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Records of the conference

Convened in Paris April 15 to May 4, 1896

REPORT

PRESENTED ON BEHALF OF THE COMMITTEE BY THE FRENCH DELEGATION

At the beginning of this report which the Committee was kind enough to entrust to it, the French Delegation thinks it ought to point out that the proposals made by the French authorities and the International Bureau did not shake any of the basic foundations of the Berne Convention. Ten years' experience had revealed a few imperfections, some doubts had arisen on certain points, compromises deemed necessary in 1886, at the beginning of the Union, might seem pointless after an already sufficiently long period of communal life. It was simply a question therefore of dispelling the doubts, of clarifying certain provisions, of making some progress by continuing the forward march in order to achieve the so-ardently desired aim of a really complete and effective protection of authors' copyright in their literary and artistic works. To the proposals made by the French authorities and the International Bureau were joined those which the various delegations presented to the Conference and which, with perhaps one exception, sought to amend the French authorities' proposals; they did not go beyond the range of questions raised when the Conference was actually convened and to which each of the Union countries had been able to direct its attention. The Committee thus considered these various proposals and it is on the outcome of its deliberations that we are reporting here, our aim being to present briefly, but as clearly as possible, the reasons for the solutions adopted.

The Committee was even more reserved than the French authorities had been; it spared no effort in order to achieve a desirable unanimity; the majority agreed to defer certain solutions to which it was particularly attached. The Committee made some slight modifications to a small number of articles; it thinks it has removed certain obscurities; it made an

improvement of some importance in relation to the right of translation. It is not a question of a revolution therefore but a modest evolution. The discussion to which the 1886 Convention was subjected has proved, we believe, that, on the whole, it was good; all the Union States are satisfied with the association they formed and most of them only ask to strengthen the ties which bind them. Is not this observation a highly appreciable result of our Conference meeting and are we not entitled to hope that it will have some influence on the decisions of those States which have remained outside our Union but whose delegates were good enough to attend our working sessions?

We shall now examine in turn the various proposals submitted to the Conference by relating them to the provisions they aim to amend or complete.

Article 2 of the Convention

Various proposals had been made by the French authorities as well as by the German, Belgian and Swiss Delegations to amend the second paragraph of this Article. They sought to remove a difficulty raised before some courts concerning the import of the provision contained in this second paragraph with regard to the conditions and formalities to be accomplished in order to enjoy protection. Furthermore, the Swiss Delegation proposed amending the terms of the rule concerning the term of protection. The vast majority of the Committee would have readily amended the paragraph in question along the lines of these various proposals. This idea was abandoned on the British Delegation's declaration that it could not agree to these amendments and that it was obliged to keep to Article 2 as it was worded. The Committee thus proposes letting Article 2 remain as it is in its entirety except for two changes on which no difficulty arose.

In the first paragraph it will be mentioned expressly that works must have been *first* published in a country of the Union. The underlining was perhaps not really necessary;

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the requirement of *first publication* in the Union followed inevitably from the spirit and even the text of the Article, but after all an addition which helps to emphasize the rule cannot be a bad thing.

A fifth paragraph will be added to the Article to indicate that *posthumous works* are included among the works protected by the Convention. No objection was raised to accepting this proposal, which had been made by the French authorities and the Italian Delegation, as it appeared to be fully within the spirit of the Berne Convention. There is no reason why the principles of this Convention should not apply to posthumous works nor why those works should simply be left to be governed by national laws and specific treaties. As doubts have arisen, it is better to be absolutely clear.

While the Committee did decide not to amend the text of Article 2, paragraph 2, itself, it has not abandoned the ideas which inspired the various proposals mentioned above and which it will now discuss.

A few words first of all about the sentence proposed by the Swiss Delegation concerning the duration of rights.

Under the present text, the enjoyment of copyright *must not exceed*, in the other countries, the term of protection granted in the country of origin. This rule, in conjunction with the principle of national treatment, leads to the consequence that, in the relations between two countries whose legislation lays down different terms of protection, it is the shorter term which is applied, for example the term of 30 years from the author's death as regards the relations between France and Germany or Switzerland. However, although there would be no question of claiming more than 30 years' protection for a French work in Germany or Switzerland, nothing prevents France, if it wishes to, from granting protection to a German or Swiss work for 50 years pursuant to its own law, without taking account of the shorter term fixed by the law of the country of origin. The Convention gives the Union States the *option* of not granting complete national treatment on this matter of duration; it does not and could not *compel* them to act in this way. They are always free to go further and to let works published in the territory of the Union enjoy a longer term of

protection than that which is provided for in the law of their countries of origin. The Swiss proposal sought to formulate this idea expressly. No objection was raised within the Committee, which thought that it sufficed to explain this in the report without it being necessary to touch the text of the Convention.

The other proposals concerning the second paragraph were of greater importance in that they related to a question which has, in fact, arisen in practice. Under the text of the Convention, the enjoyment of copyright *shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work*. The meaning of this provision does not seem to be seriously debatable. As a result of it the author needs only to have complied with the legislation of the country of origin, to have completed in that country the conditions and formalities which may be required there. He does not have to complete formalities in the other countries where he wishes to claim protection. This interpretation, which is in keeping with the text, was certainly in the minds of the authors of the 1886 Convention, and they had considered the removal of the need for multiple formalities to be one of the most invaluable advantages of the joint achievement. Nevertheless, several courts in one of the Union countries thought it possible to accept that works published in the other Union countries were subject in that country *to the same formalities as national works*, the Convention having only exempted them from the formalities which could be imposed on *foreign works*. The Committee could not accept such an interpretation which, moreover, from the explanations which the British Delegation was kind enough to give us, would seem to have been abandoned by the most recent case law. Without wishing to amend the text of Article 2 itself for the reasons indicated earlier, it asks the Conference that the meaning it attributes to this text be recorded in a separate Declaration which would not have the slightest character of a new provision but simply that of an authentic interpretation of the Convention. It will be clearly understood between the countries which sign this Declaration that, under the second paragraph of Article 2, the protection afforded by the Convention depends solely on the accomplishment, in the country of origin of the

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work, of the conditions and formalities which may be prescribed by that country's legislation.

Article 2 refers to *works published* in one of the countries of the Union without indicating what is meant by this. When may it be said that there is *publication* in a country of the Union and that, consequently, the condition to which protection is subject has been accomplished? The question was not raised directly about Article 2 but in connection with Article 3. However, as Article 2 is the first Article in the Convention in which *publication* is mentioned, it may be useful if the explanations concerning publication are to it.¹

No one questioned the usefulness of precisely determining what constitutes *publication* within the meaning of the Convention, but certain delegates thought that it would be better to let the various legislations solve the question, the more so as the question was in itself a very difficult one and an agreement would be hard to reach. Nevertheless, the majority of the Committee was of the opinion that there was here an essentially *international* question to be resolved. Publication does not only produce effects in the country where it takes place but also in the other countries of the Union. A Union author has a dramatic work performed in Paris, then has it issued in Switzerland. Which is the country of origin of the work? Is it France, where the work was first performed, or Switzerland where it was issued? The answer to this question is of interest to the various countries of the Union since the legislation of the country of origin influences the term of protection. The majority of the Committee thus thought that there was every reason to seek the interpretation which should be given to the Convention with regard to publication and to record the solutions adopted in a separate Declaration.

