

Copyright

Monthly Review of the United
International Bureaux for the Protection
of Intellectual Property (BIRPI)

5th year - No. 8

August 1969

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INTERNATIONAL UNION

Extraordinary Session of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union)

(Geneva, June 20 and 21, 1969)

Final Report

Introduction

1. The Permanent Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) hereinafter referred to as "The Permanent Committee" met in extraordinary session on June 20 and 21, 1969, in Geneva, at BIRPI headquarters.

2. The twelve States members of the Permanent Committee were represented: Belgium, Brazil, Denmark, France, Germany (Federal Republic), India, Italy, Portugal, Rumania, Spain, Switzerland, United Kingdom.

3. Representatives of the following States, members of the Berne Union, were present as observers: Australia, Holy See, Israel, Malta, Monaco, Morocco, Netherlands, Sweden.

4. At the invitation of the Chairman of the Permanent Committee, Kenya and the United States of America were present as observers. While neither State was a member of the Permanent Committee, both were members of the subcommittee established by Resolution No. 1 (XR) of the Intergovernmental Copyright Committee of February 7, 1969, which was to meet in Paris immediately following the meeting of the Permanent Committee and which was to consider analogous problems.

5. Unesco was also invited to attend the meeting as an observer and was represented.

6. The list of participants is annexed to the present report.

7. The session was presided over by Mr. Jorge Carlos Ribeiro (Brazil) in his capacity of acting Chairman of the Permanent Committee.

8. BIRPI was represented by its Director, Professor G. H. C. Bodenhausen, and by its First Deputy Director, Dr. Arpad Bogsch. The task of the Secretariat of the Permanent Committee was fulfilled by Mr. Claude Masouyé, Head of the External and Public Relations Division, and by Mr. Vojtěch Strnad, Head of the Copyright Division.

9. The agenda as it appeared in document DA/30/1 was unanimously adopted.

General Discussion

*on the advice to be given by the Director of BIRPI to the subcommittee of the Intergovernmental Copyright Committee established by Resolution No. 1 (XR) dated February 7, 1969, and entrusted with examining the problems raised by the proposed revision of Article XVII of the Universal Copyright Convention and the Appendix Declaration relating thereto (Document DA/30/3)**

10. The Chairman of the Permanent Committee, using document DA/30/3 as the basis for discussion, invited the participants to make statements of a general nature and then to examine the five issues raised in paragraphs 15 to 21 of the said document. He stressed that the advice to be given by the Director of BIRPI to the subcommittee of the Intergovernmental Copyright Committee would be given under his own responsibility but that the discussion of document DA/30/3 would allow him to formulate a precise opinion on the problems in question. He also mentioned document DA/30/4, which contained a statement by the Observer of Argentina.

11. Mr. Charpentier (France) pointed out first that his Delegation was profoundly convinced of the necessity of maintaining the independence of the Berne Convention and the Universal Copyright Convention. The failure of the Protocol annexed to the Stockholm Act of the Berne Convention had demonstrated the impossibility of bringing together under that Convention the traditional principles of a high level of protection and exceptions in favor of developing countries. The Universal Convention with its lower level of protection was the appropriate instrument for resolving the problems of developing countries.

12. He did not share the fear expressed in the Report of the Director of BIRPI that without concessions in favor of developing countries the Berne Convention would be reduced to a system acceptable, in practice, only to countries of Western Europe. In his opinion, the Berne Convention could cater for all the industrialized countries; and, furthermore, there was nothing to indicate that all the developing countries would be desirous of leaving the Berne Union.

13. Moreover, he did not share the opinion of the Director of BIRPI that highly developed countries had no need of a detailed system of international rules because of the great

* The document is reproduced hereafter (p. 153).

similarity of their national legislations. The widespread dissemination of information and the advent of new technical means of communication required a coherent body of rules within the context of the Berne Convention.

14. Since the Delegation of France was resolutely opposed to the merger of the two existing Conventions, as well as to any solution which consisted in adding to the Berne Convention a protocol for developing countries, it desired that the safeguard clause provided for by Article XVII of the Universal Convention and the Appendix Declaration relating thereto be immediately suspended so that the said countries could leave the Berne Convention without losing the benefits accorded by the Universal Convention.

15. In the opinion of the Delegation of France, the revision of the Universal Convention must be effected without delay according to a procedure independent of the work of the Joint Study Group which was to meet in Washington the following September.

16. The Delegation of France did not share the view of the Director of BIRPI according to which the protection guaranteed by the Universal Convention was lower than that provided in the Stockholm Protocol. In particular, it believed that the Universal Convention was more restrictive in the field of translation and exportation and did not contain any provision as detrimental as that contained in paragraph (e) of Article 1 of the Protocol.

17. In conclusion, the Delegation of France urged that the conference charged with revising Article XVII of the Universal Convention should be convened without delay.

18. Mr. Straschnov (Kenya) stated that he was opposed to the idea of a merger of the two Conventions. However, he believed that the removal of Article XVII of the Universal Convention could not take place without some additional action. This could take the form of a new protocol establishing links between countries members of the Berne Union only and countries party to the Universal Convention only. Such a protocol could provide for the application of national treatment, accompanied by material reciprocity, in the relations between such countries.

19. Mr. Wallace (United Kingdom) recalled the position of neutrality adopted by the United Kingdom with respect to the revision of Article XVII of the Universal Convention. However, any conference of revision must necessarily consider other questions. He expressed satisfaction with the initiative taken by interested private circles with a view to finding arrangements of a practical nature within the existing Conventions, to meet the needs of developing countries.

20. He believed that any special rules of international law intended to meet the needs of developing countries should be incorporated in the Universal Convention rather than the Berne Convention. The level of protection in the developed countries should be the Stockholm text of the Berne Convention minus the Protocol. The Universal Convention should be revised to include certain basic rights (reproduction, public performance, broadcasting) together with a revised protocol catering primarily for the educational needs of developing countries. Such an instrument could follow the general lines

of the Stockholm Protocol but should not permit the exportation of copies made under compulsory licenses and should not contain a provision like the one contained in paragraph (e) of Article 1.

