect due to it as such, but, as the faithful interpreters of the sentiments expressed by the majority of the Conference, we are bound to agree that the growing importance acquired by the freedom of information, and the very authority of the press, do not allow us to go any further.

The question of borrowings from known works has always been a source of abuses; moreover it is very difficult to bridle the right of quotation which, without actually affording evidence of culture, remains a habit of writers who in addition are cultured persons.

The French Delegation proposed an explicit text which provided for a sort of lawful borrowing licence. In order to avoid disturbing established practices, it has had to show more moderation and content itself with some substantial drafting amendments.

Thus short quotations from newspaper articles and periodicals are lawful.

The right to take excerpts from literary and artistic works for teaching or for chrestomathies is a matter for legislation in the countries of the Union.

The actual permission given by the second paragraph is broader than the mere tolerance in the first; it is justified by the purpose of the borrowing, which is for an educational or scientific work or a chrestomathy.

Finally, quotations are always accompanied by an acknowledgement of the source and by the name of the author. The wording of Article 10 adopted at Brussels will reconcile the rights of authors with the needs of a public eager to draw on the treasures of human knowledge.

The purpose of the new Article 10*bis* is to extend the right to make borrowings and short quotations to cover recording and reproduction in the case of reporting current events by means of photography or cinematography or by broadcasting. Here is another concession granted to the freedom of information. We are convinced that we are interpreting the general sentiment of the Conference, after the observations of the Delegates of Spain and the Netherlands, when we say that only short fragments can be involved, the borrowing of which seems essential to the accurate reporting of current events.

The right of performance is written into Article 11. Under the earlier wording adopted at Berlin and confirmed at Rome, the protection of the right of performance admittedly could not be disputed in all good faith. However, this essential form of copyright needed to be formally established in the Convention and given the character of an exclusive right to authorize public performance. That was the reasoning worked out by the program in support of the new wording, divided into specific propositions, which was eventually adopted by the Conference.

We are bound to draw the following conclusions from the debate, and in particular from the last discussion inspired by the report of the Sub-Committee: the right of performance has not been substantively altered in either character or extent. Its form is now beyond discussion, and it is protected against tendentious interpretation. It takes the form of an exclusive right in favour of the author to authorize public performance and transmission. However, at the end of paragraph (1), the application of the provisions of Articles 11*bis* and 13 is reserved.

Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the Delegate of Hungary have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to Articles 11*bis*, 11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principle of the right.

Paragraph (2) establishes the equivalence of rights with respect to the translation of works.

Paragraph (3) reproduces the earlier text. In the course of the discussions there was talk of codification of the right of performance in connection with Article 11: the term is perhaps somewhat pretentious, but the right of performance henceforth features in a decisive entry in the text of the Convention.

The Rome Conference takes the credit for having created, in Article 11*bis*, the author's exclusive right of authorizing the communication of his work by broadcasting. By laying down the principle in an elliptical fashion, the Convention wording was appropriate for the state of an invention whose development was only just starting at the time.

Taking due account of the prodigious development of radio, the program proposed a new article that broke down the right according to the latest forms of its exploitation: thus provision had to be made for broadcasting proper, rebroadcasting as distinct from relaying, deferred broadcasting after recording, communication by loudspeaker and finally television, with an attempt to encompass the improvements or extensions that could yet be made to the latter medium.

Chairman Plinio Bolla is to be commended for having conducted with singular skill the work of a Sub-Committee that had to clarify the most complex problems submitted to you for consideration, and for having drawn up a report which served as a discussion basis for the General Committee.

The French proposal, which speaks of the exclusive right of authors to authorize the broadcasting of their works or their communication to the public by any other means of diffusing signs, sounds or images, was adopted at the outset as being the most far-sighted in an area in which technology was liable to produce surprises. It now constitutes item (i) of paragraph (1).

The author also has rights in any communication to the public made by a body other than the original one. Those are in fact rights in an extension of broadcasting for which at least two processes are known today: relaying and wire distribution, as Mgr. Picard judiciously remarked in the name of the Vatican: these rights are written into item (ii) of paragraph (1).

Finally the author is invested with a third right in the communication to the public by loudspeaker or any other similar instrument transmitting, by signs, sounds or images, the broadcast of the work. This right is written into item (iii) of paragraph (1). It is a very real right, but also a virtual right if one considers the infinite capacity of inventive genius. As was so eloquently highlighted by Mr. Forns, Delegate of Spain, and also as our President made clear, while loudspeakers are mentioned and television is implied at the end of paragraph (1), they are nevertheless capable of giving rise to different rights. Whenever an instrument is used, and thereby a transmission made, there is a case for authorization. While paying tribute to the warmth of the words of the Spanish speaker, it is only fair to mention that, after having contended with the reservations of Brazil, France, Italy and Portugal, he agreed to abstain in order to make a unanimous vote possible.

Pursuant to an observation made by Mr. Pilotti, President of the International Institute for the Unification of Private Law, and according to sound legal interpretation, paragraph (1), with its three separate items, is inseparable from paragraph (2), which makes it a matter for national legislation to determine the conditions under which the rights mentioned in paragraph (1) may be exercised. Those conditions may, as the Nordic and Hungarian Delegations observed, relate to free-of-charge exceptions made for religious, patriotic or cultural purposes. These possible conditions are placed within a fairly broad framework: they may not in any circumstances be prejudicial to the moral rights of the author or to his right to

obtain just remuneration which, in the absence of agreement, is fixed by the competent authority. Interpreting the impassioned debate that took place on this subject within the Committee, we venture to say, in general terms, that each country may take whatever action it considers appropriate for the avoidance of all possible abuses, as after all the role of the State is to arbitrate between excesses, from whatever quarter.

The disagreements seem to have reached their most extreme point when it came to determining the relative legal rights of authors and exploiting agencies with respect to programmes received and recorded in one stage but delayed or deferred for broadcasting within an unspecified period. There the rights of reproduction and performance overlap and merge. There is moreover no way of disregarding the inexorable technical demands which are acquiring ever-greater importance, and it is difficult to draw the line between the recording of a deferred performance that is perishable through use and the durable recording backed by the solid potential of the law. It was not without difficulty that the Conference managed to reach unanimity on a text for paragraph (3), the first version of which was taken from a Benelux proposal: 'In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast.'

The second and third sentences of paragraph (3) make it a matter for national legislation to provide for ephemeral recordings intended for subsequent performance:

'It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.'

National legislation will therefore have the option of declaring that permission to broadcast does or does not imply permission to record for the purpose of broadcasting, provided that the recording is made by the broadcasting organization itself, by means of its own facilities and for its own purposes, and that the recording is of ephemeral character.

It will be for national legislation to define what recordings are ephemeral and to determine their legal regime in a general way, including for instance the possibility of their preservation in official archives owing to their exceptional documentary character.

If national legislation does not make use of the faculty conferred on it by the last sentence of Article 11*bis*(3), the question whether or not permission to broadcast implies permission to record and, assuming the former, whether or not it implies it only for ephemeral recordings or also for others, is determined by the contract concluded between the author and the broadcasting organization.

If interpretation of the contract fails to determine the agreement of the parties on that point, the presumption of the first sentence of Article 11*bis*(3) is applicable: authorization to broadcast does not imply authorization to record, even if the recording is only ephemeral.

If we could write subtitles for these two sentences of paragraph (3), the importance of which you will appreciate, we would say that the first comes under the heading of contractual freedom and the second under that of controlled legislative freedom. In that form Article 11*bis* remains the compromise reached at the end of a long debate in which all interests, whatever they were, were explained and acknowledged. It is a compromise achieved notably thanks to the conciliatory spirit of the Delegation of Monaco, whose interventions were decisive.

Article 11*ter*, introducing the right of public recitation, has been adopted as proposed in the programme. Recitation should be taken to mean the reading or reciting of a literary work that does not take the form of a dramatic performance.

Indirect appropriations such as adaptations, arrangements and alterations did enjoy protection, in favour of the original author, in the text of Article 12 as adopted at Berlin and confirmed at Rome, but it was not clearly expressed. The programme sought to remedy that defect by proposing a text that established the right of the

original author by reference to Article 2(2), so that the relative areas of the first creator and of the adapter might be exactly defined.

