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Notifications

Convention Establishing the World Intellectual Property Organization

Application to Aruba

In accordance with the request of the Government of the Kingdom of the Netherlands, in its note dated December 23, 1985, the Convention Establishing the World Intellectual Property Organization (WIPO), which had been made applicable to the Netherlands Antilles including the island of Aruba,*

applies as of January 1, 1986, as concerns the Kingdom of the Netherlands, to the Netherlands Antilles and Aruba.

WIPO Notification No. 136, of August 8, 1986.

* See *Copyright*, 1974, p. 250.

LESOTHO

Accession

The Government of the Kingdom of Lesotho deposited, on August 18, 1986, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO).

The Convention Establishing the World Intellectual Property Organization will enter into force,

with respect to the Kingdom of Lesotho, three months after the date of deposit of its instrument of accession, that is, on November 18, 1986.

WIPO Notification No. 137, of August 18, 1986.

Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)

Application to Aruba

In accordance with the request of the Government of the Kingdom of the Netherlands, in its note dated December 23, 1985, the Berne Convention for the Protection of Literary and Artistic Works, Articles 22 to 38, which had been made applicable to the Netherlands Antilles including the island of

Aruba,* applies as of January 1, 1986, as concerns the Kingdom of the Netherlands, to the Netherlands Antilles and Aruba.

Berne Notification No. 115, of August 8, 1986.

* See *Copyright*, 1974, p. 251.

FINLAND

Ratification of the Paris Act (1971)

The Government of the Republic of Finland deposited, on July 25, 1986, its instrument of ratification of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

The Paris Act (1971) of the Convention will enter into force, with respect to the Republic of Finland, three months after the date of this notification, that is on November 1, 1986.

Berne Notification No. 114, of August 1, 1986.

National Legislation

PORTUGAL

Decree-Law No. 306/85

(of July 29, 1985)*

In line with a world trend, the marketing of audiovisual material — in other words video material — used for the making of the most varied recordings and copies, is flourishing in Portugal, yet without any legal framework to provide efficacious protection for the owners of copyright or neighboring rights. Whether at the level of production, distribution or showing, the cinematographic sector is already seriously affected by the freedom of the marketing and showing of films recorded on videograms. It even happens that videograms are distributed and shown before the films concerned are even imported or, if already imported, before they are distributed.

This Decree-Law is not however designed to regulate the copyright and neighboring rights in relation to videograms. That is a matter to be governed by the appropriate code, on which the Government and the Assembly of the Republic are at present working.

The intention is moreover not to limit the production, circulation or use of videograms, which are capable of playing a very definite part in the propagation of culture, but on the contrary to protect them by starting to regulate them.

The distribution outlets where videograms are sold, rented or exchanged are becoming more and more numerous. At the same time the owners of rights, including producers, are not in a position to monitor the use of those videograms, as they would be in the cinematographic industry, and, as it is extremely easy to obtain a copy, the market is flooded with "pirate" videograms.

In order to contend with such drawbacks, this Decree-Law introduces the requirement of classification of videograms and the registration of each title and the corresponding classification at the General Directorate of Entertainment and Copyright, with in addition the affixing on each casing of a

label indicating the existence of the classification and the registration number.

Therefore,

Pursuant to Article 201(1)(a) of the Constitution, the Government decrees as follows:

Article 1. (1) The distribution in any form, that is, the rental, sale and public showing, of videograms shall be subject to the classification thereof by the Entertainments Commission, pursuant to Decree-Law No. 396/82 of September 21.

(2) "Videogram" means the recording on a physical carrier of a sequence of images with or without accompanying sound, which may be produced by means of a video recorder or another process, for instance the copying of a cinematographic or televised work, which is intended for showing on a screen or for audiovisual dissemination.

Article 2. (1) The classification referred to in the foregoing Article shall be granted at the request of the duly accredited owners of the rights of exploitation of the videogram intended for public distribution or showing.

(2) The request shall be made on stamped paper and shall comprise the following elements to qualify for consideration:

- (a) original title, technical and artistic particulars and summary of contents;
- (b) indication of the number of copies to be distributed;
- (c) indication of the date of production;
- (d) document attesting ownership of the rights of exploitation.

Article 3. Without prejudice to the provisions of Article 2, when the contents of the videogram are merely the reproduction of a cinematographic work that is already classified, the General Directorate of Entertainment and Copyright shall assign the same classification to it.

* Published in *Diário da República* No. 172, of July 29, 1985.— WIPO translation.

Article 4. (1) It shall be mandatory to print on the container of each copy of a videogram its classification and the number of the corresponding registration at the General Directorate of Entertainment and Copyright.

(2) For the purposes indicated in paragraph (1), the General Directorate of Entertainment and Copyright shall be responsible for affixing on each container the printed notice of which a specimen is appended¹ to this Decree-Law, and which is produced exclusively by the National Printing Press — Official Mint (*Imprensa Nacional-Casa da Moeda*).

Article 5. (1) A fee of 5,000 escudos shall be payable for the classification of each videogram, except in the case provided for Article 3, where the fee shall be 1,000 escudos.