21. This new pattern of world copyright protection could be achieved in two ways. One would consist in having, as now, two conventions; the other would be a single, two-tier, convention in which revision of the tier containing the more stringent obligations was a matter solely for the countries which had joined that tier. But in either case it was desirable that a single secretariat should be responsible for world copyright matters. This secretariat should be BIRPI and later the World Intellectual Property Organization (WIPO). In the opinion of the Delegation of the United Kingdom, such changes could be made in a very reasonable period of time.

22. Finally, Mr. Wallace informed the Permanent Committee that the United Kingdom did not wish to be a candidate for the designation of the two States which would attend, as observers, the subcommittee of the Intergovernmental Copyright Committee envisaged in item 4 of the agenda.

23. Mr. Ulmer (Federal Republic of Germany) expressed the view that the existence of two multilateral copyright Conventions was not an ideal solution but that it was nevertheless an actual fact. Such duality justified links between the two Conventions and those links existed already. Examples were the joint sessions of the two Committees established by the Conventions, the Joint Study Group on international copyright, and the collaboration between BIRPI and Unesco. It appeared to him to be indispensable to strengthen such collaboration. Mr. Ulmer shared entirely the view of the Delegation of the United Kingdom concerning a single administration of the two instruments.

24. Independently of administrative questions, there were two tasks to accomplish. The first and immediate task was to find a satisfactory solution for the relations between developed and developing countries. That should not be limited to the suspension of the safeguard clause but should include, at the same time, the introduction of other provisions into the Universal Convention. The second task, to be undertaken at a later stage, was to find solutions for the relations between all the countries in the world, including those which did not belong so far to either of the two Conventions.

25. Mr. Galtieri (Italy) declared that he shared, on several points, the views advanced by the Delegation of France. The revision of the safeguard clause seemed to him the most rapid means of satisfying the demands of developing countries. A protocol common to the two Conventions would be in the nature of a long-term solution. The administrative problems resulting from the existence of the two Conventions could be resolved within the framework of WIPO. However, that was a matter which would come under the competence of the Study Group scheduled to meet the following September.

26. Mr. Chaudhuri (India) recalled that the Paris meeting in February 1969 had been almost unanimously of the opinion that there was an imperative need for revision of Article XVII of the Universal Copyright Convention and the Appendix

Declaration relating thereto. He also recalled the statement made by the Delegation of the United States of America on behalf of the American Book Publishers. The Report that the Director had presented to the present session did not seem to him to reflect the spirit of cooperation that had prevailed at the Paris meeting; in particular, it had not mentioned the general support for revision of the Universal Convention and speedy ratification of the Stockholm Protocol. The secretariat of the Berne Convention was maintained by the contributions of member States; it should therefore reflect the aspirations of all member States and not only those of developed countries.

27. The Delegation of India considered that the said report failed to recognize the position prevailing in developing countries. The Stockholm Protocol had not been adopted for the purpose of facilitating exportation from those countries; it had been adopted for instructional purposes. What the developing countries objected to in the present system of international copyright was the difficulty they had in obtaining rights of reproduction or of translation for a limited number of books that were needed exclusively for educational purposes.

28. The Delegation of India did not share the view of the Director of BIRPI that the exceptions provided in the Stockholm Protocol appeared excessive in the opinion of many developed countries. Recent contacts which India had had with the International Copyright Task Force Committee in the United States of America and the British Publishers Association had shown that the concessions offered by these private bodies were, in a general way, equivalent to the provisions of the Stockholm Protocol.

29. In the opinion of the Delegation of India, the proposed revision of the Universal Convention did not constitute an alternative to the Stockholm Protocol but it was justified by the needs of developing countries in the field of education and by the necessity of eliminating all traces of the colonial spirit from the Universal Convention.

30. However, India was not opposed to a protocol for developing countries common to both Conventions. This question should be examined by the Joint Study Group in September rather than by the subcommittee which was to meet in Paris.

31. Furthermore, the Delegation of India was completely opposed to the creation of a third convention as well as to any program which might delay the revision of the Universal Convention. It was completely opposed to the requirement of unanimity for revision of the safeguard clause.

32. Mr. Chaudhuri then indicated the pressing needs of India in the field of translation in the light of the fact that a vast program existed to utilize the national languages in the education of the population. He recalled the recent remarks of the Minister for Education and Youth Services of India on the great need of students for books, a need which could only be satisfied by national production. It was not desirable to apply to books the same principles of protection as were applied to consumer goods. However, while seeking to protect the national interest, no steps should be taken that would divide the international community formed by books

and authors. He indicated that India spent each year in foreign currency 40 million rupees for the importation of books and half a million rupees for the payment of copyright royalties. During the meeting of the subcommittee in Paris, the Director of BIRPI should advocate not only the revision of the safeguard clause but also the appending to the Universal Convention of a protocol similar to that of Stockholm.

33. Mr. Hermanny (Brazil) endorsed the views expressed by the Delegation of France and declared that the two Conventions complemented each other and should be maintained as two separate instruments. It appeared to him that it would be very difficult to create one convention with two different levels and two categories of States. The procedure for the revision of the safeguard clause for the Berne Union should be completely independent and the Permanent Committee of that Union should not interfere with that procedure.

34. Mr. Weincke (Denmark) expressed the opinion that a mere suspension of the safeguard clause was not sufficient and that one should try rather to accomplish two things at the same time: introduce into the Universal Convention the recognition of certain basic minimum rights; revise the Stockholm Act of the Berne Convention with a view to separating the Protocol from that Act and making it an independent instrument. The revision of the two Conventions should be undertaken simultaneously. It should not be impossible to complete this process within the same period of time as that required for a revision limited to the safeguard clause.

35. Miss Ringer (United States) stated that her Delegation fully supported the program for revision of the Universal Convention embodied in Resolution No. 1 (XR) of the Intergovernmental Copyright Committee. This program should be brought to fruition in the shortest possible time.

36. She recalled that efforts were already being made in the private sector to seek solutions to the practical problems of the publication of works in the original or in translation in the developing countries.