The question does not present itself in the same terms for literary works, where the author only derives benefit from the work being printed, for dramatic, musical or dramatico-musical works, where there is a public performance

right distinct from the reproduction right, and, lastly, for artistic works.

As far as literary works are concerned, what constitutes *publication* for them, in a given country, is the fact of having been *issued* there, of having been directly brought out or put on sale there by someone who assumes the costs and responsibility of publication. The fact of being printed in that country will accompany it in most cases, but not necessarily so. In fact, the author negotiates with a publisher for the conditions of publication of his work without being concerned about who will print it and where it will be printed, this is a detail which is a matter for the publisher and which could, not exert an influence on the application of Article 2. The country in which a work is thus brought out derives from this fact itself sufficient material and moral advantages for protection to be guaranteed in its territory and in the territory of the States with which it is in association.

For dramatic, musical or dramatico-musical works no question arises if, before being made accessible to the public, they have been *issued* for the first time in a country of the Union. The result of combining Articles 2 and 9 is that, by the very fact of this edition, the two copyrights—for the reproduction and also for the public performance—are fully protected. However, it is possible to imagine public performance taking place without the work which is thus performed having been issued. If this has occurred in the territory of the Union, the author who is a national of that territory is protected there whatever character is attributed to the performance, since protection is afforded to *published* or *unpublished* works. In addition, assuming that the first *edition* of the musical, dramatic or dramatico-musical work is also made in the territory of the Union, no difficulty will arise as to the application of the Convention, as it is quite certain that it will be possible to claim the benefit of the Convention; there will still be some interest in knowing in which of the countries of the Union first publication of the work will be considered to have taken place, because of the influence of the legislation of the country of origin on the term of protection (paragraphs 2 and 3 of Article 2 combined).

However, the circumstances will not always be the same. A national has his work first

¹ See below, on p. 189 and p. 191, the Memoranda presented by the German and French Delegations in this regard.

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played or performed in a country outside the Union and then has it issued in a Union country. Or, alternatively, after having it played in a Union country first, it is in a country outside the Union that he has it issued. To know what will be his situation in these two hypothetical cases, it is absolutely essential to take a stand as to whether or not public performance constitutes *publication* within the meaning of Article 2; this is what a special Memorandum from the German Delegation has very clearly shown.

The majority of the Committee considers that, in the case of a dramatic, musical or dramatico-musical work, public performance should no more constitute publication within the meaning of the Berne Convention than for a literary work—a piece of poetry, for example—it merely being read in public. This seems to follow, almost inevitably, from the combination of Articles 2 and 9 of the Convention and especially from the third paragraph of Article 9. What is more, the fact of public performance may or may not be difficult to ascertain whereas the fact of edition is apparent. The majority of the Committee thinks therefore that a Union author who has his play first *issued* in a country of the Union could not be blamed for having had it performed previously in a country outside the Union. On the other hand, a Union author would not be conforming to the Convention if, after having his work first performed in the territory of the Union, he had it first issued outside this territory.

The conclusion is thus that, for literary, dramatic, musical or dramatico-musical works without distinction, publication results only from *edition*.

The British Delegation wished to point out that, under English law, the first performance of a dramatic or dramatico-musical work is publication. That is why it could not associate itself with the majority's decisions.

With artistic works (paintings, statues, etc.), the question may also be posed as to what constitutes publication. A French painter or sculptor exhibits his painting or his statue at the annual Salon; will his work be considered *published* as a result? It is quite certain that unauthorized imitations will be suppressed in the territory of the Union whatever response is given to this question since protection is

afforded to *published* or *unpublished* works; the situation is the same as for musical or dramatic works performed and not printed. But this French painter subsequently sends his painting to a country outside the Union; there it is printed or reproduced by another method. Could the Convention's protection be claimed for these prints, lithographs, etc.? Yes, if exhibition at the painting Salon really does constitute *publication*, since then the condition required by the Berne Convention has been satisfied, first publication having taken place in Paris, i.e. in a country of the Union. No, if there is no real publication other than by reproduction of the work, since then this first publication has been effected outside the Union. The question would present itself in similar terms for the opposite case, that is the case where a French painter, after exhibiting his painting outside the Union, then has it printed or photographed in France. The majority of the Committee thought that the solution adopted for public performance—which derives from the text of the Convention—would lead to the solution for the exhibition of a work of art. This exhibition could not constitute publication of a dramatic work.

Needless to say this interpretation of the words *publication* or *works published*, which the majority proposes recording in a separate Declaration, applies not only to Article 2 but to all the Articles of the Convention in which these words are used. It would therefore be understood between the countries which signed this Declaration that *works published* are *works issued* in one of the countries of the Union and that, consequently, the representation of a dramatic or dramatico-musical work, the performance of a musical work and the exhibition of a work of art do not constitute *publication* within the meaning of the Convention.

Article 3 of the Convention

Under this Article, the Convention's provisions apply to the publishers of literary or artistic works which are published in one of the countries of the Union when the author belongs to a country which is not a party to it. Thus, for these works, protection is granted not to the author but to his publisher who publishes the

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work in a Union country. The French authorities were only proposing to add a paragraph to the Article whereby the Convention's provisions would have applied under the same conditions to organizers of performances of musical, dramatic or dramatico-musical works. Other delegations wanted the present Article 3 to be replaced by a new wording. The German Delegation, departing from the viewpoint accepted by Germany in its 1883 Convention with France as well as in the 1884 and 1885 Conferences, proposed granting protection directly to authors who were not nationals of one of the countries of the Union but who had their literary or artistic works issued by a publisher domiciled in one of those countries. It was apparent from this formula, as well as from the explanations contained in a special Memorandum,¹ that the German Delegation did not mean to consider publication the fact of a dramatic or musical work being publicly performed. On the other hand the Belgian and Swiss Delegations, in proposals differing only in nuances in wording, granted protection to authors of literary works first published or performed in one of the countries of the Union even though those authors were not nationals of Union countries.

Agreement was reached quite easily, and the Committee proposes to the Conference that Article 3 as it stands be replaced by an entirely new provision worded as follows:

‘Authors who are not nationals of one of the countries of the Union, who first publish, or cause to be first published, their literary or artistic works in one of those countries, shall enjoy, in respect of such works, the protection granted by the Berne Convention, and by this Additional Act.’

It will be noted that it is no longer a question of *publishers* but of *authors*; it is directly on the latter that the right is conferred. No one supported the system of Article 3 in its present form; the German Delegation's Memorandum brilliantly outlined the legal difficulties which are encountered in the design of a right specific to the publisher. It was not even accepted that an author who was not a Union national should be obliged to have recourse to a

publisher domiciled in one of the countries of the Union; he is at liberty to publish his work himself and thus to be his own publisher. But then a question naturally arises. How does the Convention, which would appear only to have to determine the situation of nationals of the Contracting States, come to deal with individuals outside the Union?

This is quite easily understandable under the system of Article 3 as it stands, whereby protection is granted, not to the author outside the Union, but to the publisher who is assumed to be established on a permanent basis in the territory of the Union. The Convention thus provides for someone who has ties with the Union, in most cases through the dual link of nationality and domicile; at the very least, in all cases, through the link of domicile. But if this point of view is abandoned the question may be posed as to whether there really are grounds for dealing with non-nationals and whether each State should not be left to determine its situation as it thinks fit.