In the course of the discussion, alter observations by the Spanish, Norwegian and United Kingdom Delegations had been taken into account, it appeared that the more concise text proposed by France had won the support of most of the delegations. Our colleague Marcel Boutet summarized its structure in the following terms: exclusive authorization given by the author to carry out the alteration of his work; non-exclusive right to inspect the alteration, as obviously the right belongs also to the maker of the alteration, but nevertheless the original creator's right of inspection exists alongside the right of the maker of the alteration.

The programme had hoped to lay down the whole set of rights belonging to the authors of musical works in relation to recording and to the new forms engendered by that industry. The French Delegation had supported and strengthened that hope: a distinction had to be made between recording, the distribution of mechanical reproduction apparatus and the use of that apparatus, in broadcasting or any other performance.

The Article adopted is more modest in form, but nevertheless contains substantial guarantees.

According to paragraph (1) of the new Article 13, the author enjoys the exclusive right of authorizing recording by instruments for mechanical reproduction, instead of 'adaptation,' which was imprecise and liable to ambiguous interpretations. Under item (ii) of paragraph (1), he enjoys the same right in respect of the public performance, by means of such instruments, of works thus recorded.

The distribution of discs or apparatus was not taken into consideration by the Conference, but it did entrust its Rapporteur-General with mentioning that the author could specify by contract that the distribution of apparatus or recorded discs was liable to generate liability to payment of a royalty or compliance with a formality. This is an attribute of copyright that should be highlighted here as a source of revenue specific to the author.

Paragraph (2), which has to do with the reservations concerning the application of the rights deriving from national legislation, reproduces the former paragraph but with the addition of an important amendment, which was written in after a protracted debate between opposing views. It says that the reservations 'shall not, in any circumstances, be prejudicial to the author's right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.' Your Rapporteur considers that a text of this kind is incompatible with the system of compulsory licences, and that in any event it strengthens the author's position considerably vis-à-vis publishers of discs in any equitable negotiation of their relative rights.

Considering the conjectures to which the program and the proposals of delegations gave rise, we might have thought that Article 14 would be accompanied by a detailed set of regulatory provisions, and that it would make a discrimination between films. The differences of opinion that emerged in the course of the discussions obliged us to content ourselves with a more sober, but no less valuable text.

True to the analytical method, paragraph (1) clearly sets out two rights in favour of the author:

(i) The cinematographic adaptation and reproduction of works, with as a rider the distribution of the works reproduced, which is liable to give rise to a specific right.
(ii) The public performance of the works thus adapted or reproduced.

Paragraph (2) is worded as follows: 'Without prejudice to the rights of the author of the work reproduced or adapted, a cinematographic work shall be protected as an original work.' This text has to be interpreted to mean that there is no reason to make any discrimination in the protection of films, and that the Convention abstained from proposing a criterion concerning the nature of cinematographic production. The very conception of a work entails an intellectual effort.

The Delegate of the United Kingdom asked for his statement, which was supported by France, to be placed on record, to the effect that the time had come, in view of the progress made by the film industry, to deal with all cinematographic productions on an equal footing, without any discrimination regarding either the nature or the duration of protection.

The Sub-Committee endorsed the French proposal for a new paragraph (3) worded as follows: 'The adaptation into any other artistic form of cinematographic production derived from literary, scientific or artistic works shall remain subject to the authorization of the author of the original work.'

It also adopted paragraph (4) of the program text, the effect of which was to rule out the reservations and conditions referred to in Article 13(2) in respect of cinematographic adaptations. However, it expressed the wish that, in the interest of information, the subject matter of newsreels might be given a special mention favouring the application of national laws in the General Report of the Conference.

With regard to paragraph (5), the Sub-Committee decided in favour of retaining the text at present appearing under (4), at the same time indicating the interest of preserving the correlation between Article 14(5) and Article 11*bis*(1) of the program.

This brief entry instead of an excessively long commentary cannot of course give any idea of the protracted discussions that took place in the Sub-Committee, so masterfully presided over by our esteemed colleague Mr. Dantas, but is not the conciseness of the text in itself a tribute paid to the potency of the law that it expresses?

The *droit de suite* is a conditional legacy left by the Rome Conference, which had subscribed to the principle advocated so eloquently by Jules Destrée in the form of Rome Resolution III.

This illustrates the value of the resolutions of our Conferences: they are in the nature of incubators for ideas that are liable to mature under the beneficial influence of this first stage of exposition and consideration. Since that time, the *droit de suite* has found its way into a number of national laws more or less inspired by the Belgian and French legislation, which dates back to 1920. We have thus taken cognizance of the Czechoslovak, Polish, Italian and Uruguayan laws, which are analyzed in the programme's explanatory memorandum. The delegates to this Conference have been kind enough to give a favorable reception to the work of our colleague Raymond Weiss, one of the first advocates of the *droit de suite*, and also to the remarkable work by Mr. Duchemin, who has condensed the lessons of experience and general documentation into a vast tableau which cannot be improved upon. The discussions have revealed some very judicious reservations and observations by the honourable United Kingdom Delegate, Mr. Crewe: far from putting up opposition on principle, he has perhaps presented criticism that is worthy of consideration. The same is true of Sweden. The Delegates of Portugal, Czechoslovakia, Italy, Belgium and Hungary gave their support, which made it possible to draw up a text that states the principle in its paragraph (1), and reserves the area of national legislation in paragraphs (2) and (3), and also the conditions of reciprocity.

The careful drafting of Article 14*bis*, which asserts, in favor of the author or the persons or institutions that succeed him, an inalienable right to an interest in any sale of the work subsequent to its first disposal, thus strikes us as having rather the function of a magnet: the future will show whether in fact it has exerted its attractive force on national legislation.

The Conference was willing to adopt almost without discussion the proposal made by France for Article 15, asserting that the protection of the author's right to the recognition of his name is applicable even if that name is a pseudonym, provided that it leaves no doubt as to his identity.

Paragraph (2) acknowledges that the publisher may be regarded as representing the author in respect of anonymous works and works of unknown pseudonymous authors.

The matters dealt with in Articles 16, 17 and 18 of the Convention did not give rise to any comment.

The Rome texts are thus adopted without change.

Relations Between the Convention and National Legislation

Article 19 is one of the most important in terms of the general theory of the Convention. It has been mentioned that a doubt had subsisted at the Berlin Conference regarding the extent of the right conferred by Article 19. As Louis Renault, our distinguished predecessor, had said that the Union Convention constituted a minimum of protection, that implied that

authors were entiled to claim the benefits of national legislation in various countries, even if that legislation was more favourable than the text of the Convention; and that indeed is still our way of thinking, based on the assumption that the national law in question would be at a more advanced stage of development than the text of the Convention.

Authors will have the benefit of national laws, but, when the Berlin texts were drafted, instead of referring to national laws purely and simply, they read 'by legislation in a country of the Union in favour of foreigners in general.' It could be believed that authors were only allowed to claim, under the domestic law of a given country, those provisions concerning foreigners that were more favourable than the text of the Convention. Clearly this would be at variance with Article 4 of the Convention: in that Article, as you know, all foreigners are eligible for the enjoyment of rights in all the countries party to the Convention. In order to align Article 19, in its final form, with Article 4, it has to be said that the minimum of protection consists in the author being allowed to claim, in every country of the Union, not only all rights under the Convention, but also the advantages of domestic laws in general, whatever those laws may be, and whether they apply to nationals or to foreigners.

Thus, by means of the deletion that you are going to make in Article 19, you will of course be according to all authors the benefits of Convention law, which is the very, basis of this Union, and at the same time you will be recognizing in their favour the internal applicability of all domestic laws in so far as they are more advantageous than the provisions of the Convention. This is subject to the principles that will constitute the very substance of the Convention. In this way we achieve the harmonization of the whole structure of Article 19 with the principle, stated in Article 4, of the entitlement of foreigners to equivalent rights.