37. The Delegation of the United States wished to emphasize that a simple revision of the safeguard clause would be very dangerous. It believed therefore that it was necessary to study not only the question of suspension but also the questions indicated in the five points of the said Resolution. It was only by finding solutions to all the problems mentioned in the Resolution that one could avoid a polarization of the two Conventions.

38. Among the five points, the United States considered the one dealing with new links between the two Conventions the most important. On this subject, the proposal presented by the Delegate of Kenya merited close study. With regard to the other points, it was necessary to study the criteria on the basis of which a country would cease to be a developing country and would be considered a developed country. It was necessary also to determine how such a change in status would affect the country's conventional obligations.

39. Finally, the Delegation of the United States considered that the concept of reciprocity should be introduced vis-à-vis those countries which would benefit from the suspension of the safeguard clause.

40. Mr. Sher (Israel) did not see, from the point of view of the Berne Union countries, any fundamental difference between the relationship of members of the Union which were not party to the same Act and their relationship with countries which were party to the Universal Convention. Consequently, from this point of view, the Universal Convention could be considered another Act of the Berne Convention. The sole difference between the two Conventions from the institutional point of view, apart from imposing obligations at a different level, was the fact that they were administered by two different secretariats.

41. He considered that the problems of developing countries were essentially of a practical nature and recalled the propositions presented in this respect by Israel during the Stockholm Conference. However, those propositions did not enter into the scope of the present meeting, which was solely concerned with legal issues. The long-term objective was to assure a uniform system in favor of developing countries; the two existing systems should be merged and should follow the same principles, with a single administration.

42. The Delegation of Israel stated that in the meantime it was in favor of establishing closer links between the two Conventions and introducing minimum rights into the Universal Convention. In any event, the revision of the safeguard clause was, in its opinion, within the exclusive competence of the countries party to the two Conventions. This was clear not only from the wording of the said clause but also from the fact that the obligations included therein concerned only those States which were members of the Berne Union. The legal situation of countries bound only by the Universal Convention was in no way affected by the existence or the non-existence of the safeguard clause.

43. Mr. Hesser (Sweden) recalled that Article XVII of the Universal Convention had been created to safeguard the interests of countries members of the Berne Union and had been adopted unanimously. The importance of those interests was emphasized by the fact that the Article had been adopted unanimously. The mere suspension of the safeguard clause would leave unprotected those interests for the defense of which the clause had been introduced. Such a gap, if it were to be created, should be filled by the recognition in the Universal Convention of fundamental rights. For example, at least the principle of the right of reproduction, the right of public performance, and the right of broadcasting, should be acknowledged.

44. He believed that in the absence of such guarantees in the Universal Convention the Stockholm Protocol itself created a level of protection much higher than that of the Universal Convention in its present form. He informed the Permanent Committee of the decision of the Swedish Parliament authorizing the Government to deposit a declaration admitting the application of the Protocol to Swedish works.

45. Finally, Mr. Hesser associated himself with the view of the Delegate of Denmark proposing that the Stockholm Act of the Berne Convention should be so revised that the Protocol would no longer be an integral part of that Act.

46. Mr. Belinfante (Netherlands) pointed out that his country had already opposed the integration of the Protocol

into the Berne Convention at Stockholm, and that he therefore shared the views of the Delegations of Denmark and Sweden on this point. He likewise approved in its entirety document DA/30/3, as well as the general ideas expressed by the Delegations of the Federal Republic of Germany and the United Kingdom.

47. As regards the question of the vote to modify the safeguard clause, the Delegation of the Netherlands believed that the countries party to the two Conventions should be able to vote on this matter and that their decision must be unanimous. This opinion was not based on the idea that the Appendix Declaration would be an agreement within the meaning of Article 20 of the Berne Convention, but was derived from the very nature of the Declaration as a means of safeguarding the Berne Union. However, that did not signify that the Netherlands would be opposed to its suspension.

48. The Director of BIRPI expressed the view that the suspension of the safeguard clause without the establishment of links to replace it would be extremely dangerous for the future of international relations in the field of copyright. Moreover — and especially if such suspension were decided by a majority rather than by unanimity — there would be a risk that it would be ratified by an insufficient number of States to make it worth while to developing countries.

49. Consequently, he proposed that if the safeguard clause must be revised the two Conventions should be revised simultaneously: the Berne Convention, in order to separate the Stockholm Protocol from it and to make certain of the latter's provisions more precise; the Universal Convention, in order to introduce some minimum rights with exceptions identical to those which would be admitted under the revised and by then separate Stockholm Protocol.

50. Since the minimum rights would be expressed only in the form of general principles and the exceptions would consist of relatively simple modifications to the Stockholm Protocol, the two revisions could be arranged without delay. The two concurrent revision conferences could take place as early as 1970, or at the latest in 1971. BIRPI, for its part, would be ready to collaborate with Unesco in the fullest manner, to achieve without delay satisfactory solutions in this regard.

The Five Issues

51. After hearing these various statements of a general nature, the Permanent Committee, on the invitation of its Chairman, examined the five issues mentioned in Resolution No. 1 (XR) of the Intergovernmental Copyright Committee.

1. Beneficiaries of the suspension of the safeguard clause — Definition of the concept of a "developing country"

52. Mr. Sher (Israel) stated that he was opposed to the criteria suggested in document DA/30/3 and believed that each country should be the judge of its own position. In his opinion, no objective criteria could be set for "needy" countries, and he referred to the criteria accepted in Stockholm, which were unsatisfactory, and were not, in his opinion, to be interpreted in the way the Director had done in document DA/30/3. He also asked what would be the situation of countries that ceased to be developing countries.

53. Mr. Charpentier (France) expressed the view that only developing countries should have the right to benefit from the suspension of the safeguard clause and that the applicable criteria should be those applied in practice by the United Nations.

54. Mr. Ascensão (Portugal) said that no distinction should be made between developed and developing countries and that the system of a safeguard clause was an abnormal solution for the regulation of international relations. The fact that Portugal was opposed to the said clause did not mean that it desired to leave the Berne Union.