However, the Union has an interest in encouraging the publication, in its territory, of works of authors who are nationals of non-Contracting States, and in order to do so there must be guaranteed protection not only in the country where publication has actually taken place but also in the other contracting countries. It is agreed therefore that, provided certain conditions to be determined are satisfied—and on which explanations will be given—the non-national author will be protected both in the country where these conditions have been met and in the other countries of the Union. If we are stressing this point it is because, in this way, the normal sphere of the Convention right is being enlarged somewhat. Indeed, if we take the case of a Russian author publishing his work in Berlin, the question of whether or not he will be protected in Germany appears to be outside the scope of the Berne Convention since Russia is not party to it. But if it is accepted that this publication in Germany affords the author protection in the other countries of the Union, how can it not be accepted that he will also be protected in Germany where first publication has taken place? Protection extends quite naturally from the country of origin to the other countries with which it is in association, but an absence

¹ See this Memorandum on p. 195 below.

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of protection in the country of origin would be difficult to reconcile with the existence of protection in the other countries. It has to be agreed therefore that the protection granted will apply throughout the territory of the Union without restriction.

Having said this, what should be the position of non-national authors? Reasons of justice and reasons of usefulness seem to demand that their position should not be identical to that of nationals, that there should be quite notable differences so that countries outside the Union are induced to join it not only from a desire to pay tribute to the right but in the very interest of their nationals.

There will first be the difference that protection will not be granted to non-nationals for their unpublished works. Consequently, pursuant to what has been said earlier on the meaning which, in the view of the majority of the Committee, should be attached to the word *publication*, a dramatist, a composer, a painter, a sculptor from a country outside the Union will not be protected by the Convention in respect of any work of his which is performed or exhibited—even for the first time—in a Union country.¹ To be entitled to protection *first publication* of their works must have taken place there. To reinforce the difference in situation one could imagine them being treated more strictly than a national as regards this publication. If, for a national, publication follows from *issue* in a Union country without the place where the work is actually printed being a matter of concern, for the non-national protection could have been made subject to the condition that the work had not only been issued in a country of the Union but had also been printed, engraved or reproduced there as the case may be. What complaint could have been made about such a condition? It would only rest on the will of the non-Union States to remove the difficulties which their writers, composers or artists might suffer. The doors of the Union are wide open to them. A provision

of the kind which has just been indicated as possible ought not to be confused therefore with the provisions of legislation which subordinate protection to manufacture in the country while not offering to remove this requirement for States willing to subscribe to them. Nevertheless, on reflection, the Committee decided not to enter into ideas of this kind. It proposes protecting authors who are not Union nationals simply on the basis that they have published their works or have had them published in a Union country, publication to be understood here as for the application of Article 2. For those countries which sign the Interpretative Declaration to which reference was made earlier, the definition of *publication* which is found there applies to all the articles of the Convention in which this word is used.

By the fact of first publication in a country of the Union, non-national authors shall enjoy *the protection granted by the Convention* in respect of their works thus published. It follows from this that they not only have the right to prevent their translation under Article 5 and their public performance under Article 9. The observation could be made that the only difference which exists then between nationals and non-nationals is in respect of unpublished works and that the Union is thus generous indeed towards the nationals of countries which are not party to it. This is true, but the Committee thought that such generosity was more worthy of the high principles which govern the Convention and might in the end have a similar effect to that of the measure by which France, almost half a century ago, granted unconditional protection to works published outside its territory.

Article 4 of the Convention

The Committee's view is to make no amendment to the text of this Article. However, some words of explanation should be given about the amendments which were proposed.

The French authorities, supported by the Belgian Delegation, proposed adding *works of architecture* and *photographs* to the list of works protected by the Convention; for its part, the Italian Delegation asked for *choreographic works* to be added. In the latter regard, the question presented itself in the same terms as at

¹ Sir Henry Bergne expressed the opinion that, under the Berne Convention, it is very doubtful that protection in a country of the Union may be denied to works which, through a first public performance, have acquired a right to statutory protection in another Union country.

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the 1885 Conference. The Italian proposal came up against an objection on a matter of principle from the German Delegation; in its view, there was as yet no satisfactory definition of choreographic works in science, legislation or case law; furthermore, there is no agreement on the limits of the protection to be afforded to these works. Under those conditions the Committee could only maintain the *status quo* by not inserting choreographic works in the list set out in Article 4 and by letting No. 2 of the Final Protocol subsist.

The French and Belgian proposal on *works of architecture* also met with an objection as to principle raised by several delegations, notably those of Germany and Great Britain, whose laws do not protect works of architecture as such, but only the plans or drawings relating to architecture. As it proved impossible to come to an understanding in this regard, the idea of amending Article 4 had to be abandoned. However, the Committee proposes inserting in the Final Protocol a provision under which, in those countries where protection is granted to works of architecture themselves, such works shall be admitted to the benefits of the provisions of the Convention. Therefore, on the part of the countries in question, a concession without reciprocity is made to the countries of the Union whose legislation does not protect works of architecture themselves. If this concession produces effects, it is possible that the protection thus granted may determine a change in legislation in the countries whose nationals profit from it.

As to *photographs*, which had already been left out of Article 4 in 1885, agreement still could not be reached on introducing them, as several laws refuse to recognize them as having the character of artistic works, while nevertheless affording them special protection. The German Delegation however made a proposal which happily enabled the present situation to be improved.

Under No. 1 of the present Final Protocol, it is agreed that *those countries of the Union where the character of artistic works is not refused to photographs* undertake to admit them to the benefits of the provisions of the Convention; it was therefore only in the countries granting or, at least, not denying photographs the character

of artistic works that protection could be claimed by virtue of the Convention. Where the character of artistic works was excluded it was not permissible to take advantage of the special protection which could be established by the law. It was on this point that the German Delegation was proposing an addition under which, in those countries which do not grant photographic works the character of works of art, photographs will be protected pursuant to the provisions of those countries' legislation, without those who claim this protection having to meet other conditions and formalities than those laid down by the laws of the country of origin.

The Committee proposes combining the first paragraph of the Final Protocol's present No. 1 and the additional paragraph proposed by Germany by means of the following clause to be inserted in the Final Protocol:

'Photographic works and works produced by an analogous process shall be admitted to the benefits of these provisions in so far as the laws of each State permit, and to the extent of the protection accorded by such laws to similar national works.'

Thus, in the relations between Union countries, it will be possible to claim the protection as such that is granted photographs or works produced by an analogous process. While granting national treatment to the Union countries, no country is sacrificing its principles. The most important thing is that some form of protection is guaranteed; the exact nature of the protection is of secondary importance.

In protection being claimed by virtue of the Convention, it follows, on the one hand, that protection may not be claimed for a longer period than in the country of origin and, on the other, that it is enough to satisfy the conditions and formalities laid down in that country, in accordance with the interpretation given earlier of Article 2, paragraph 2, of the Convention. On these two points the German Delegation's amendment gave an explicit explanation to this effect. To remove any doubt on the question of conditions and formalities—which is of great practical importance—the Committee proposes an express reference in the Interpretative Declaration.

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It is useful to observe that, under the clause submitted to the Conference, the countries of the Union in which, at present, the legislature would not be willing to grant any protection to photographs are not obliged to protect the photographs of other Union countries but will, however, benefit from the protection which might be granted in these other countries.¹ Here again a concession is made without reciprocity which is explained in the same way as the concession referred to earlier. It is to be hoped that this situation will not continue. The Committee asks the Conference to express the *wish* that in all the countries of the Union the law may protect photographic works or works produced by analogous processes and, furthermore, that the term of protection may be at least 15 years. In this last part the *wish* concerns those countries in which protection already exists but for a period of less than 15 years, as is the case, for example, in Germany and Switzerland.