Reservation of Special Agreements; Status of the Bureau, Language of the Bureau and Responsibilities of the Bureau; Unanimity Clause

Articles 20, which reserves the right to enter into special agreements, 21, which gives the Bureau of the International Union, whose official language is French, its vocation, and 22, which specifies its responsibilities, have not undergone any change. The Berlin text as confirmed at Rome is once again retained.

Article 23, which governs the expenses of the International Bureau, gave rise to a discussion whose terms were to be expected on account of the circular already distributed by the Bureau, which received a telling response from Delegations.

As the United Kingdom Delegate has not insisted on the outlined principle of the equal distribution of expenses, we shall therefore be provisionally retaining the system of proportional distribution.

The expenses of the Bureau have amounted to 120,000 gold francs per annum.

I take this opportunity to say that the Berne Bureau has always been extremely frugal in its use of public funds; it seems to have lived up to the vocation of such an institution, and has never failed to show impartiality; its has always concerned itself with informing all contracting countries as much and as amply as possible. We express the wish that it may remain true to these salutary rules, and we ask the Swiss Government to take such action as may be necessary for the Bureau and its staff to be treated, notably with respect to their status and employment conditions, according to standards comparable to those applied to the other Unions; the Swiss Delegation has declared that its Government is prepared to accede to this wish, on condition that States members of the Paris Union but not of the Berne Union also declare their agreement, and that the taxation status of Swiss officials of the Bureau remains reserved.

The program proposed replacing the unanimity rule for changes to be made to the Convention with a 5/6 majority rule, in the light of the example set by the Pan-American Conference of Washington held in June 1946, which seems to have been obsessed with the risk of the veto right being exercised. Czechoslovakia, Poland and Hungary declared their loyalty to the unanimity principle. The Hungarian Delegation gave as its reason the fact that, for those States, relegation to a minority position could affect their very adherence to the Convention, and that therefore the unanimity principle was a guarantee against

its disintegration. The Bureau withdrew its proposal.

In addition to the traditional arguments that may be put forward in favour of the unanimity rule, it should be mentioned here that the Union Convention is more of a legislative treaty than a contractual treaty.

Moreover, following the adoption of Article 2(4), there is a possibility for all countries of deriving direct copyright protection from the Convention. We are experiencing the formation of a body of treaty law equivalent to domestic law, which will be acquiring growing importance. Clearly unanimity is called for, over and above any other reasons, between those States that accept this new source of legislation.

Rights of Accession

Article 25 remains unchanged in relation to the Berlin text as confirmed at Rome.

Conditions Governing Territories Under Trusteeship and Special Regimes

Article 26, which gives States the possibility of informing the Swiss Government in writing of the application of the Convention to colonies, protectorates and territories under special regimes, naturally called for amendments as a result of the observations of the Delegate of the United Kingdom.

Those amendments have been incorporated, due account having been taken of the requests made and of the style used in the United Nations Charter in 1945.

Substitution of the Brussels Act for the Berne Convention

Article 27, which is concerned with a matter of form, is an abridgement in relation to the Rome text.

It establishes the replacement of the original Berne Convention and the successive Acts that revised it by the Brussels Act in relations among those countries that have ratified the latter Act.

The previous Acts will remain in force among countries that do not ratify the present Act.

Clause Concerning International Jurisdiction; Languages of the Convention

The new Article 27*bis* introduces a clause concerning international jurisdiction for the interpretation or application of the Convention in the event of a dispute arising between two or more countries.

This text is the end result of a long doctrinal campaign, marked at various stages by proposals of the same kind, submitted to the 1925 Conference of The Hague on industrial property protection, and to the 1928 Rome Conference. Those proposals came from the International Institute of Intellectual Cooperation, and also from the Norwegian Delegation, and they were already supported by Mr. Raymond Weiss, who became the zealous advocate of this extension of international justice in the field of the Unions concerned. The proposal was repeated at the 1934 London Conference.

The present proposal is due to the initiative of the Swedish Delegation, which kindly invited the French Delegation to make a combined effort with it. A number of other delegations gave it enthusiastic support.

The competence of the International Court of Justice and its procedure, governed by the Statute annexed to the United Nations Charter of June 26, 1945, is stated without being imposed. Contracting countries still have the option of arbitration or any other form of settlement.

The *res judicata* principle will continue to be respected.

The dispute will be circumscribed, and of course may only arise between such States as are acceptable to the International Court of Justice.

At the request of the Delegation of the Netherlands, expressed by its representative Mr. Bodenhausen, the International Bureau will be informed of the dispute, and will bring it to the notice of the other countries of the Union; this provision is in conformity with Articles 62 and 63 of the Statute of the International Court of Justice, which provides for spontaneous or instigated intervention. On a highly useful question that was raised by the honorable United Kingdom Delegate, Mr. Crewe, it was explained that the Court's decision could never embody any condemnation, but that it would confine itself to stating the law, whereupon, according to custom, it would be for States to draw the appropriate consequences through diplomatic or legislative channels, as they saw fit.

A new Article 31 has been inserted in the Convention, worded as follows:

'The official Acts of the Conferences shall be established in French. An equivalent text shall

be established in English. In case of differences of opinion on the interpretation of the Acts, the French text shall always prevail. Any country or group of countries of the Union shall be entitled to have established by the International Bureau an authoritative text of the said Acts in the language of its choice, and by agreement with the Bureau. These texts shall be published in the Acts of the Conferences, and next to the French and English texts.'

The United Kingdom Delegation had three times asked, with the most pressing insistence, for the text of the Convention to be drawn up in French and in English, both texts being equally authentic. Its request was strongly supported by all the Dominions represented at the Conference. France could have asserted its 62 years of State possession and invoked the actual text of the Berne Convention, which had always been written in French as a single language throughout three revision conferences, in support of refusal to accept this substantive change which required unanimity.

In the interest of good international relations, it has chosen not to adopt an inflexible attitude, even though it regrets the loss of the single text, which was an unambiguous guarantee of general understanding for countries that speak all other languages and refer to the French language. Conscious of acting in the general interest, the French Delegation consented to the present solution only on condition that the French text continued to be authentic.

However, once the Conference had departed from the principle of the single language, it was only fair to provide the possibility of obtaining authorized texts of the Acts in other languages, some of which are still the most widely spoken and the richest in culture of the universe.

These texts are published in the records of the Conference, as annexes to the French and English texts, the term 'authorized' meaning, for those texts other than the English and French ones, that they have authentic character in the countries to which they apply.

Conclusion

We do not think that it would be fair to compare the results achieved by the Brussels Conference with the amendments introduced by the Rome Conference. The old French saying, *'Comparaison n'est pas raison*', has long been repeated: the times are not the same; morality has evolved, and indeed the maintenance of certain permanent positions is sometimes more commendable than certain advances.

However, confining ourselves to the visible record of amendments to the text of the Convention, we would point out the following:

The introduction of cinematographic and photographic works in Article 2(1); the promotion of works of applied art. These new forms of creation now grace the threshold of the Convention.

The rights in collections of works have been specified.

The mention of the successors in title of the author establishes their status.

The concept of publication is clarified in Article 4, as are the relations between publication, making available to the public and recording and between the right of reproduction and the right of performance, and the fact of their coming into being at the same time.

Direct protection has been written into the Convention, with all the prospects that it offers for the development of the general provisions of treaty law.

The scope and exercise of moral rights have been broadened.

The 50-year term is tending to establish itself more widely through the vicissitudes of comparison.

Posthumous works and anonymous and pseudonymous works are provided for.

The right of quotation and borrowing is given a cautious degree of licence. The new Article 10*bis* takes account of the needs of the press and news reporting.

The right of performance is stated in unambiguous terms.

The right of public recitation takes its place in Article 11*ter*.

Article 11*bis* has been completely reworked, as has Article 13: the relations of authors and composers with the broadcasting and mechanical reproduction industries are laid down in equitable terms.

The status of cinematography is specified.

The *droit de suite* makes its first appearance in the Convention in Article 14*bis*.

The principle of the minimum of protection is established, and allowance made in Article 19 for the possibility of broadening it.

Finally, the Convention now has a clause concerning international jurisdiction.