55. Mr. Ulmer (Federal Republic of Germany) endorsed the views of the Delegation of France.

56. Mr. Galtieri (Italy) recalled that the safeguard clause contained in the Appendix Declaration was composed of paragraphs (a) and (b). As regards paragraph (b), the suspension (which could prevent certain countries from leaving the Berne Union) should be established, in the view of the Delegation of Italy, solely in favor of developing countries. As regards paragraph (a), since it was a clause which seemed to limit perceptibly the sovereignty of States, the Delegation of Italy would not be opposed to considering the possibility of a suspension which could be made in favor of all States, whether developing or not.

57. Mr. Sher (Israel) expressed the view that if the principle of reciprocity was introduced one could recognize the right of any country to leave the Berne Convention without the consequences envisaged in the Appendix Declaration because such reciprocity would act like an automatic brake.

58. Mr. Straschnov (Kenya) shared the opinions expressed by the Delegations of France and the Federal Republic of Germany.

2. *Limitation in time for the suspension of the safeguard clause*

59. Mr. Straschnov (Kenya) stated that he was in favor of making the duration of the benefits of suspension coincide with the period during which the benefiting country was a developing country, and suggested that a careful study should be made of the situation that would arise when the specified period ended. He asked whether or not it would be necessary for countries that had left the Berne Union to rejoin, or whether it would be possible to envisage participation in the Berne Union on a suspended basis which would cease at the end of a fixed period.

60. Mr. Sher (Israel) expressed the view that no time limit should be imposed. In any case, the suggestion to permit suspension of membership would without doubt be better than permitting a pure and simple break with the Berne Union.

61. Mr. Charpentier (France) believed that a developing country should remain entitled to the benefit of suspension as long as it remained a developing country.

62. Mr. Ulmer (Federal Republic of Germany) expressed the view that it was not appropriate to envisage a time limit.

3. *Idea of material reciprocity*

63. Mr. Ulmer (Federal Republic of Germany) expressed the opinion that material reciprocity already existed in the

Universal Convention with respect to the term of protection. In his view, as far as the relations between developed and developing countries were concerned, this one rule of reciprocity was sufficient.

64. Mr. Charpentier (France) stated that the Delegation of France reserved the right to examine more closely, in the course of the discussions at Washington, the very important question of the possible introduction of the principle of reciprocity into the Universal Convention, and that it would present concrete proposals in due course. In any event, the Delegation of France wished to underline that in its opinion the rule of reciprocity could in no case be applied to developing countries, as it would be a useless and vexatious sanction.

65. Mr. Sher (Israel) shared the opinion expressed by Mr. Ulmer, and said that it would not be right to introduce sanctions against developing countries which might have to suspend their membership of the Berne Union.

66. Mr. Straschnov (Kenya) referred on this point to the suggestions that he had made in the course of the general discussion.

4. *New links between the two Conventions*

67. Mr. Wallace (United Kingdom) believed that two separate camps, without any links, would have disastrous consequences for international relations in the field of copyright. It was therefore imperative to create new links.

68. Mr. Ulmer (Federal Republic of Germany) referred to the opinion of the Director of BIRPI that it was necessary to provide for minimum rights in the Universal Convention. He believed that it would be difficult, in a short space of time, to formulate detailed provisions introducing these minimum rights but that the solution could be found in the form of an interpretative declaration of Article I to define the notion of "adequate and effective protection". After having expressed in the said declaration the principle of the protection of such fundamental rights as the rights of reproduction, broadcasting, and public performance, it would be necessary to incorporate reservations along the lines of those now appearing in the Stockholm Protocol, with adequate amendments as concerns paragraph (e) of Article 1 thereof.

69. Mr. Charpentier (France) declared that the question of new links should be examined by the Joint Study Group. In no case should the safeguard clause be replaced by a measure of reprisal against those countries which would avail themselves of the suspension. In addition, the effect of Article XVII would continue to exist and therefore it did not need to be replaced. In effect, paragraph (b) of the Appendix Declaration was not affected by the suspension and thus the principle of paragraph (a) would remain in force and would continue to be applied to developed countries. However, if one meant by new links the introduction of improvements into the Universal Convention, the Delegation of France declared itself ready to study this question thoroughly.

5. *Majority or unanimity for revising the safeguard clause*

70. Mr. Charpentier (France) expressed the view that, unless the revision conference itself decided otherwise, two

thirds of the States present and voting should have the right to amend Article XVII of the Universal Copyright Convention and the Appendix Declaration.

71. Mr. de San (Belgium) agreed with this opinion.

72. Mr. Sher (Israel) said that, since the interests involved were those of Berne Union member countries only, it should be only countries bound by both Conventions that should have the right to vote and the unanimity rule written into the Berne Convention should be applied.

73. Mr. Archi (Italy) favored a two-thirds majority unless the revision conference itself decided otherwise.

74. Mr. Straschnov (Kenya) did not think that the unanimity rule should apply since what was to be revised was the Universal Convention and not the Berne Convention. The Appendix Declaration was, moreover, a special agreement within the meaning of Article 20 of the Berne Convention, but it was not an integral part of that Convention. In any case, the revision conference would be sovereign in deciding what majority should be required.

75. Mr. Chaudhuri (India) agreed with this last opinion.

76. Mr. Ulmer (Federal Republic of Germany) expressed the view that any modification of the safeguard clause should require two votes: one by the countries party to the Universal Convention, and another by the countries party to both Conventions.

77. Mr. Belinfante (Netherlands) agreed with the idea of a double vote but said that, whereas a majority of two-thirds might suffice in the first vote, for the second vote — that of the countries bound by both Conventions — unanimous agreement was required.