Article 5 of the Convention

The question of translation is, as has often been said, the international question *par excellence*. For literary and scientific works, between countries which do not speak the same language, copyright has little import if it is limited to reproduction and does not include translation. France has always declared that translation is just a method of reproduction and that, consequently, as long as the author and his lawful representatives may prohibit the reproduction of the work they can prohibit its translation. However, it has had to reckon with the ideas and interests of other countries and, in most of its conventions, copyright, as far as translation

is concerned, is kept within fairly narrow limits. When the question of forming the international Union arose, France repeated its argument which did not win acceptance. The 1884 Conference had merely expressed the wish that it would be appropriate to encourage as far as possible the tendency towards complete assimilation of the translation right to the reproduction right in general. The system adopted by the 1885 Conference and which is formulated in the present Article 5 of the Convention is simply this, that for ten years from publication of the original work, authors shall enjoy the exclusive right of making or authorizing the translation of that work. No condition is imposed on them. Their right is absolute during this period. On the other hand, once the period has expired the exclusive right disappears; irrespective of whether or not the author has made or authorized a translation, anyone may translate, provided of course that the work of the previous translator, which is protected by Article 6 of the Convention, is not appropriated.

This system, the result of a compromise between very conflicting views, had generally been considered only a transition; the wish expressed by the 1884 Conference had shown the direction in which the Union ought to go, the goal towards which it should strive. Thus the French authorities thought that, on this important point, it was impossible to maintain the *status quo*. They proposed therefore as a principal objective to assimilate translation to reproduction. The German Delegation submitted an amendment to Article 5 to the Conference along the same lines. The Belgian and Swiss Delegations accepted this same solution. Regrettably, it had to be acknowledged that it would be impossible, at the present Conference, to achieve what those Delegations regarded as definitive progress. It proved necessary to make do with a compromise on which agreement could be reached. The French authorities had added to their main proposal: '*Subsidiarily*, it could be decided: (1) that the period granted to the author for translation is increased to a minimum of 20 years; (2) that the author will be protected against unauthorized translations for the entire duration of his copyright in the original if he makes use of the

¹ The Swiss Delegation had asked for photographic works to be admitted to the benefits of the provisions of the Convention in so far as national legislation permitted it, while stipulating at the same time a 20-year minimum term of protection. The essential part of the proposal was accepted; as to fixing a period, it would have been difficult to reach agreement and, in addition, the observation was made that, since the countries of the Union were not all being required to protect photographic works, it was not logical to impose any period of protection on those which did protect them.

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translation right himself within the stipulated period.' It was this last system which won acceptance as having two advantages: it enables the principle of assimilating translation to reproduction to be asserted while only subjecting it to one condition; it accords with British legislation and with a proposal from the Italian Delegation. Mr J. de Borchgrave couched it in terms which we consider most felicitous because they assert first of all the principle of assimilating translation to reproduction while only subjecting this principle to one condition which it is hoped will soon disappear. Accordingly the Belgian Delegate proposed the following wording:

'Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works during the entire term of their right over the original work. Nevertheless, the exclusive right of translation shall cease to exist if the author shall not have availed himself of it in one of the countries of the Union before the expiration of ten years from the date of the first publication of the original work.'

In the mind of the author of this proposal there was no point in adding that the author, to retain his exclusive right of translation, must avail himself of it in the languages for which he might wish to claim protection. The translation right, which necessarily includes the right to translate in all languages, implies no less necessarily a distinct right in respect of each language. Hence the consequence that the author who does not authorize a translation in a given language within the ten-year period inevitably lets the translation right in that language fall into the public domain.

However, as controversies had arisen in Germany on this last point, the majority of the Committee thought it preferable to adopt a different wording in order to remove all doubt.

Accordingly, the Committee proposes to the Conference that the first paragraph of Article 5 of the Convention be replaced by the following provision:

'Authors who are subjects or citizens of any of the countries of the Union, or their lawful

representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works during the entire term of their right over the original work. Nevertheless, the exclusive right of translation shall cease to exist if the author shall not have availed himself of it, during a term of ten years from the date of the first publication of the original work, by publishing or causing to be published, in one of the countries of the Union, a translation in the language for which protection is to be claimed.'

Thus the principle of assimilating translation to reproduction is clearly stated in the first sentence of the new paragraph, and our successors will only have to delete all that follows that sentence.

To enjoy the exclusive right of translation, the author must have accomplished the conditions and formalities laid down for the original work in conformity with Article 2, paragraph 2, but he is exempted from any special formalities which may relate to exercising the translation right, such as imposed by the German law, for example.

The text only refers to authors who are *subjects or citizens of any of the countries of the Union*. However, there is no doubt that, by first publishing their works in a country of the Union, non-Union authors are thus guaranteed, pursuant to the new Article 3 as discussed above, the full enjoyment of copyright and consequently the translation right just as the reproduction right.

After stating the principle, the new provision adds a restriction. The exclusive right of translation only subsists for as long as the reproduction right if the author has had a translation published within ten years of publication of the original work. If this condition is not met the translation right falls into the public domain. The present situation remains unchanged but, of course, if, in such a case, the author's exclusive right ceases, it is only for the future. Action may always be taken against non-authorized translations which are published before the ten years have expired.

If publication of an authorized translation within the ten-year period guarantees the exclusive right, this only applies to the language

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in which this translation has been issued. The translation right falls into the public domain as regards all the languages in which no authorized translation has been issued within the ten years.

As the ten-year period still exists, paragraphs 2, 3 and 4 of Article 5, which indicate how it is to be calculated, are maintained without change.

Finally, it is important to note that the restriction in Article 5 to nationals' exclusive right of translation concerns only their published works. As far as their unpublished works are concerned, the translation right does not fall into the public domain for the simple reason that no use has been made of it within the ten-year period, since that period only commences on publication. Consequently, as regards unpublished works, the translation right is fully assimilated to the reproduction right, the ten-year period only beginning to run, in accordance with the provisions of Article 5, on publication. This observation is of great practical interest for dramatic or dramatico-musical works which are performed but are not published. The absolute protection granted to unpublished works only concerns subjects or citizens of countries of the Union; it has been explained earlier, in connection with Article 3, that non-Union nationals only enjoyed protection in respect of published works.

Article 7 of the Convention

Under this provision, the principle is that articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. Thus there is a general entitlement to reproduction unless this is forbidden. It should be added that this prohibition cannot apply to articles of political discussion, to news of the day and to *miscellaneous facts*.

This provision has been criticized from various viewpoints, and several amendments were submitted to the Committee. The French authorities wanted to limit the extent to which copyright was undermined by Article 7. They

therefore proposed reversing the rule to state that pieces of writing published in newspapers or periodicals could not be reproduced or translated without their authors' authorization, while continuing to allow reproduction with respect to articles of political discussion, news of the day or *miscellaneous facts*. This was the most absolute proposal in terms of copyright.