On closing his report after the 1908 Berlin Conference, my eminent predecessor Louis Renault declared himself pleased, on behalf of his colleagues, to have remained true to the spirit of his predecessors.

I shall certainly not boast of having done the same thing, and indeed, in absolute terms, it is perhaps not desirable to do so.

In international law more than in any other law, it is important to reconcile the inner voice of tradition with the urge for movement, but, when it is a question of writing a law that suits such a variety of peoples, whose mentalities are all equally respectable, one has above all to draw inspiration from the lessons of life.

For 20 years we have been witnessing such a prodigious development in inventions and the means of communicating thought that we are continually dismayed by the revolutionary achievements of science, and the unforeseeable forms that it is capable of imposing on intellectual exchanges.

At the same time our world, and most especially Europe, has undergone such profound political and social transformations as a result of this long war and its aftermath that we are powerless to imagine its configuration at any one time in a society caught up in a spate of development.

Our task was to ensure the protection of copyright at a time when books have been left far behind by electrical and mechanical means of exploitation and will be by still others that are germinating in future inventions.

This Conference has been above all the Conference of broadcasting, discs, cinema and artificial or natural screens.

Your great work is to have reconciled copyright, a spiritual concept, to these at once so powerful and so changeable material realities.

At another level you have had to make allowance for the arrival of new forces on the world stage.

The literary salons are closed; they have been closed by radio, by the screen, one might say by the operation of all these waves and their mysterious reflections; it is no longer just amateurs but whole peoples, avid crowds who want to drink at the fount of knowledge and are demanding a free place at the banquet. To this we should add that, in all States, communities are organizing themselves and information, teaching and even culture are starting to take on national—I hesitate to use the barbaric word 'nationalized'—forms.

On a number of occasions you have been obliged to take these modern needs into consideration. It is to your credit that you have both understood them and kept them in proportion: it is in this respect, I think, that the Conference will be regarded by posterity as a success.

And yet, while acceding generously to these contemporary aspirations, you have at the same time remained the heirs to a tradition.

You have sensed that copyright is one of the manifestations of human rights and, having emerged from the turmoil, you have still wanted to ensure its protection through all its metamorphoses.

Those of us who have remained true to individualistic philosophy may regret these transformations, which are liable to alter the communication and interchange of ideas between civilized peoples.

Yet we would not be genuine humanists if, in spite of these obstacles and apprehensions, we were not concerned above all with safeguarding the dignity of mankind and ensuring that the most precious product of his intelligence shines forth to be reflected in the mirror of other men.

I should like to think that you have succeeded in doing this by virtue of that admirable feeling of international understanding that has so often enabled this Conference to rise above its own destiny and for which your latest servant has to give you credit, being as it is your supreme testimony to men, who come and go, and to ideas, which are immortal.

Marcel Plaisant
Member of the Institute

Reports by the Sub-Committees

Preliminary note: We are publishing first the reports by the three Sub-Committees set up at

the beginning of the Conference and are observing in this regard the chronological order of their creation. Then come the reports by the Sub-Committees set up during the debates in the order of the articles of the Convention that they were asked to consider.

For the composition of the Sub-Committees, see pp. 88–89 above.

Report by the Sub-committee on Photography and Cinematography

(June 14, 1948)

1. Photography

1. Principle of Protection

The Sub-Committee decided unanimously in favour of the principle of protecting photographic works.

Referring to the decision taken in this regard by the General Committee, it notes that 'photographic works and works produced by a process analogous to photography' should be inserted in the list in Article 2(1). This reference would be placed after 'books, pamphlets and other writings.'

The Sub-Committee discussed whether it should be specified in the text that only photographic works having the character of personal creations were protected.

There was doubt as to the appropriateness of such a step, and no agreement could be reached. It was not that the idea thus expressed was incorrect, but it seemed that a criterion which applied to all the productions governed by the Convention should not be mentioned in connection with a particular category of works such as photographic works.

That being the case, the question arose as to whether it was not advisable to define a literary or artistic work in explicit terms, by means of a general provision. In the face of opposition from the *United Kingdom* Delegate, who observed that such a provision could lead to discrimination between works according to their merit, which would be contrary to the spirit of the Convention, the Sub-Committee preferred to let the General Committee decide on this point.

The decision to mention photographic works in Article 2(1) means deleting the present Article 3.

This was the conclusion eventually reached by the Sub-Committee, subject to observations presented notably by the *Czechoslovak* and *Italian* Delegates to the effect that national legislation should be left to fix the conditions under which news photographs would be protected.

2. Term of Protection

Faced with the impossibility of achieving agreement on a uniform duration—even a minimum one—the Sub-Committee is proposing that the present text of Article 7(3) be maintained in so far as it concerns photographic works or those obtained by a process analogous to photography.

II. Cinematography

1. Principle of Protection

The Sub-Committee unanimously adopted the principle of protecting cinematographic works.

It refers, in this respect, to the General Committee's decision to include cinematographic works in the list in Article 2(1).

The principle of protection being thus established, the Sub-Committee wondered whether a distinction should be made between cinematographic works or whether, on the contrary, the words placed between brackets in the text of the programme, 'with the exception of those governed by Article 14(3),' should be deleted.

From the discussion it emerged that agreement had been reached on the deletion of the words although no formal decision had been taken.

However, having been taken up again when Article 14(3) was considered, the question remained open, following the objections expressed by the *Czechoslovak* and *Italian* Delegations, which wanted to make the protection system for news films subject to national legislation.

2. Scope of Protection

This is the subject matter of Article 14.

As regards the first paragraph, the Sub-Committee adopted the text proposed in the programme subject to the following amendment:

(1) 'the cinematographic adaptation of these works *and* the distribution of the works thus adapted';

(2) 'the public presentation and performance of the works thus adapted.'

In view of the impossibility of defining the author of a cinematographic work and the need to protect the original work, the Sub-Committee is proposing the replacement of paragraph (2) of the programme text by paragraph (3) of the present text.

As regards the programme's paragraph (3), the Sub-Committee was confronted with four solutions, but no agreement was reached on any of them:

— the first, presented by the *French* Delegation, was purely and simply to delete the programme's paragraph (3);
— the second, from the *Czechoslovak* Delegation, also entailed deletion of the paragraph subject to the artistic or literary character of the protected work being specified in one of the Convention's initial articles;
— the third, presented subsidiarily by the same Delegation and supported by the *Italian* Delegation, left it to domestic legislation to determine the protection of cinematographic *productions* which do not have the character of a cinematographic *work*;
— finally, the fourth was similar to the text of the programme's paragraph (3), but proposed improving its wording either by replacing *in initio* the word 'work' by the word 'production' or by adopting a new text worded as follows: 'if the cinematographic production consists only of a series of photographs not presenting the character of a cinematographic work, it shall enjoy the protection afforded to photographic works.'

The *United Kingdom* Delegate requested formal acknowledgement of his declaration, supported by *France*, that the time had come—in view of the film industry's progress—to treat all cinematographic productions on an equal footing, without establishing any discrimination whatsoever, as regards both the nature and the term of protection.

The Sub-Committee subscribed to the *French* proposal concerning a new paragraph (3) worded as follows: 'The adaptation to any other artistic form of cinematographic productions made from literary, scientific or artistic works shall remain subject to the authorization of the author of the original work.'

It also adopted paragraph (4) of the programme text to exclude, in respect of cinematographic productions, the reservations and conditions under Article 13(2). However, it expressed the wish that, for information purposes, a special reference be made to news films in the Conference's General Report in favour of the application of national laws.[1]

With regard to paragraph (5), the Sub-Committee decided in favour of maintaining the present text, appearing under No. 4, while indicating the interest there was in maintaining concordance between Article 14(5) and Article 11*bis*(1) of the programme.

The new paragraph (6) proposed by *Italy* was rejected.

However, the Sub-Committee expressed the desire that the *Italian* proposal be considered within the context of Article 6*bis*.

Another proposal from *Italy* concerning a new paragraph (7) as well as a *United Kingdom* proposal relating to it, presented in connection with paragraph (2) and concerning the right of the owner of the original negative, did not win unanimous endorsement from the Sub-Committee, which did nevertheless express the opinion that these proposals could usefully be discussed in connection with the examination of Article 15.