6. General discussion on the five issues

78. Miss Ringer (United States), speaking solely as an Observer representing her country at the present extraordinary session of the Permanent Committee, suggested that certain alternative views should be considered at the subcommittee meeting at Paris. With respect to the scope of the suspension, she expressed the view that it should be limited to developing countries, and that this concept should not be defined as in the Stockholm Protocol or on the basis of an arbitrary figure such as per capita income. She suggested that consideration be given to a system under which a country would be allowed to decide for itself whether it was developing, but that it should be required, both initially and at stated intervals thereafter, to declare its intention to take advantage of the suspension and to support its declaration with statistics involving not only income and gross national product but also production and trade figures with respect to books, films, and broadcasting, and statistics concerning education and illiteracy. In addition, depending upon other factors, the possibility for a Berne country to apply material reciprocity under the Universal Convention with respect to works of former Berne members should be given careful consideration, as a safeguard against the possibility that a developing country might continue indefinitely to claim the benefits of the suspension after it had ceased to be developing. As to the question of voting at the revision conference, the Delegation

of the United States referred to the report of the Vienna Conference, and suggested the possibility of a single vote to consist of a two-thirds majority of all members present and voting and also a two-thirds majority of the Berne members represented in that group. The Delegation of the United States reiterated the need for careful consideration of the question of links between the two Conventions, and expressed the hope that the suggestions brought out at the present meeting, including that of the Delegation of the Federal Republic of Germany, would be explored. She expressed satisfaction with the cooperative spirit of the meeting and the common view that the planned revision of the Universal Convention was only a first step toward a general improvement of international copyright relations.

79. The Director of BIRPI summarized the conclusions which, in his opinion, could be drawn from the views expressed in the Permanent Committee. He did not consider a mere revision of the safeguard clause satisfactory; any such revision should be accompanied by supplementary measures. As to the five issues, it appeared to him that the majority of the Permanent Committee was of the following opinion:

- (i) as to issue No. 1: only developing countries should be allowed to benefit from a suspension of the safeguard clause; the notion of "developing country" should be defined as in the Stockholm Protocol;
- (ii) as to issue No. 2: any precise limitation in time would be artificial and should not be provided for;
- (iii) as to issue No. 3: any application of the concept of material reciprocity depended on the scope of the revision; if the revision was limited to the safeguard clause, the said reciprocity should be introduced; if the revision was broader, reciprocity should apply only between countries party to the Berne Convention alone and countries party to the Universal Copyright Convention alone;
- (iv) as to issue No. 4: replacement links appeared to be necessary; in any case, the treatment accorded to developing countries under each of the two Conventions must be the same;
- (v) as to issue No. 5: it would be appropriate to envisage a double vote.

80. The Director of BIRPI finally informed the Permanent Committee of his intention to submit to the subcommittee of the Intergovernmental Copyright Committee document DA/30/3 and the present report, with an oral explanation on the basis of the conclusions that he had just drawn.

81. The Chairman of the Permanent Committee concluded that the Permanent Committee would take cognizance of the statements made during the course of the meeting and passed to item 4 of the agenda.

Designation of two States members of the Permanent Committee

to attend the meetings of the subcommittee of the Intergovernmental Copyright Committee as Observers

82. On the proposal of Mr. Ulmer (Federal Republic of Germany), supported by Mr. Charpentier (France), the Committee unanimously designated Denmark and Italy.

Closing of the Session

83. Mr. Wallace (United Kingdom) and Mr. Ulmer (Federal Republic of Germany), speaking on behalf of the participants, congratulated in turn the Chairman of the Permanent Committee for the masterly fashion in which he had conducted the discussions and thanked the Director of BIRPI and his staff for their assistance in the preparation of the work and throughout the proceedings.

84. The Permanent Committee unanimously approved the present report and the Chairman declared the extraordinary session closed.

ANNEX

List of Participants

I. Member States of the Permanent Committee

Belgium

Mr. Gérard L. de San, Director-General and Legal Counsellor, Ministry of National Education and Culture
Mr. Frans van Isacker, Professor at the University of Ghent
Mr. Jacques Bocqué, Assistant Counsellor, Ministry of Foreign Affairs

Brazil

Mr. Jorge Carlos Ribeiro, Secretary of Embassy, Montevideo
Mr. Joracy Schafflör Camargo, Vice-President, National Commission of Brazil for Unesco
Mr. Daniel da Silva Rocha, Delegate of Brazil
Mr. Eduardo Hermann, Secretary of Embassy, Permanent Mission of Brazil, Geneva

Denmark

Mr. Willy Weincke, Head of Department, Ministry of Cultural Affairs

France

H. E. Mr. Pierre Charpentier, Ambassador, Ministry of Foreign Affairs
Mr. André Kerever, Maître des requêtes, Council of State, Technical Advisor, Ministry of Cultural Affairs.

Germany (Federal Republic)

Dr. Eugen Ulmer, Professor at the University of Munich
Mrs. Elizabeth Steup, Director, Ministry of Justice
Dr. Manfred Günther, Counsellor, Ministry of Foreign Affairs
Miss Gisela Rheker, Counsellor, Permanent Delegation of the Federal Republic of Germany, Geneva

India

Mr. Kanti Chaudhuri, Joint Secretary to the Government of India, Ministry of Education and Youth Services
Mr. D. N. Malotra, President, Federation of Publishers and Booksellers Associations in India

Italy

H. E. Mr. Pio Antonio Archi, Ambassador, Delegate for Intellectual Property Treaties, Ministry of Foreign Affairs
Mr. Gino Galtieri, Inspector-General, Head of the Literary, Artistic and Scientific Property Office, Presidency of the Council of Ministers
Mr. Giuseppe Trotta, Judge at the Court of Appeal, Legal Advisor

Portugal

Mr. José de Oliveira Ascensão, Professor at the Faculty of Law, University of Lisbon
Mr. Luis Pazos Alonso, Secretary of Embassy, Permanent Mission of Portugal, Geneva

Rumania

Mr. Costel Mitran, Second Secretary, Permanent Mission of Rumania, Geneva

Spain

Mrs. Isabel Fonseca Ruiz, Director del Gabinete de Estudios, Department of Archives and Libraries

Switzerland

Mr. Jean-Louis Marro, Head of Copyright Section, Federal Bureau of Intellectual Property

United Kingdom

Mr. William Wallace, C. M. G., Assistant Comptroller of the Industrial Property and Copyright Department, Board of Trade

II. Observers

(a) States not members of the Permanent Committee

Australia

Mr. W. N. Fisher, Third Secretary, Permanent Mission of Australia, Geneva

Holy See

Rev. Henri-M. de Riedmatten, O. P., Permanent Observer accredited to the United Nations Office, Geneva