The Norwegian Delegation was proposing a very simple system. In its view, copyright was not infringed by the reproduction in newspapers or magazines of articles in original or in translation taken from other papers or magazines if the reproduction right had not been specifically reserved. The source would always have to be clearly indicated. Thus the principle of Article 7 as it stands was generalized in that the reservation could apply to any articles, even articles of political discussion or news of the day. Furthermore, when reproducing, the source must be indicated—which the present Article does not require. It should be added that the Norwegian Delegate acknowledged that serial stories did not fall within the application of the Article he had proposed, and thus no reservation would be necessary to prohibit their reproduction.

Monaco's Delegation made a proposal which was very similar to the one which has just been analyzed. The difference lies mainly in that the traditional provision is maintained as regards articles of political discussion, news of the day or *miscellaneous facts*.

The Belgian Delegation's proposal, supported by the Italian Delegation, differed more from the present right. It first stated the principle that serial stories or any articles, whether from newspapers or periodicals, published in a country of the Union, may not be reproduced or translated without the sanction of the authors. Then, as a qualification to this rule, it was stated that, nevertheless, *any newspaper may reproduce an article published in another newspaper*, provided that the source is indicated, unless the article bears an express notice to the effect that its reproduction is forbidden. What characterizes the Belgian proposal is first the distinction made between newspapers and periodicals; protection is absolute for articles published in periodicals, and no reservation is

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necessary. As regards newspaper articles, the proposal is very similar to the Norwegian one: reproduction is permitted in other newspapers unless forbidden.

The German proposal attempted to reconcile the different interests by means of a tripartite division: (1) articles which may not be reproduced without authorization; (2) articles which may be reproduced unless this is forbidden; (3) articles which may always be reproduced. The difficulty lay in precisely distinguishing between the articles which fell into the first category and those which fell into the second.

After a lengthy discussion, the Committee managed with some difficulty to reach an agreement, the main lines of which are as follows:

Serial novels, including short stories, are set apart. They may not be reproduced without the sanction of the authors and no reservation is required from the latter. Serial stories did not present any difficulty and there is no real innovation as far as they are concerned; the provision is merely explanatory, as the French Delegation always upheld and as had been accepted by the British, Italian and Swiss Delegations in 1886. Serial novels are not strictly speaking newspaper articles; they are works which are published in a particular way and all the proposals agreed to treat them separately. It was not such an easy matter for *short stories*; first it was claimed that the expression was too vague and that the articles to which it applied were not distinguished clearly enough. The objections came from the British and Norwegian Delegations in particular. However, it was observed that the words *short stories*, linked with serial novels and as opposed to *news of the day*, to which reference is made in the last paragraph of the Article, had a sufficiently precise meaning, that they denoted novelettes, short tales and works of fantasy often combined in a single newspaper or magazine article. The term is equivalent to the English expression *works of fiction* and the German word *Novellen*.

Except for serial novels and short stories, the Committee maintains the system of the present Article 7, i.e. the entitlement to reproduce articles from newspapers or periodicals unless this is forbidden.

The Committee did not accept therefore the distinction proposed between newspapers and

periodicals. Although this is not expressly stated, it thinks that the reproduction which may thus take place in the absence of any reservation is reproduction in other newspapers or periodicals. It would not be permissible to publish a volume comprising a series of articles without the author's consent.

If the Committee is maintaining the system of reproduction being permitted when there has not been any prohibition, it nonetheless adds a qualification: the need to indicate the source. At the request of the Italian Delegation, it has been understood that the notice of the source shall include not only an indication of the newspaper or periodical in which the article had appeared but also the author's name if the article is signed.

Article 9 of the Convention

The Committee is not proposing any amendment to this Article, but it did give rise to discussions which ought to be recalled. Under the third paragraph, the author's consent is only necessary for the public performance of published musical works where the author has expressly declared on the title page or commencement of the work that he forbids the public performance thereof. The stipulation is certainly rather odd; it is reminiscent of the old provisions which required the translation right to be expressly reserved. Should the author be compelled to affirm that he intends to exercise his rights? Should it be assumed from his silence that he abandons them? In theory there is no reason why the author should be obliged to declare in some form that he means to avail himself of one particular right and not another. The 1886 Convention had to take account of the *de facto* situation in certain countries of the Union, especially Germany and Great Britain. If, under French legislation, the composer's authorization is always required, under German legislation (Act of 1870, Article 50, paragraph 2) and the British (Act of 1882, Section 1), such authorization is only necessary if it is expressly reserved. Besides being contrary to the principle of copyright, this requirement has practical drawbacks in that the composer's rights may be compromised by his publisher's intentional or unintentional negligence. Thus the French

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authorities proposed deleting the third paragraph of Article 9 and simply stating that the stipulations of Article 2 apply to the public performance of musical works in the same way as to the public performance of dramatic or dramatico-musical works. This proposal, supported by the Belgian Delegation, met with total opposition from the German and British Delegations. They asserted in particular that, in their countries, public opinion would not accept that, in the absence of any express reservation, the author or his agents could prevent the public performance of his musical works under certain circumstances (non-profit making concerts, performances of musical works by social clubs, students, military bands).

It would perhaps be appropriate to make a distinction between the different cases. Authorization could have been required in principle except for allowing a number of exceptions. But the distinction was very difficult to make and a position had not yet been reached in which it could be reliably established. No one questioned the fact that there was progress to be made in this regard, but such progress seemed to be dependent on preliminary work being done by the national legislatures because the customs particular to certain countries needed to be taken into account. It is for them to reconcile the rights of authors and those of the public. When this work has been done it will be possible to save authors the formality which is imposed on them at present. The Committee confines itself therefore to recommending to the Conference that it express the wish that the legislators of the countries of the Union should fix the limits within which the next Conference could adopt the principle that musical works be protected against unauthorized performance without the author being obliged to give notice of reservation. The French Delegation could only express its regret that it had not proved possible to state the principle of the author's right without accepting a fairly large number of exceptions. The Belgian Delegation wished to be expressly associated with this sentiment.

Article 10 of the Convention

The French authorities requested the deletion of the second paragraph of this Article as being

superfluous or harmful and for the *transformation of a theatre play into a novel and vice versa* to be mentioned among the unauthorized indirect appropriations of a literary or artistic work. A German amendment agreed to these two proposals which the two Delegations did not consider to be innovations but a simplification and an interpretation. It was not possible to make these changes which other delegations, notably the Belgian one, also accepted, because of opposition from the British Delegation.

It pointed out that in actual fact the English law did not allow a novel to be drawn from a theatre play but it did allow a theatre play to be drawn from a novel. The British Delegation thus agreed to including the transformation of a theatre play into a novel among the unauthorized appropriations but not the opposite case. This could not be accepted in these terms; it would have been strange to protect what anyone is rarely tempted to do and to allow, on the other hand, what is particularly dangerous. Until British legislation is amended on this point of great interest to authors, the Committee can but propose stating in a separate Interpretative Declaration that the transformation of a novel into a theatre play or a theatre play into a novel is governed by the provisions of Article 10.

Article 12 of the Convention

This Article states that any pirated work *may be seized on importation* into any country of the Union where the original work enjoys legal protection. The outcome of the explanations given within the Committee is first that the expressions used should not be misunderstood in the belief that, in the case in point, seizure constitutes an optional measure for the countries of the Union. It is for the interested parties that this option exists: they have recourse to seizure or not as they think fit. But if they wish to seize they must be able to do so and the legislation of the Union countries is bound to enable them to do so; these may, however, lay down as they wish the forms such seizure will take and determine the authorities which are competent to effect it.