3. Term of Protection

As it was unable to decide unanimously in favour of a uniform term of protection, the Sub-Committee agreed to the *United Kingdom* proposal in so far as it concerned the establishment of the period's starting point, i.e. the date of completion of the original negative, the duration itself being fixed by national law subject to the principle of the comparison of the periods.

Consequently, the Sub-Committee adopted the programme text in so far as it concerned cinematographic works, but completed it with a provision which the *Czechoslovak* Delegation

[1] See General Report p.101.

expressed in the following terms: 'the period of protection shall begin to run from the date of completion of the original negative of the film.'

Report by the Sub-committee on Broadcasting and Mechanical Instruments

A. Report by the Chairman of the Sub-committee On Broadcasting and Mechanical Instruments (June 13, 1948)

The Sub-Committee held its meetings on June 7, 8, 9, 10, 11, 12 and 14, 1948. It dealt with Articles 11*bis*, 13 and 13*bis* of the program.

Article 11bis

Broadcasting Right

The Sub-Committee unanimously considered that the exclusive right granted to authors by the Rome Conference 'of authorizing the communication of their works to the public by broadcasting' should remain inviolable.

However it considered, as did the programme, that it was preferable to refer more concisely to the right of authorizing broadcasting in order to indicate clearly that only the emission was determinative, to the exclusion of reception and listening or viewing.

Whereas the programme also includes television in the term 'broadcasting' (argument Article 11*bis*(1)(iii) and Article 11*bis*(3) concerning the transmission and fixation of images), the Sub-Committee decided unanimously in favour of television being mentioned separately in Article 11*bis*(1)(i), either by using the technical term itself or by adopting a general expression. On the later lines, the *French* proposal in particular, which refers to authors' exclusive right of authorizing 'the broadcasting of their works or the communication thereof to the public by any other means of diffusion of signs, sounds and images,' caught the Sub-Committee's attention; this text might, if the case were to arise, prove more provident than the Conference in a field in which technology could hold surprises in store for us. The Drafting Committee will have to choose. If it decides in favour of the *French* proposal, the use of the word 'communication' will not in any way imply the need for reception or for listening or viewing, any more than it would imply it in the Rome text (idea with regard to Article 11*bis*(1)(ii) and (iii) in the Sub-Committee's text).

Needless to say, in the rest of Article 11*bis*(1), the 'broadcast of the work' should be understood not only as the work broadcast in the strict sense which Article 11*bis*(1)(i) gives to the term broadcasting, but also the work which has been communicated to the public by any other means of diffusion of signs, sounds and images, regardless of whether or not it is by wire.

The programme proposes that the authors of literary and artistic works be granted a second exclusive right: the right of authorizing 'any new communication to the public, whether by wire or not,' of the broadcast of the work. It thinks it thus resolves satisfactorily the problem of subsequent uses of the original broadcast. According to the explanatory memorandum prepared by the Belgian authorities and the Bureau of the Union, any broadcast aimed at a new circle of listeners or viewers, whether by means of a new emission over the air or by means of a transmission by wire, must be regarded as a new act of broadcasting, and as such subject to the author's specific authorization. The Sub-Committee considered that this criterion did not emerge with the desired clarity from the proposed text and moreover that it was far too vague; it felt that a mere change in the means of emission or transmission should not entail the need for a further authorization. Consequently, the majority (12 votes to six) decided in favour of a *Belgian* proposal presupposing the intervention of a body other than the original one as a condition for the requirement of a new authorization. A *French* proposal which sought to require the author's specific authorization for any 'communication to the public,' whether by wire or not, of the broadcast of the work, when that communication went beyond the framework of the terms of the original contract, was rejected by 13 votes to five. But of course, despite this rejection, the application of the *clausula rebus sic stantibus* principle in the contractual relations between author and broadcasting organizations continues to be reserved as long as national legislation or case law accepts such a principle.

A *Czechoslovak* proposal to exclude television from the application of Article 11*bis*(1)(ii) was withdrawn.

The third exclusive right in favour of authors recognized by the programme in relation to broadcasting, namely the right of authorizing 'the communication to the public by loudspeaker or any other similar instrument transmitting, by sounds or images, the broadcast of the work' (signs ought to be mentioned with sounds and images), did not meet with any serious opposition within the Sub-Committee. However, some Delegations (*Hungary, Monaco, Netherlands*) would have liked to introduce limitations on this right *jure conventions* by excluding it either when the loudspeaker or other transmitting instrument is not used for financial gain (*the Netherlands and Monaco*), or when it is used 'within a family or domestic circle or for the purposes of teaching in schools' (*Hungary*). But these Delegations declared themselves satisfied when, as we shall see, the Sub-Committee decided, in connection with Article 11*bis*(2), in favour of allowing national legislation to determine the conditions under which the right granted in Article 11*bis*(1)(iii) may be exercised.

A *French* proposal to add a provision to the first paragraph of Article 11*bis* whereby authorization to exploit the work by one of the means indicated in the first paragraph of Article 11*bis* would not have implied authorization to use one or other of these means, was not accepted by the Sub-Committee; the latter considered, generally speaking, that it was not for the Union Convention to set rules for the interpretation of the contracts which authors entered into with their assignees. The Sub-Committee did, however, recognize that, in the case in point, the rule of interpretation proposed by *France* was sound and judicious.

Monaco's Delegation would have liked the Convention itself to place a limitation on the exclusive right granted authors in Article 11*bis*(1)(i) by introducing a compulsory licence in favour of the broadcasting organizations for works which had been accessible to the public for over a year; this compulsory licence would not have been prejudicial to the moral right or to the author's right to obtain equitable remuneration, to be fixed, in the absence of agreement, by the competent authority. The Sub-Committee rejected this proposal by 15 votes to two with three abstentions as too dangerously prejudicial to authors' copyright.

On the other hand, the Sub-Committee failed to decide to follow the *French* Delegation, which would have liked to delete the reservation in favour of national legislation in Article 11*bis*. On the contrary, departing from the programme and conforming to the desire expressed by numerous countries (*Austria, Czechoslovakia, Hungary*, *Italy*, *Luxembourg*, *Monaco*, *Netherlands*, *New Zealand*, *Poland*, *Switzerland*, *United Kingdom*), it considered that the right in Article 11*bis*(1)(iii) should also be subject to the reservation in paragraph (2). Reference was made in this regard to the important role that loudspeakers played in the countries which had suffered destruction in the war.

The Sub-Committee departed from the programme on another point by providing that the reservations in paragraph (2) could also apply to the right to authorize television broadcasting (hence the deletion of the words 'as to literary and musical works' in paragraph (2)). This is a new field, little known still, in which Governments wish to retain some freedom of action.

However, it goes without saying that, as in the Rome text, the conditions of exercise laid down by national legislation will be strictly limited to the country which has laid them down and will in no circumstances be prejudicial to the author's moral rights, or to his right to receive equitable remuneration to be fixed, in the absence of agreement, by the competent authority.

The programme suggests that a third paragraph might be added to Article 11*bis* whereby the authorization to broadcast would not imply, *in dubio*, that of recording the broadcast work on records or tapes. This was one of the most debated provisions. During the preparatory work, *Austria*, *Norway* and *Finland* had requested its deletion; *Monaco* and the *Netherlands* had gone further by proposing that the requirement of the author's authorization for recordings intended solely for the needs of broadcasting should be excluded *jure conventionis. Poland*, *Switzerland*, *Hungary* and *Italy*

had suggested intermediate solutions. After a detailed discussion, the Sub-Committee found itself faced with four solutions:

— a *Dutch* proposal, which took up a proposal made by *Switzerland* in 1935, consisting in adding the following phrase to the programme's paragraph (3): 'The latter authorization shall not be required in respect of recordings made by a broadcasting organization and intended exclusively for their subsequent broadcast';
— a new *Swiss* proposal consisting in replacing the programme's paragraph (3) with the following text: 'The authorization granted in accordance with the first paragraph shall imply, for the organization which has obtained it, the right to record the work by means of instruments recording sounds or images if, for technical or timing reasons, the broadcast of the work has to be delayed; in such a case, the aforesaid instrument must be destroyed or rendered unsuitable for any further use once it has served to broadcast the work within the framework of a single programme.'
— a proposal from *France* and the *United Kingdom* simply to approve the programme's paragraph (3);
— a proposal by *Denmark* to delete the same paragraph (3).