Israel

Mr. Ze'ev Sher, Deputy Attorney General, Ministry of Justice

Kenya

Mr. Georges Straschnov, Director, Department of Legal Affairs, European Broadcasting Union

Malta

Mr. R. A. Sammut, Administrative Officer, Ministry of Labour and Welfare

Monaco

Mr. Georges Straschnov, Director, Department of Legal Affairs, European Broadcasting Union

Morocco

Mr. Abderrabim H'ssaine, Director-General, Copyright Office

Netherlands

Mr. W. G. Belinfante, General Counsellor, Ministry of Justice
Mr. D. Wechelaer, Senior Oficial, Ministry of Cultural Affairs

Sweden

Mr. Torwald Hesser, Justice of the Supreme Court

United States of America

Mr. Abramam L. Kaminstein, Register of Copyrights, Library of Congress
Miss Barbara A. Ringer, Assistant Register of Copyrights, Library of Congress
Mr. Harvey J. Winter, Business Practices Division, Bureau of Economic Affairs, Department of State

(b) Intergovernmental Organization

United Nations Educational, Scientific and Cultural Organization (Unesco)

Miss M.-C. Dock, Head, Copyright Division

III. United International Bureaux for the Protection of Intellectual Property (BIRPI)

Professor G. H. C. Bodenhausen, Director
Dr. Arpad Bogsch, First Deputy Director

Mr. Claude Masouyé, Senior Counsellor, Head, External and Public Relations Division
 Mr. Vojtěch Strnad, Counsellor, Head, Copyright Division
 Mr. Robert D. Hadl, Legal Assistant, Copyright Division
 Mr. M. Stojanović, Legal Assistant, Copyright Division

IV. Officers of the Meeting

Chairman: Mr. Jorge Carlos Ribeiro (Brazil)
 Secretaries: Mr. Claude Masouyé (BIRPI)
 Mr. Vojtěch Strnad (BIRPI)

Proposed Revision of the Universal Copyright Convention Report by the Director of BIRPI

Main Considerations

1. Several developing countries seem to find the level of copyright protection according to the Berne Convention too high for their economic and social situation which makes them more "consumers" or "importers" than "producers" or "exporters" of works protected by copyright.

2. The Stockholm Protocol tried to meet the wishes of such developing countries by specifying a number of cases in which they could forgo applying some of the minimum provisions of the Berne Convention. The exceptions so provided for in the Stockholm Protocol seem, however, to be excessive in the opinion of many developed countries. It now seems likely, two years after the signature of the Stockholm Protocol, that that Protocol will not be ratified by several of those countries without whose ratification its practical usefulness would remain very limited indeed. None of the English-speaking or French-speaking developed countries has ratified the Protocol so far or held out lately any hope of ratification.

3. Since, nevertheless, most developed and developing countries seem to wish to maintain international copyright relations with each other, a search for alternative solutions has started.

4. One of the alternative solutions proposed in other circles would consist in the suspension of the so-called "safeguard clause" of the Universal Copyright Convention. Such a suspension would require the revision of that Convention and, to be effective, it would require that the revision be ratified by the main "exporting" countries among the developed countries.

5. It is difficult to see why it would be easier for developed countries to ratify such a revision of the Universal Copyright Convention than to ratify the Stockholm Protocol: under that Convention the protection guaranteed to works originating in developed countries is less — far less — than they would receive under the Stockholm Protocol.

6. It is therefore to be feared that, if developing countries place their hopes in the revision of the Universal Copyright Convention, their expectations might be frustrated owing to the lack of an adequate number of ratifications, just as in the case of the Stockholm Protocol.

7. Consequently, it seems more realistic to recognize the real nature of the problem — which is the relations between some developed and some developing countries — and try to find a solution which stands a good chance of not only being accepted by international meetings and not only being signed

at diplomatic conferences, but also being ratified by the parliaments of the interested countries.

8. For the reasons already stated, a suspension of the safeguard clause would hardly be a solution because it would lower too drastically the level of international protection of copyright in the relationships between certain countries. What is needed is a clear agreement on what exceptions from the traditional requirements the interested countries could accept. It would seem that the exceptions ought to be in the nature of those contained in the Stockholm Protocol but somewhat more precise and, mainly as far as Article 1(e) of that Protocol is concerned, less sweeping. Naturally, creating exceptions requires the existence of rules. Such rules exist in the Berne Convention but there are hardly any in the Universal Copyright Convention.

9. Perhaps, therefore, the solution lies in the direction of finding rules and exceptions which are applicable under both Conventions. There seems to be no economic or social reason for any developed country to grant concessions to developing countries under one of the Conventions and to deny them under the other. The viability of a new protocol regarding developing countries, common to both Conventions, or the merging of the two Conventions, providing, at the same time, for the same concessions to developing countries, should be explored. If merging seems to be the better solution, one should try to solve, at the same time, the small differences which separate developed countries from each other under the Berne Convention and the Universal Copyright Convention, respectively, or which have prevented either Convention from becoming truly universal.

10. In some Western European circles, there seems to exist an opinion that the presence of the developing countries in the Berne Union is not desirable because such presence may gradually erode the high level of guaranteed ("minimum") rights written into the Berne Convention. While the latter may be true, to stop any such erosion does not require what would virtually constitute an invitation to the developing countries to leave the Berne Union. Instead, such countries should be accommodated in the network of international copyright relations in a way which, at the same time, will allow developed countries to maintain fully their high level of minimum rights. Such a way would be the granting of special exceptions under such minimum rights to developing countries. There is no reason to believe that if such exceptions were provided for, developing countries would try to interfere with the level of relationships which do not affect their interests, that is, with the level of relationships among developed countries. Exclusion of any such interference could

be legally guaranteed by providing that on amendments concerning provisions which do not bind developing countries — that is, the higher level protection — only the developed countries may vote.