The French authorities asked for the words '*on importation*' to be deleted so that it would

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be understood that seizure was possible not only on importation but also inside the country—which would indeed seem to be what the authors of the Convention had in mind. Amendments from Germany, Belgium, Italy and Monaco accepted the French viewpoint. The Committee proposes to the Conference that Article 12 of the Berne Convention be replaced by the provision contained in the German Delegation's amendment.

Note should be taken, on this point, of the British Delegation's reservations. It did not question the proposal in itself but declared that it could not confirm that there were laws in all the British colonies enabling internal seizure. If therefore it should be the case that in a colony internal seizure is not permitted by the legislation in force there, the British Delegation does not wish its Government to be able to be criticized for non-fulfilment of the Convention.

The Swiss Delegation had proposed an amendment whereby works authorized in the country of origin cannot be seized when they are passing in transit through a country in which these works are illicit. It did not press for acceptance of its proposal when the observation was made that it was not appropriate to resolve such a delicate question as that of transit in relation to a case which must rarely occur (*shared publishing right*, see the Franco-German Convention of 1883, Article 11).

Article 14 of the Convention and Final Protocol, No. 4.

Pursuant to Article 14, the Convention, *under the reserves and conditions to be determined by common agreement*, applies to all works which at the moment of its coming into force have not yet fallen into the public domain. There had been a desire to take account of the *de facto* situation existing in certain countries at the time the Convention came into force, of the interests of those who might have lawfully reproduced or performed foreign works without their authors' authorization. Under No. 4 of the Final Protocol, application of the Convention on this point was to be determined either in conformity with the special stipulations contained in such literary conventions as existed or were to be concluded

to that effect, or, in the absence of such stipulations, in accordance with the provisions of the domestic legislation.

The French authorities had thought that the transitional period had been long enough, since the Convention has been in force for almost nine years, and that there was no reason for not now ensuring the full and complete application of the Convention throughout the territory of the Union. Such is also the view of the Belgian Delegation. The French authorities thus proposed purely and simply asserting the principle by deleting the reference to reserves and conditions.

This proposal met with opposition from the German and British Delegations who affirmed that, despite the passage of time, absolute retroactivity might harm legitimate interests; that in order to avoid this it would be necessary to embark on distinctions which would be difficult to make; that, consequently, it was best to maintain the *status quo*. The Committee does not propose amending Article 14 therefore.

On the other hand, it is proposing a new wording for No. 4 of the Final Protocol.

In the first paragraph it has reinstated the words *within the country of origin* which had almost certainly been inadvertently omitted since they appear in Article 14. There should not be any doubt as to the meaning; the Convention must apply to works which have not fallen into the public domain in their country of origin. It seems that some quarters may have thought that what were involved were works which have not fallen into the public domain in the country where protection is claimed, which is inadmissible. The new wording, which does no more than copy the formula of Article 14, will remove all pretext for such an error.

Paragraph 2 remains unchanged.

A third paragraph has been added in order to apply retroactivity with its compromises to the exclusive right of translation, such as it is admitted in the new wording of Article 5, paragraph 1. If, on the date of this latest text coming into force, ten years have not yet elapsed since publication of a work and if an authorized translation of this work has been published—all this in a country of the Union—the exclusive right of translation will be maintained, pursuant to the new Article 5, as regards the language for

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which use has been made of it. On the other hand, the expiration of the ten-year period, even very shortly before the new Article 5 has come into force, without an authorized translation having been issued, will mean the translation right falling into the public domain.

Finally, in a fourth paragraph, it is stated that 'the above-mentioned temporary provisions shall apply in case of new accessions to the Union.' It is considered that countries joining the Union all need to take transitional measures just as much as countries which have been a party to it from the outset. The desire was to urge acceding countries to take measures which were both in their own interest and in that of the other Union countries. To this end it had been proposed stating that 'countries which have not taken measures within a period of two years will be deemed to have purely and simply accepted the principle of retroactivity.' It seemed that there were only advantages to be gained from such a proposal since acceding countries were given the option of declining the Convention's pure and simple application to works published before accession for two years. This length of time seemed more than sufficient particularly as, before acceding, a Government will consider the consequences of accession and what measures to take. Nevertheless, doubts arose. It was feared that a fixed time limit might be considered awkward and might dissuade certain States, whose accession to the Union was considered particularly desirable, from doing so. The vast majority of the Committee did not share these fears; however, it did not want to carry on regardless and not take account of the scruples of one of its members. It therefore deleted the sentence in question.

Final Protocol, No. 3

Under this provision, 'the manufacture and sale of instruments for the mechanical reproduction of musical works in which copyright subsists shall not be considered as constituting an infringement of musical copyright.' The French authorities were asking for a paragraph to be added, worded as follows: 'The benefit of this provision shall not apply to instruments which can only reproduce tunes by the addition

of perforated strips or cards or other systems which are separate from the instrument, are sold apart and constitute musical editions with a particular notation.' As the Belgian Delegation observed, if the principle of the proposal had been accepted, its working would have had to be altered given that it was a matter not of prohibiting the manufacture of the instruments themselves but of subjecting the perforated strips and cards, considered to be editions of a specific nature, to the Convention.

According to the French Delegation, the proposal's aim was not so much to introduce a new principle but rather to interpret the present provision sensibly and to set reasonable limits on it. In granting an immunity the Convention had in mind those instruments which include their own notation and have a reproduction capability limited to certain airs. The immunity should not in fairness apply to instruments which are capable of playing an infinite number of tunes by introducing—in the form of perforated cards—notations which are external to them, movable and unlimited in number. There is no longer a fusion between instrument and notation, the latter being but an edition in a particular form, which cannot be lawful without the author's consent.

The Delegations of Belgium, Italy and Monaco supported the French Delegation's observations.

The German Delegation, which had been good enough to present the Committee with a special Memorandum on the question,¹ and the Spanish, British, Norwegian and Swiss Delegations fought against the proposal in an animated discussion in which even some of the offending instruments played their part. It may be said that some of the reasons of principle invoked in favour of the freedom of manufacture requested could rebound on ideas which are particularly dear to the Union countries. The interest of manufacturers of instruments does not differ greatly from that of printers who wish to be able to reproduce freely; translators say they do a service to the reputation of the authors they translate just as manufacturers claim that they contribute to the fame of the

¹ See this document on p. 199 below.

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composer whose pieces are played by their instruments. The industry in question—which is thriving, it would seem—will not die due to the fact that authors' rights are better respected. It will be possible for it to dip into the public domain or come to terms with authors who, in most cases, will be content with a modest fee.

Particular stress should be placed on the practical objections raised against the proposal. The question is of great interest to certain countries whose manufacturers would offer strong resistance to the restriction of what they consider to be their right; if this industry is impeded within the Union it will develop outside it, the more so as the instruments in question are produced mainly for export overseas. The question is not ripe for an international solution. Case law is uncertain; courts in Germany and France have reached opposite verdicts. It is not being proposed that the freedom granted in 1886 should be withdrawn but that it should be limited. How then is a line to be drawn between widely varying instruments? Will interchangeable cylinders be considered special editions? Is this not going very far? Details were given on the relatively high prices of the instruments in question and the perforated cards. For example, the most advanced, the 'pianista,' was said to retail at 780 francs and the cards for it cost 1.50 francs per meter; The 'Tannhäuser' overture, published in this way, costs 90 francs whereas the ordinary edition sells at 4 francs.