The *Dutch* proposal was rejected by nine votes to six with three abstentions; the *Swiss* one by ten votes to four with four abstentions; that of *France* and the *United Kingdom* by nine votes to three with six abstentions. It was thus the solution defended by *Denmark* which prevailed.

The *Dutch* Delegation declared that its attitude towards Articles 11*bis* and 13 of the revised Convention depended on the solution adopted for this problem.

Efforts should continue, in the General Committee, to reach agreement on a compromise solution. The great difficulty is to find the demarcation line between a recording of a transitory nature for the purposes of a broadcast which is simply delayed, on the one hand, and a lasting recording, on the other: the *Swiss* attempt in this direction was not successful as the *Swiss* proposal, in the view of the majority of the Sub-Committee, entangled itself in a detailed regulation which did not seem to have its place in the Convention.

On behalf of the Nordic countries, *Denmark* drew the Sub-Committee's attention to the fact that the new inter-Nordic draft Bill provides that a musical or literary work may be freely performed in church services or elsewhere for religious education, provided that the people listening are admitted free of charge. The Sub-Committee thought that the General Committee should discuss the question raised by this regulation in connection with Article 11.

The *French* Delegation did not insist on its proposals concerning the broadcasting of works published by the press and the broadcasting of translated works. As regards the latter, the Sub-Committee considered that the protection of translations resulted from the general principles of the Convention (Article 2(2)).

Mechanical Rights (Musical Works)

First of all, the Union Convention grants the authors of musical works the exclusive right to authorize 'the adaptation of those works to instruments which can reproduce them mechanically.' The Sub-Committee is proposing to replace the word 'adaptation' with the word 'recording' so as to avoid the word 'adaptation' being used with several meanings in the text of the Convention (cf. Articles 2(2) and 12). The Sub-Committee is of the view that it is pointless to add, as the programme proposes, the phrase 'or any adaptation of those works to such instruments' to the word 'recording'; it is true that recording sometimes implies adapting the work, but the original author's right in his relations with the adapter is sufficiently guaranteed by the general provisions of the Convention (Article 12 in relation to Article 2(2)).

The programme proposes granting the authors of musical works, under Article 13(1)(ii), the exclusive right of authorizing the 'distribution' of the instruments on which such works have been recorded. This innovation met with a certain amount of opposition. In short, the Sub-Committee found itself faced with two proposals:

1. a *Swiss* proposal to combine subparagraphs (i) and (ii) of Article 13(1), and to state in

subparagraph (i) that 'the recording of such works by instruments capable of reproducing them mechanically and the distribution of those instruments' (by analogy with what the Cinematography and Photography Sub-Committee decided in respect of Article 14);

2. a *Czechoslovak* proposal to delete subparagraph (ii) of Article 13(1).

The *Swiss* proposal obtained ten votes against four given to the *Czechoslovak* proposal, with four abstentions.

The majority of the Sub-Committee thought it should be indicated that, in the normal course of events, authorization was given for the recording with a view to its sale, but that the author might have a legitimate interest in dissociating the authorization to record from the authorization to distribute (concession to distribute records for a given territory only, etc.).

The maintenance of the author's exclusive right to authorize public performances by means of recordings did not give rise to any difficulties.

The proposal from *Austria* and *Germany* that the right to authorize the broadcasting of his works by means of recordings be added to the list of the author's exclusive rights was withdrawn, as was *Monaco's* proposal that on the contrary, the authorization to broadcast should cover the use, for the purposes of transmission, of instruments capable of reproducing sounds and images mechanically. The Sub-Committee did not wish to prejudge the disagreements which apparently existed in this regard in several countries of the Union on account of national legislation.

The *United Kingdom* proposal in favour of the manufacturers of mechanical musical instruments was likewise withdrawn, the *United Kingdom* Delegation reserving the possibility of proposing to the Conference that it either express a wish in favour of recognizing this right—related to copyright—or make it the subject of an Additional Act.

The interpretative rule suggested by the programme in the last two sentences of Article 13(1) met with the same fate, and for the same reasons, as the one proposed by *France* in Article 11*bis*.

With regard to the reservations and conditions in Article 13(2), the Sub-Committee decided to continue to permit them, contrary to *France's* proposal; it even decided, contrary to the programme, that the reservations and conditions could also affect the exclusive right under Article 13(1)(ii) (public performance). However, the Sub-Committee, following the *United Kingdom* delegation, thought it should be specified here not only that the effect of the reservations and conditions would be strictly limited to the countries which had put them in force, but also, as in Article 11*bis*(2) that they would not, in any circumstances, be prejudicial to the author's right to obtain just remuneration, to be fixed, in the absence of agreement, by the competent authority. Thus the reservations and conditions cannot completely negate one of the rights granted authors under Article 13(1). The Sub-Committee considered that the reservation in respect of moral rights went without saying, and that it was not necessary to include it expressly as in Article 11*bis*(2).

The third paragraph of Article 13 was not amended by the Sub-Committee. *Austria* withdrew its proposal to the effect that the non-retroactivity should not exist *jure conventionis*, but only in accordance with national legislation, reserved in this regard by the Convention. The *French* proposal according to which 'The provisions of paragraph (1) shall not be retroactive; consequently, they may not be asserted in a country of the Union against manufacturers or their successors in title in respect of any recordings or adaptations of works to mechanical instruments which were lawfully made by such manufacturers or their successors in title before the entry into force of the Convention signed at Berlin on November 13, 1908, and, in the case of a country having acceded to the Union since that date or acceding to it in the future, before the date of its accession,' gave rise to interpretation difficulties with regard to the position of manufacturers who made recordings between the date mentioned in the text and that of the entry into force of the Convention to be signed at Brussels or of the relevant country's accession to it; several delegations thought it prejudicial to the rights which were considered to be established by virtue of their national legislation. *France* reserved the possibility of taking the matter up again before the General Committee.

Article 13bis

Mechanical Rights
(Literary Works)

The Sub-Committee was unanimously in favour of introducing a new Article in the Convention concerning the recording of literary works but excluding them from the possibility of the reservations and conditions under Article 13(2).

On a proposal by the *United Kingdom*, however, it decided by a very large majority (12 votes to two, with one abstention) to introduce an exception concerning mixed works. When text is combined with music in such a way that the two elements form the work together, the Sub-Committee was of the view that national legislation should be reserved the possibility of having the same situation apply to the words as to the music.

As for the transitional provisions, the programme proposes, in Article 13*bis*, a simple reference to paragraphs (3) and (4) of Article 13. The Sub-Committee agreed with the *Austrian* and *Swiss* Delegations that it ought to be pointed out, in any event, that the date of the entry into force of the Berlin Act or of a country's accession to it should be replaced, as regards Article 13*bis*, by the date of the entry into force of the Brussels Act or of a country's accession to it. The Rapporteur considers, however, that this question—which was examined somewhat hurriedly by the Sub-Committee because of the necessities of the programme—should be studied attentively by the General Committee: before Berlin, the recording of musical works was lawful; before Brussels, the recording of literary works was not; as fur as literary works are concerned, Article 13*bis* merely confirms a rule which follows from the general principles of the Union Convention; under these circumstances, it will perhaps be possible to delete any transitional provision in Article 13*bis*.

P. Bolla
Chairman

N.B. Lack of time made it impossible to submit this report first to the Sub-Committee.

B. Texts Proposed by the Sub-Committee on Broadcasting and Mechanical Instruments

(June 15, 1948)

Article 11bis

(1) Authors of literary and artistic works shall have the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of diffusion of signs, sounds or images; (ii) any communication to the public, by wire or wireless means, of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain just remuneration which, in the absence of agreement, shall be fixed by the competent authority.