11. The adoption of a policy, or of measures amounting to such a policy, which would make of the Berne Convention an essentially Western European Convention would be contrary to the long-term interests even of the Western European countries. Such countries hardly need, for their mutual relations, the minimum rights written into the Berne Convention. Since, on all essentials, their national legislations are similar, *in their mutual relations*, they could probably live with a Convention which guarantees no minimum rights and merely provides for national treatment. But as soon as most other regions of the world are considered, the minimum rights of the Berne Convention are a practical necessity. And if, for the developing countries and them alone, those minimum rights were qualified by some exceptions, such a solution would not seem to be an unreasonable price to pay for trying to preserve *meaningful* copyright relations with other parts of the world, including the developing countries.

Background

12. The Intergovernmental Copyright Committee, established under the Universal Copyright Convention, decided, on February 7, 1969, “to convene a conference for revision of Article XVII of the Universal Copyright Convention and of the Appendix Declaration relating thereto”; established a subcommittee “to examine the issues raised by the proposals for the revision of Article XVII and its Appendix Declaration”; and expressed the wish that five specific issues — quoted below — be considered by the subcommittee. The text of the resolution of the Intergovernmental Copyright Committee and the text of the said Article and Appendix Declaration are attached to the present document.

13. The subcommittee referred to above will meet at Unesco headquarters, in Paris, from June 23 to 27, 1969. Among the seven members of the subcommittee are four of the members of the Permanent Committee: Brazil, France, Germany (Federal Republic), and India. Two further members of the Permanent Committee of the Berne Union are invited as observers. The Director of BIRPI is invited in an advisory capacity.

14. The two purposes of the present (June 20 and 21, 1969) extraordinary session of the Permanent Committee are described in the following terms in the report of the Permanent Committee on its extraordinary session of February 3 to 7, 1969: “on the one hand to assist the Director of BIRPI in the advice he will be called upon to give to the subcommittee on the issues included in its mandate; and on the other hand to designate the two States members of the Permanent Committee to attend the meetings of the subcommittee as observers” (BIRPI document DA/29/11, paragraph 34).

The Five Issues

15. Among the five issues to be considered by the subcommittee, one, although bearing the number 4, raises a pre-

liminary question on the answer to which replies to the first three issues depend. Issue No. 4 asks “whether any link between the Berne Union and the Universal Copyright Convention could or should be substituted for the safeguard clause”.

16. It is proposed that the answer should be in the affirmative: a substitute could and should be found for the safeguard clause. As to the further question what should be substituted for the safeguard clause, reference is made to the possibilities outlined in paragraph 9, above. The ideas tentatively advanced there need, of course, further study and discussion both among governments and between governments and representatives of private interests (the latter not invited to the Paris meeting of the subcommittee in June 1969). The Joint Study Group scheduled to meet in Washington (September/October 1969), consisting of 26 States and a number of representatives of private interests, would be an appropriate forum for such study and discussion, the more so as one of the three subjects with which that Group must deal consists of “matters arising from the existence of two copyright conventions of world-wide scope and possible methods for *providing links* between them” (Joint Resolution of the Permanent Committee and the Intergovernmental Copyright Committee, February 7, 1969, BIRPI document DA/29/11, page 14; emphasis added).

17. If the affirmative reply to issue No. 4 is accepted, the safeguard clause could not only be suspended but it could be removed, since, if both the minimum rights and the concessions provided for developing countries are uniform, the question whether there should be a safeguard clause has no longer any practical significance. However, the first three issues have still some significance, although not in connection with the suspension of the safeguard clause but with its substitute, if such substitute were to consist of a common protocol for developing countries. The suggested replies to the first three issues would then be as indicated in paragraphs 18, 19, and 20, below.

18. Issue No. 1 is “whether the suspension of the safeguard clause should be limited to developing countries and, if so, how that term should be defined”. Applying the question to the substitute link (a common protocol), the suggested answer is that any common protocol allowing for exceptions under the minimum rights provisions should be limited to developing countries. The term “developing countries” could be defined as suggested, after consultation with the United Nations Secretariat, in BIRPI document DA/29/2, submitted to the February 1969 session of the Permanent Committee. That definition, it is recalled, would embrace countries with less than US\$ 300 yearly per capita income and would include the following member States of the Berne Union: Brazil, Cameroon, Ceylon, Congo (Brazzaville), Congo (Democratic Republic), Dahomey, Gabon, India, Ivory Coast, Madagascar, Mali, Morocco, Niger, Pakistan, Philippines, Senegal, Thailand, Tunisia, Turkey, Upper Volta. (*N.B.* Mali and Upper Volta are in the process of leaving the Berne Union.)

19. Issue No. 2 is “whether the safeguard clause should be suspended indefinitely or for a specified period of time”. Applying the question to the substitute link (a common protocol), the suggested answer is that any exceptions under the

minimum rights provisions should be limited in time. Should, however, an economic criterion of the kind referred to in paragraph 18, above, be adopted for the notion of "developing country", the limitation would not necessarily have to be expressed in a certain number of years or in a certain number of years alone. Under the economic criterion, once a country's per capita income exceeds the limit current in the United Nations (with the passing years, probably far above US\$ 300), it would no longer qualify for the exceptions envisaged. However, in order to allow for more advance planning, perhaps the two criteria (mere time and mere economics) could be combined in a system in which a certain number of years would be added to the date at which the economic criterion is no longer met, or in which a certain number of years for exceptions would be guaranteed even if, during that period, the per capita income rose above the UN level.

20. Issue No. 3 is "whether a Berne Union member should be entitled to adjust the level of protection to that offered by a developing country under the suspension". Applying the question to the substitute link (common protocol), the answer, it is suggested, should be in the affirmative. Developed countries should be entitled to material reciprocity, not only because of the inherent principle of "quid pro quo" but also because it will serve as a stimulus for developing countries to protect *their own* authors, publishers, etc., and thereby promote both their creative talents and their printing, publishing, distribution, etc., industries. Of course, under the suggested solution, such reciprocity would exist not only between developed and developing countries of the Berne Union but between developed and developing countries in general.