We wanted to recall the main arguments put forward on either side. Agreement was impossible. The Committee could therefore only note the difference in views which prevents any amendment whatsoever being proposed to the provision of the Final Protocol. The French Delegation and those which supported it can only regret this.

New Article Proposed by Germany

The German Delegation proposed adding an Article *4bis* to the Convention which would have read as follows:

'Any reproduction of a work which enjoys protection under the present Convention that has not been authorized by the author or his lawful representatives is illicit and shall

entail the respective civil and criminal consequences, even if the country's legislation permitted such reproduction of national works against the payment of royalty fees.'

The same principle would have applied to public performances and, indeed, it was especially in this regard that it was of interest because, under certain legislation, a dramatic, dramatico-musical or musical work may be publicly performed without the author's consent for a modest royalty payment.

The German Delegation declared that it was simply a question of confirming a principle and that it was for national legislation to determine the civil and criminal consequences which would ensue.

The Swiss Delegate expressed his regret that the proposal had not been conveyed to the various Union authorities sooner, so that the Governments directly involved could have presented observations and given instructions to their delegates. For Switzerland in particular it is a very serious question which has given rise to long and difficult negotiations with France. Under the Swiss Federal law, national works may be freely performed against the payment of fees. The principle of the Convention is precisely the assimilation of foreigners to nationals. It would thus mean that here foreigners would be given a better situation or it would entail an important amendment to the national legislation. The Swiss Delegate is not authorized to enter into discussion on such a delicate issue.

After an exchange of observations, it was noted that the proposal was indeed outside the Conference's programme and should be left aside pursuant to the precise rules of the regulations adopted at the beginning of our working sessions. The French Delegation wished to note, however, that it was bound to adopt the principle itself of the proposal, which was aimed at seeing copyright better respected.

Consideration of the Resolutions

The French authorities had first drawn attention to the appropriateness of forming limited Unions between countries disposed to guarantee literary and artistic property more extensive protection in their respective relations than

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that which was afforded by the provisions of the general Convention. This is not strictly speaking a resolution, and the Committee is not making any proposal to the Conference in this regard. The latter is not being asked to make any general statement on the advantages and drawbacks of limited Unions. It is for each country to take a stand on this point and to avail itself or otherwise of the option reserved to it under Article 15 of the Convention.

It is useful to observe that if the provisions adopted by the Conference are not signed or ratified by all the Union countries, a limited Union will in fact be formed as a result by those which accept these new provisions. Even if the idea of limited Unions is not favoured, it may prove necessary to form one in order to achieve certain essential results and not to be totally prevented from doing so by the need to obtain the unanimous consent of the contracting parties.

It even follows from this that when, in the provisions of the *Additional Act* which will be discussed later, reference is made to the countries of the *Union*, it is those countries which accept this Additional Act, or accept it at a future date, which will thus form this limited Union whose existence has just been established.

We do not pretend this is simplicity itself but it is often necessary to accept temporary complications and difficulties in order to achieve what must be our goal—international regulations for the members of a single Union.

Under the heading *second resolution*, the French authorities drew attention to *the measures to be taken to facilitate communication to the Berne Office of the instruments of registration or deposit of literary or artistic works*. The authorities recalled wishes expressed in various Congresses—which showed the interest there was in the question—but did not put forward any proposal. During the Conference's second session Mr. Baetzmann, the Norwegian Delegate, asked for a *resolution* to be adopted worded as follows:

‘It is desirable that the various States of the Union take measures to facilitate communication to the Berne Office of the acts of registration or deposit of literary and artistic works, where such formalities exist.

‘It shall be for the Berne Bureau to coordinate the information which it is thus furnished by adding all the documents it is

able to procure in relation to publication of literary and artistic works, in all its forms, in the various Union States.’

A discussion began within the Committee in this regard; Chevalier Descamps asked it to reject the resolution as worded and rather to recommend to the Conference a proposal which might read as follows:

‘The Conference draws the attention of the Governments to the advantages, from the viewpoint of ascertaining the *de jure* situation of literary and artistic works, which the publication of good national bibliographies would present and it expresses the wish that, in those countries where this is necessary, Governments publish or advocate the publication of such bibliographies as documents they would deem useful from this same viewpoint.’

Moreover, Mr. Baetzmann had purely and simply withdrawn his proposal after explaining that what he had had in mind was to organize a practical information service which could not compete in the slightest with the International Bibliography Institute set up in Belgium. At the end of an exchange of observations, the Committee considered that it was not appropriate to express a wish along any lines. In view of this decision as well as the withdrawal of the Norwegian Delegate's proposal, there would be no point in going into details on the import and nature of this proposal nor on the measure indicated by Mr. Descamps. Suffice it to say that from Mr. Morel's explanations it was apparent that the International Bureau simply plans to consider how it could best satisfy the numerous requests for information it receives concerning the first publication or the translation of literary or artistic works. There is no question whatsoever of creating a *Universal Directory* or a structure which could be compared to any extent to such a considerable undertaking. The International Bibliography Institute has embarked on this task in Belgium; it will thus render an invaluable service and there is no question of competing with it.

Finally, the French authorities expressed the wish that individual legislation enact criminal sanctions with a view to curbing usurpation of names or imitation of signatures or symbols appearing on literary and artistic works. Frauds

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are frequently committed, particularly where paintings are concerned, and it is in the general interest that they should be curbed; artists are calling for it as a matter of urgency. The Committee recommends that the Conference adopt this *resolution*.

Resolution Proposed by the German Delegation

Just as, by virtue of Article 15, the Union countries may enter into separate and particular arrangements between each other, provided that these arrangements confer more extensive rights on authors or their lawful representatives than those granted by the Union or embody other stipulations not contrary to the general Convention, the *Additional Article* to the Berne Convention declares that its conclusion shall in no way affect the maintenance of existing Conventions between the contracting States in so far as specific arrangements could subsequently be entered into. The German Delegation drew the Committee's attention to the difficulties and complications resulting from the Berne Convention being combined with earlier conventions.¹ Frequently doubts arise as to whether certain provisions of these are still in force. The German Delegation thinks therefore that it would be useful if the various Governments of the Union examined the conventions they may have entered into with one another before the Berne Union came into force from this aspect and for the outcome of this examination to be recorded in a special act. Depending on the circumstances, some old conventions will be negated by general agreement or annulled, while others will be replaced by simpler conventions specifying only those clauses which retain their usefulness in the light of the existence of the Union. The outcome of the examination which the Governments would thus be invited to undertake would be notified to the countries of the Union by the International Bureau before the next Conference met.

The Committee approved the idea which inspired the German Delegation's proposal and it asks the Conference to express a wish along these lines.

Finally, without asking the Conference to express a formal wish, the Committee, in conformity with the desires already expressed by the 1884 Conference, is of the opinion that it would be useful if agreement could be reached between the Union countries with regard to the duration of the copyright granted to authors of literary or artistic works.

Furthermore, the 1884 Conference had expressed the wish that the trend towards the complete assimilation of the translation right to the reproduction right in general should be encouraged as much as possible. The views of the vast majority of the Committee in this regard are sufficiently apparent from the explanations given earlier in connection with the new wording of the first paragraph of Article 5.

Form to be Adopted for the Conference's Decisions

It remains for us to outline the procedure which the Committee recommends to the Conference for the recording of the end result of its discussions.