Article 13

(1) Authors of musical works shall have the exclusive right of authorizing: (i) the recording of such works by instruments capable of reproducing them mechanically, and the distribution of those instruments; (ii) the public performance by means of such instruments of works thus recorded.

(2) Reservations and conditions relating to the application of the rights mentioned in the preceding paragraph may be determined by legislation in each country, in so far as it may be concerned; but all such reservations and conditions shall apply only in the countries which have prescribed them and shall not, in any circumstances, be prejudicial to the author's right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority.

(3) The provisions of paragraph (1) shall not be retroactive, and consequently shall not be

applicable in a country of the Union to works which, in that country, may have been lawfully adapted to mechanical instruments before the coming into force of the Convention signed at Berlin on November 13, 1908, and in the case of a country which has acceded to the Convention since that date, or accedes to it in the future, before the date of its accession.

(4) Recordings made in accordance with paragraphs (2) and (3) of this Article, and imported without permission from the parties concerned into a country where they are not lawful, shall be liable to seizure.

Article 13bis

(1) The authors of literary works shall have the same exclusive rights as those granted to authors of musical works by paragraph (1) of the preceding Article.

(2) Nevertheless, when a work comprises words and music forming an inseparable whole, paragraph (2) of the preceding Article shall also apply to the literary work.

(3) Paragraphs (3) and (4) of the preceding Article shall apply by analogy; however, the date of the coming into force of this Convention and, in the case of a country which has acceded to the Union since that date, or accedes to it in the future, the date of its accession shall apply instead of the date indicated in the aforesaid paragraph (3).

C. Texts Proposed by the Sub-Committee on Broadcasting and Mechanical Instruments

(June 17, 1948, first edition)

Article 11bis(3)

In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast.

It shall, however, be a matter for national legislation to determine the regulations for recordings carried out by a broadcasting organization by means of its own facilities, and for the sole purpose of its recorded broadcasts.

D. Texts Proposed by the Sub-Committee on Broadcasting and Mechanical Instruments

(June 17, 1948, second edition)

Article 11bis(3)

It shall be a matter for national legislation to determine the regulations for recordings carried out by a broadcasting organization by means of its own facilities and for the sole purpose of its recorded broadcasts.

E. Supplementary Report by the Chairman of the Sub-Committee on Broadcasting and Mechanical Instruments

(June 22, 1948)

As it had proved impossible to obtain the unanimous agreement of the Union States on the wording of Articles 11*bis*(3) and 13(2) as emerging from the deliberations of the General Committee, the Chairman of the Sub-Committee convened the Delegations of the following States: *Belgium*, *Czechoslovakia*, *France*, *Italy*, *Monaco*, *Netherlands*, *Poland*, *Spain*, *United Kingdom*.

The *Italian* and *United Kingdom* Delegations could not take part as they were detained by other Conference discussions.

The Delegations present reached agreement on a proposal to the General Committee that it retain the wording of Article 13(2) as already adopted and word Article 11*bis*(3) as follows:

(3) In the absence of any contrary provision, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast.

It shall, however, be a matter for national legislation to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities.

P. Bolla
Chairman

Report by the Chairman of the Applied Art Sub-Committee

(June 18, 1948)

The Sub-Committee held its meetings on June 14, 16, 17 and 18, 1948.

It devoted its attention to examining paragraph (1) (items 1 and 4) of Article 2 of the Union Convention and the amendments to it proposed by the programme, as well as the text proposed by the programme consisting in the addition of a paragraph (4) to Article 2.

It came to the following conclusions:

Article 2

Paragraph (1)

(*a*) After the words 'whatever may be the mode or form of its expression,' add the words 'the merit or the purpose' and after the words '(and) lithography,' the words 'and applied art.'

(*b*) Replace the text of paragraph (4) of the present text of Article 2 by the following text: 'It shall be a matter for legislation to determine the relative conditions of protection and extent of application of their laws concerning works of applied art and industrial designs and models, subject to reciprocity as regards the conditions, extent, nature and term of protection.'

(*c*) Delete the paragraph (4) proposed in the programme.

Comments

(a) The programme envisaged adding the words 'and of art applied to industrial purposes.' The *United Kingdom* Delegation observed that this reference was too restrictive since art applied to other areas as well as to industry ought also to be envisaged. In view of this observation, the Sub-Committee thought that the addition 'applied art' was preferable and should be adopted.

Moreover, the Sub-Committee deemed it preferable and simpler to delete paragraph (4) as proposed in the programme, and to insert the substance of that paragraph, i.e. the words 'whatever may be the merit and the purpose,' in the first paragraph of Article 2.

(b) While subscribing to the amendments provided for under (a) above, certain Delegations, notably those of *Italy* and the *United Kingdom*, asked for account to be taken of the situation obtaining in countries where productions of form only came within the scope of application of different laws that subjected works of applied art and industrial designs and models to different regulations.

Furthermore, the *French* Delegation insisted on the need to introduce the principle of reciprocity for the conditions, extent, nature and term of protection, with the just and equitable aim of applying, in Union countries, only such protection to the works concerned as was specified for those works in their countries of origin.

It was after an in-depth discussion that all the delegations taking part in the Sub-Committee's work agreed on the text reproduced above.

We should stress by way of conclusion that, although the addition of the word 'purpose' was accepted unanimously in the text of Article 2(1), the *Italian* Delegation asked for a mention to be made in the General Report that, while it agreed to the addition of the word, it was because the text adopted by the Sub-Committee for paragraph (4) of Article 2 had the effect of allowing certain national laws to continue to exclude certain purposes under their copyright laws. That would allow the national provisions of that nature not to be in contradiction to the new text proposed for the Union Convention.

D. Coppieters De Gibson
Chairman

First Report by the Sub-committee On Article 4(4)

(June 11, 1948)

Article 4

Paragraphs (1) and (2): present text.

Paragraph (3):

(3) The country of origin of the work shall be considered to be: (. . .) in the case of published works, the country of first publication or, in the case of works published simultaneously in several countries of the Union, the country whose legislation grants the shortest term of protection; in the case of works published simultaneously in a country outside the Union

and in a country of the Union, the latter country shall be considered exclusively as the country of origin.

A work shall be considered as having been published simultaneously in several countries when it has been published in two or more countries within 30 days of its first publication.

Paragraph (4):

(4) For the purposes of Articles 4, 5 and 6, the expression 'published works' means works copies of which have been issued and effectively made available to the public, whatever may be the means or the form of production of the copies. The performance of a dramatic or dramatico-musical work, or of a musical work, the public recitation of a literary work, the communication by telephone or the broadcasting of literary and artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

Paragraph (5):

(5) The country of origin shall be considered to be, in the case of unpublished works, the country to which the author belongs. However, in the case of works of architecture, or of graphic and three-dimensional art, forming part of a building, the country of the Union where these works have been built or incorporated in a building shall be considered as the country of origin.

Second Report by the Sub-Committee On Article 4(4)

(June 15, 1948)

As the Sub-Committee's first proposal met with some objections from the *United Kingdom* Delegation, the Sub-Committee reconsidered several questions. After contacting the Delegation in question, it now proposes the following texts for Article 4, paragraphs (3), (4) and (5):

Paragraph (3):

(3) The country of origin of the work shall be considered to be: (. . .) in the case of published works, the country of first publication or, in the case of works published simultaneously in several countries of the Union, the country whose legislation grants the least long term of protection; in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin.

A work shall be considered as having been published simultaneously in several countries which has been published in two or more countries within 30 days of its first publication.

Paragraph (4):

(4) For the purposes of Articles 4, 5 and 6, the expression 'published works' means works copies of which have been issued and effectively made available to the public, whatever may be the means or the form of production of the copies. The performance of a dramatic or dramatico-musical work, or of a musical work, the public recitation of a literary work, the transmission or broadcasting of literary and artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

Paragraph (5):

(5) The country of origin shall be considered to be, in the case of unpublished works, the country to which the author belongs. However, in the case of works of architecture or of graphic and three-dimensional art forming part of a building, the country of the Union where these works have been built or incorporated in a building shall be considered as the country of origin.