21. The last issue (No. 5) to be studied is the matter of "the majority necessary at a revision conference to revise the Universal Copyright Convention and particularly its Article XVII and the Appendix Declaration thereto". As to the first part of the question, which does not seem directly to affect the Berne Union, no opinion is voiced at this time. However, the second part of the question not only affects the Berne Union but, actually, affects only those States party to the Universal Copyright Convention which are members of the Berne Union. According to the very terms of Article XVII of the Universal Copyright Convention, the Appendix Declaration — which contains the "safeguard clause" — is an integral part of the Universal Copyright Convention "for the States bound by the Berne Convention" (emphasis added) and for no other States. Consequently, the only way in which Berne Union countries may change the obligations they undertook under the Appendix Declaration — an instrument which, in good legal logic, is then also an annex to the Berne Convention — is the way in which they may change their obligations under the Berne Convention. That way, according to Article 24(3) of the said Convention (Brussels Act), is unanimity.

Request for Opinion

22. The Permanent Committee is invited to express its opinion on the views and suggestions contained in the present document.

ANNEX A

Resolution No. 1 (XR)

The Intergovernmental Copyright Committee,

Considering the requests of a number of countries party to the Universal Copyright Convention to convene a conference for revision of the Convention,

Taking note of the fact that these requests were prompted by proposals for changes in the provisions of the Universal Copyright Convention with respect to its relationship to the Berne Convention for the Protection of Literary and Artistic Works,

Recognizing its duty, under Article XI of the Universal Copyright Convention, to make careful and thorough preparations for any revision conference,

Decides to convene a conference for revision of Article XVII of the Universal Copyright Convention and of the Appendix Declaration relating thereto;

Establishes, in accordance with Rule 16 of its Rules of Procedure, a subcommittee to examine the issues raised by the proposals for the revision of Article XVII and its Appendix Declaration. The subcommittee is composed of the following members: France, Federal Republic of Germany, India, Kenya, Mexico, United States of America; the Chairman of the Intergovernmental Copyright Committee is *ex officio* member of the subcommittee; the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the United International Bureaux for the Protection of Intellectual Property may attend meetings of the subcommittee in an advisory capacity; Czechoslovakia and two States members of the Permanent Committee of the Berne Union designated by the latter attend the meeting of the subcommittee as observers;

Expresses the wish that the following be included among the issues considered by the subcommittee:

- (1) whether the suspension of the safeguard clause should be limited to developing countries and, if so, how that term should be defined;
- (2) whether the safeguard clause should be suspended indefinitely or for a specified period of time;
- (3) whether a Berne Union member should be entitled to adjust the level of protection to that offered by a developing country under the suspension;
- (4) whether any link between the Berne Union and the Universal Copyright Convention could or should be substituted for the safeguard clause; and
- (5) the majority necessary at a revision conference to revise the Universal Copyright Convention and particularly its Article XVII and the Appendix Declaration relating thereto;

Requests that the subcommittee submit its report to the Intergovernmental Committee at the time of its next regular session and recommends that it communicate, as a matter of information, its report to the Joint Study Group established under Resolution No. 2 (XR);

Decides that the Intergovernmental Copyright Committee, at its next regular session, shall fix the date for the meeting of the conference for revision of Article XVII of the Universal Copyright Convention and of the Appendix Declaration relating thereto and shall proceed with preparations for that conference, taking into consideration the results of the subcommittee established hereunder.

The documentation prepared by the Secretariat to be submitted to the next regular session of the Intergovernmental Copyright Committee shall include a report of the work accomplished at that time by the Joint Study Group envisaged under Resolution 59 (IX) of the Intergovernmental Copyright Committee;

Instructs the Chairman of the Intergovernmental Copyright Committee, in consultation with the Director-General of Unesco, to convene the subcommittee thus constituted.

ANNEX B**Universal Copyright Convention
(Excerpts)***Article XVII*

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a Declaration has been annexed to the present article. This Declaration is an integral part of this Convention for the States bound by the Berne Convention on January 1, 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration as well as the Convention.

Appendix Declaration relating to Article XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to the Universal Copyright Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the co-existence of the Convention of Berne and the Universal Convention,

Have, by common agreement, accepted the terms of the following declaration:

(a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.



GENERAL STUDIES

**The “droit de suite”**

Robert PLAISANT
Professor at the Faculty of Law
and Economics of Caen

Meetings of Other International Organizations Concerned with Intellectual Property

September 8 to 12, 1969 (Nuremberg) — International Federation of Musicians (FIM) — 7th Ordinary Congress

October 14 to 17, 1969 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents — Working Group

November 12 to 14, 1969 (Strasbourg) — Committee of Experts on Patents of the Council of Europe

November 18 to 20, 1969 (The Hague) — International Patent Institute (IIB) — 102nd Session of the Administrative Council

November 25 to 28, 1969 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents — Working Group

December 8 to 11, 1969 (The Hague) — International Association for the Protection of Industrial Property (IAPIP) — Council of Presidents

January 12 to 16, 1970 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents

ANNOUNCEMENT OF A VACANCY FOR A POST IN BIRPI

COMPETITION No. 88

Legal Assistant in the Copyright Division

Category and grade: P.3

Principal Duties:

In general to assist in the implementation of BIRPI's copyright and neighbouring rights program.

The particular duties will include:

- (a) legal studies on questions concerning copyright and neighbouring rights;
- (b) drafting of working papers for, and reports on, international meetings;
- (c) participation in meetings of other international organizations concerning copyright and neighbouring rights;
- (d) maintaining up to date a complete collection of copyright and neighbouring rights legislation of all countries.

Qualifications:

- (a) University degree in law or equivalent qualification;
- (b) Experience in the field of copyright and neighbouring rights (preferably including their international aspects);
- (c) Excellent knowledge of one of the official languages (English and French) and at least a good working knowledge of the other.

Nationality:

Candidates must be nationals of one of the member States of the Paris or Berne Unions. Qualifications being equal, preference will be given to candidates who are nationals of States of which no national is on the staff of BIRPI.

Age limit:

Candidates must be less than 50 years of age at date of appointment.

Date of entry on duty:

As mutually agreed.

Application forms and full details regarding the conditions of employment may be obtained from the *Head of Personnel, BIRPI, 32, chemin des Colombettes, 1211 Geneva 20, Switzerland*. Application forms, duly completed, should reach BIRPI not later than *September 30, 1969*.