Two systems are possible.

The first is to make a new Convention in which the provisions of the 1886 Convention would be combined with the new provisions accepted by the present Conference. Attached to it would be a Final Protocol likewise recast in which the observations of the official minutes would be recorded. Once this new Convention with the Final Protocol had come into force, the 1886 Convention with its annexes would have been repealed.

The second system consists in maintaining the various Acts signed in 1886 and simply signing an *Additional Act* containing the various amendments adopted by the present Conference.

The vast majority of the Committee did not hesitate between these two systems; all its preferences were for the first one which has the great advantage of simplicity and clarity. For both judges and ordinary individuals it is far easier to consult a single text than to have to combine two texts of different dates, the more so as sometimes the amendment concerns only one paragraph. Quoting becomes complicated and the Committee could see this at once.

¹ See the list of these conventions on p. 201 below.

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To its great regret, the Committee is not proposing this system; it met with absolute opposition to which it had to bow in order not to destroy, for reasons of form, the agreement reached after great efforts. The delegates in favour of the system of an *Additional Act* are fully aware of the advantages of the other system. It is for purely practical reasons that they have rejected it. It is essential not to seem to be calling everything into question and to give those who might not be in favour of the Convention a pretext to attack it as a whole. In those countries where the Convention has to be submitted to Parliament, dissatisfaction about the adoption of this or that new provision might lead to the Convention itself being rejected whereas, if the *Additional Act* is rejected, the Berne Convention will still subsist. This was what happened in Lisbon in 1885 at the Postal Congress; the Paris Convention of 1878 was not recast, the amendments adopted were assembled in an *Additional Act*. Finally, this is again what has just been done by the International Railways Conference which met in Paris to revise the 1890 Berne Convention and which signed a final report on May 2, containing a draft *Additional Convention*.

The Committee is therefore submitting to the Conference:

- (1) A draft *Additional Act*;
- (2) A draft *Interpretative Declaration*.

The Declaration contains the various interpretations which the majority of the Committee recommends to the Conference and to which reference has been made in this report. As regards those countries which adhere to this Declaration, no changes are made to the texts concerned which are merely given an authentic interpretation. This interpretation will be compulsory by the very fact of the Declaration being ratified; that is why no time limit is indicated for implementation.

Article 1 of the draft *Additional Act* contains the various amendments made to the 1886 Convention and Article 2 the amendments to the Final Protocol. The *official minutes* remain unchanged.

In the Committee's opinion, the *Additional Act* forms a whole; it should be accepted or rejected outright. The Union countries

represented at the Conference which might not feel able to sign it or which might not ratify it, continue to be governed by the 1886 Convention with its annexes. Moreover, they may always accede to it by notifying the Swiss Federal Council; but they may not single out certain of the amendments adopted at the present Conference and accept them while rejecting the others. Otherwise the complexity would become truly inextricable.

As regards those countries which already belong to the Union, the option of continuing to be governed by the unamended Convention follows from the principles as well as from the formal text of Article 17, paragraph 3, of this Convention, under which 'it is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries which are members of it.' The situation is different for countries which might ask to join the Union; to simplify matters, we might have thought of deciding that henceforward it will only be possible to accede to the revised Convention. However, this is not the solution which the Committee is asking the Conference to adopt. For promotional purposes its view is to leave the choice open to the countries which might like to join. If any particular provisions adopted in Paris frighten them at this time, they may confine themselves to acceding to the 1886 Convention; they will thus be in the same position as any Union countries which do not sign or ratify the *Additional Act*; like the latter they will always be at liberty to accede to it later.

The *Interpretative Declaration* does not form a single whole with the *Additional Act*. Just as, amongst the countries represented at the Conference, not all those which sign the *Additional Act* will sign the Declaration, in the same way those countries which subsequently accede to the *Additional Act* will not be obliged at the same time to adhere to the Declaration. Not only this, those countries which accept, or which subsequently accept, only the 1886 Convention may adhere to the Declaration in that it interprets the provisions of this Convention. There is no need to be put off by the reference made in it to the *Additional Act*.

Needless to say, the *Interpretative Declaration* must be accepted as a whole and it is not

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enough to say that some interpretations are accepted and not others.

If the Conference adopts the Committee's decisions it will not be possible to criticize it for having been intransigent. It will have sacrificed many ideas which were dear to it in the desire for agreement and in the hope of enlarging the Union. However, there is no harm in expressing the desire that this rather complicated situation, which is little in keeping with the idea of union, does not continue indefinitely, that the outcome of the deliberations of the next Conference—more privileged in this respect than the Paris Conference—is a single Convention text governing all the

Contracting States. The Committee asks the Conference expressly to state a *wish* to this effect.

The *Additional Act* must have the same force and duration as the Convention of September 9, 1886. This is what is stated in Article 4 of the draft. The Committee understands that, by ratifying the Additional Article, this will form but one whole with the Convention to which it relates so that the Additional Act may not be denounced separately.

Article 4 also deals with the exchange of ratifications and the effective date.

For the French Delegation
LOUIS RENAULT

Records of the Conference

Convened in Berlin October 14 to November 14, 1908

REPORT

PRESENTED TO THE CONFERENCE ON BEHALF OF ITS COMMITTEE¹

Pursuant to Rule 4, paragraph 1, of its Rules of Procedure, the Conference decided at its second session to refer the questions before it to a Committee for prior examination. The aim of this report is to record the proceedings of this Committee, which held ten sessions. As the Rules of Procedure authorize the Committee to sub-divide into Sub-Committees, this option was exercised and two Sub-Committees were set up. One² was asked to examine the German Government's proposal to set up a pension fund for officers of the Berne International Bureau; this Sub-Committee's decisions, which were approved by the Committee, will be presented to the Conference in a special report.

¹ This report was submitted first to a Drafting Committee comprising Messrs. Dungs and von Goebel (*Germany*), de Borchgrave (*Belgium*), G. Lecomte and Renault (*France*), Sir Henry Bergne and Askwith (*Great Britain*), Ferrari (*Italy*) and Baron de Ugglas (*Sweden*) and then to the Committee, which approved it at its session on November 11, 1908.

² It comprised Messrs. von Goebel (*Germany*), Breton (*France*), Askwith (*Great Britain*), Ottolenghi (*Italy*), Hoel (*Norway*) and Kraft (*Switzerland*).

The other³ studied the questions concerning mechanical musical instruments; its conclusions were submitted to the Committee, were approved by it and are recorded within the present report. Finally, it should be added that, to comply with Rule 7 of the Rules of Procedure as much as of the nature of things, the texts emerging from the Committee's successive votes were submitted to a Drafting Committee which carefully revised them in eight sessions; it was after that revision that they were presented to the Committee which passed them definitively at its session on November 11, 1908. The Conference is therefore in a position to come to its decisions in full knowledge of the facts.

At a time when it is a question of revising the work accomplished in Berne in 1886 and in Paris in 1896, it may be worth indicating in a few lines the Union's progress over 22 years.

When, at the request of the *International Literary Association*, later to be called the *International Literary and Artistic Association*,

³ It comprised Messrs. Robolski and Osterrieth (*Germany*), Wauwermans (*Belgium*), Ferraz (*Spain*), Breton and Gout (*France*), Sir Henry Bergne and Askwith (*Great Britain*), Ferrari (*Italy*) and Kraft (*Switzerland*).