Report by the Sub-Committee on Article 6bis

(June 19, 1948)

The Moral Rights Sub-Committee, created by the General Committee on June 11, met on June 14, 16 and 17.

It took into consideration the various proposals for amendment concerning Article 6*bis* of the Union Convention presented either to the Berne Bureau for the purposes of the Brussels Conference or to the Conference itself in the course of the General Committee discussion.

It thought it appropriate to depart as little as possible from the text of the Convention in force, which had been ratified by the experience

of the last 20 years, while acceding to the desire expressed by the *French* Delegation and several others to let national legislation develop the protection granted to authors' interests in connection with their moral rights, which interests are not economic in nature.

The Sub-Committee nevertheless considered that there was nothing to be gained by referring expressly in the text to spiritual, moral or personal interests, those being the various expressions proposed in this regard.

Indeed the *Portuguese* Delegation rightly observed that the term 'spiritual interests' would be open to misunderstanding in certain countries where it had a religious significance.

Furthermore, the terms 'moral interests' and 'personal interests' would require a subsequent explanation which would not be easy to establish since, as the *Dutch* Delegation observed, it could not be a question here of interests relating to one particular work by the author, in view of the fact that those interests seemed adequately protected by the other expressions in the text, but of interests relating to his works as a whole. As they could not be accompanied by an explanation of that kind, the terms in question would come up against the objection raised by the *United Kingdom* Delegation, which found them too vague.

The above considerations led the Sub-Committee to accept a new *French* proposal to insert in the text in force a general reference to prejudice to the author's interests.

In addition to that insertion, the Sub-Committee thought it could recommend that the General Committee adopt an addition to the text to cover possible cases which did not strictly speaking constitute either a distortion, or a mutilation or an alteration of the work, but which were nonetheless actions prejudicial to the author's interests.

On the other hand, the overly broad idea of 'use of the work which may have prejudicial effects' was rejected because of the *Czechoslovak* and *United Kingdom* Delegations' legitimate worries.

To coordinate better the first and second paragraphs of the present text, the Sub-Committee thought it should stress that the rights recognized in the first paragraph belonged to the author during his lifetime. It would have liked it to be possible to safeguard those same rights at least for the duration of the economic rights.

The *United Kingdom* Delegate objected, however, saying that in his country there were cases in which such protection was not guaranteed. Consequently, he could only agree to a solution which left each country sufficient freedom of assessment, as had been accepted for the *droit de suite* introduced in Article 14*bis*.

As for the matter of extending the rights beyond the expiry of the period established for the economic rights, it emerged from our discussions that certain delegations could not agree to such an extension being actually written into the Convention. Consequently, although sympathetic to the principle of the desired extension, the Sub-Committee did not feel it could endorse the proposals made to that effect.

It is for these various reasons that, in the text which the Sub-Committee is proposing to the General Committee for approval, the second paragraph comprises three sentences, each of which mentions the competence of national legislation. The first of those sentences concerns the duration and the transmissibility of moral rights alter the author's death; in substance, the other two reproduce the provisions of paragraph (2) of the former text.

The Sub-Committee has the honour of submitting these proposals to the General Committee, and observes that all the decisions concerning them were taken unanimously, after mature reflection.

Article 6bis

Former text	*Proposed text*
(I) Independently of the author's economic rights, and even after transfer of the said rights, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work, which would be prejudicial to his honour or reputation.	(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right, during his lifetime, to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or any other derogatory action in relation to, the said work, which would be prejudicial to his honour, his reputation or his interests as author.

(2) It shall be a matter for the national legislation of the countries of the Union to determine the conditions under which these rights shall be exercised. The means of redress for safeguarding these rights shall be governed by the legislation of the country where protection is claimed.

(2)(*a*) In so far as the legislation of the countries of the Union permits, the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the said legislation.

(*b*) It shall be a matter for the national legislation of the countries of the Union to determine the conditions under which the rights mentioned under (*a*) shall be exercised.

(*c*) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Report by the Sub-Committee on Articles 11 and 11*ter*

(June 18, 1948)

Proposed Text

Article 11(1)

'Authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works;

(ii) the communication to the public of the said performance of their works by any means, the provisions of Article 11*bis* being reserved.'

The other provisions of the Article in question remain unchanged in relation to the programme.

Report

The various delegations in this Sub-Committee formally declared that their agreement and hence unanimity on this text were subject to the condition that the following statement should appear in the general report: 'The wording as now adopted in Article 11(1) makes no substantive change to the import of the text as it appears in the Berne Convention according to the Berlin and Rome revisions, given that certain exceptions admitted by some Union countries for clearly defined cases have no international import.'[1]

Furthermore, it will be noted that no reference is made in the text presented above to the *Hungarian* proposal to add, after the words 'musical works,' the words 'choreographic works and entertainments in dumb show,' because the latter are included in the notion of the works to which the right of performance, with which this Article is concerned, applies.

Article 11ter(new)

The new Article 11*ter* was also accepted on the sole condition that a similar declaration would be made concerning it in the general report.

Mutatis mutandis the following text would be proposed for the declaration:

'Those countries which insisted on the inclusion of the above statement concerning Article 11(1) in the general report also wish to be able to allow similar exceptions to the application of this Article in the same clearly defined cases, on the understanding that those exceptions will not have any international import.'[2]

Report by the Sub-Committee on Article 14(3)

(June 19, 1948)

At the June 16 meeting of the General Committee, it was suggested that paragraph (3) of Article 14 as proposed in the programme be deleted, as it no longer had any purpose, the protection of cinematographic and photographic works being henceforward governed in exactly the same way.

The *Italian* Delegation intervened to request that the question of the freedom, to reproduce literary and artistic works in connection with a

[1] See General Report, p. 100.

[2] See General Report, p. 102.

news report be nevertheless settled in relation to cinematography.

It became clear that this question was of wider scope. It also concerned reporting by wireless broadcasting. The Sub-Committee is therefore proposing the deletion of Article 14(3), and the endorsement of a proposal by the *Nordic* and the *Benelux* countries that a new paragraph (4) be added to *Article 9*, on the grounds of a certain affinity of subject. The paragraph would run thus:

'It shall be a matter for legislation in the countries of the Union to determine the possibility of reproducing and presenting literary and artistic works to the public by recording sounds or images fit connection with a photographic or cinematographic report, or a report by wireless broadcasting.'

This proposal was not supported unanimously when it was presented, because certain delegations considered that it was a minor exception which would not have international implications. The Sub-Committee feels bound to observe that this attitude is debatable. The significant number of delegations which have looked into the question is in itself an indication of the interest it arouses. Then, especially as regards news films, it certainly cannot be said that the freedom to reproduce literary and artistic works is of purely national interest, since news films are very often exported.

Moreover, the Sub-Committee observes that Articles 9(3) and 10 include similar provisions in related spheres.

The Sub-Committee thinks therefore that this question should be regulated in the manner it proposes.

The Sub-Committee also considered the question whether it was necessary to introduce a special provision in the Convention concerning the question of films of current interest and news films. It does not consider that such a solution need be adopted, because the protection of cinematographic works provided for in Articles 2 and 14 is sufficient, given that current-interest films and news films generally possess the character of a work. It will be for the courts to settle this question *in Concreto*.

Records of the Intellectual Property Conference of Stockholm

June 11 to July 14, 1967 Volume II

Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20)

by
Svante BERGSTRÖM,
Rapporteur
(Member of the Delegation
of Sweden)

Introduction

1. The Plenary Assembly of the Berne Union, which met of June 12, 1967, under the chairmanship of Mr. Gordon Grant (United Kingdom), set up Main Committee I (hereinafter referred to as 'the Committee') with the task of considering the proposals for revising the substantive copyright provisions of the Berne Convention (Articles 1 to 20), with the exception, however, of the proposals for the establishment of an additional Protocol Regarding Developing Countries, consideration of which, according to the Rules of Procedure of the Conference, came within the province of Main Committee II.

2. The Plenary Assembly of the Berne Union agreed without opposition to the proposals put forward by the Delegation of Sweden that a member of the Delegation of the Federal Republic of Germany be elected as Chairman