(2) Payment of the fees due under the foregoing paragraph shall be made to the General Deposit Bank (*Caixa Geral de Depósitos*) by means of a payment form issued by the General Directorate of Entertainment and Copyright.

(3) The proceeds from the fees referred to in this Article shall be paid to the Fund for the Promotion of Culture (*Fundo de Fomento Cultural*) of the Ministry of Culture.

(4) The fee amounts specified in paragraph (1) may be altered by joint order of the Ministry of Finance and Planning and the Ministry of Culture.

Article 6. (1) The public showing of videograms shall be considered a public show or entertainment for the purposes of the application of Decree-Law No. 42.660 of November 20, 1959, and the regulatory provisions under it, and also that of Decree-Law No. 396/82 of September 21.

(2) The public distribution or showing of a videogram that is the copy of a cinematographic work acquired on behalf of a business enterprise may not take place less than two years after the date of the contract for the distribution of the cinematographic work concerned, unless otherwise agreed between

the owner of the right of distribution of the work and the user of the videogram.

Article 7. (1) Any unclassified videogram shall be considered unlawfully produced and its public distribution or showing shall be punished with a fine of 20,000 to 200,000 escudos.

(2) Any infringement of the provisions of Article 6(2) shall be liable to a fine that varies in the same proportions.

(3) The minimum and maximum amounts of the fines provided for in this Article shall be doubled when they are imposed on corporate bodies.

(4) If no request for classification has been filed within 60 days following seizure, the unlawfully produced videograms referred to in Article 7(1) shall be considered abandoned to the State, without any entitlement to indemnification except in the cases provided for in Article 26 of Decree-Law No. 433/82 of October 27.

(5) Unauthorized copies shall also be seized, as shall the materials, machines or other instruments or the documents used to commit the infringement or intended for that purpose.

(6) Videograms or copies abandoned to the State shall be entrusted to the General Directorate of Entertainment and Copyright, which, after having erased the image fixed on the medium, shall decide on the purpose of the latter in the light of the public interest.

Article 8. (1) The imposition of the fines and subsidiary penalties provided for in this Decree-Law shall be within the competence of the Director General of Entertainment and Copyright.

(2) The amounts of fines shall be paid to the Fund for the Promotion of Culture of the Ministry of Culture.

Article 9. The classification of videograms distributed prior to the entry into force of this Decree-Law shall be effected within a period of six months, on the expiry of which the videogram concerned may no longer be classified.

¹Not reproduced (*Editor's note*).

The Berne Convention and National Laws

The Relationship Between the Berne Convention and Intellectual Property Law in Spain

Alberto BERCOVITZ*

I. General Concepts

In order to study the relationship between the Berne Convention for the Protection of Literary and Artistic Works and Spanish intellectual property law, it is necessary to distinguish three distinct stages.

During the first stage, Spanish legislation, as one of the most advanced in the field, was taken as a model when drawing up the Convention.

During the second stage, Spanish legislation remained unchanged and it therefore gradually became out of date in comparison with the successive amendments to the Convention, which were only incorporated into national law fragmentarily.

During the last stage, which is where we are at present, the urgent need to modernize Spanish intellectual property legislation has been recognized and for this purpose a draft law has been elaborated, fully incorporating the provisions of the Berne Convention contained in the latest revised text of July 24, 1971.

During this lengthy process, throughout the century following the signature of the original Berne Convention in 1886, Spain did not only participate in the creation of the Convention but also remained completely faithful to it at the international level, as can be seen from its ratification of the various revised texts. As will be seen later, this ratification was particularly advantageous to foreign authors and was not as beneficial as had been hoped to Spanish authors, because, as stated above, the improvements introduced into the texts of the Convention were not adequately reflected in Spanish national legislation.

II. First Stage — Spanish Legislation's Influence on the Convention

In the last century in Spain there was particular interest in the protection of intellectual property, with the result that the laws promulgated and inter-

national conventions signed were very advanced for their time.

The Royal Law on Printing of January 4, 1834,¹ recognized to authors of original works the ownership of their works during their lifetime and to their heirs for 10 years (Article 30), to translators the ownership of their translations during their lifetime (Article 31), and to those who printed unpublished documents an exclusive right to their reprinting for a period of 15 years (Article 32).

The first Law as such was, however, that of June 10, 1847,² which already contained a large part of the content of the subsequent Intellectual Property Law of January 10, 1879. What is surprising in this legal text is both the clarity of its provisions and their modernity with regard to the protection granted to various classes of literary property.

What is particularly noteworthy in this Law is the concern expressed for the international protection of authors' rights and this is particularly evident in Article 26, which states:

The Government shall endeavor to conclude treaties or conventions with those foreign powers that agree to do so in order reciprocally to prevent works written in the other country from being published or reprinted in their respective countries without the prior consent of the author or legitimate owner and with diminution of his property.

The best proof that there existed a serious intention to establish genuine international cooperation in the field is that a few years later the Agreement of January 25, 1854,³ was signed with France.

This Agreement was based on the principle of reciprocity and it recognized the right of property to authors of literary, scientific and artistic works (Article 1, paragraph 1), that is to say

¹ Royal Decree containing Regulations on Printing, *Decrees by the Queen Our Lady Dona Isabel II, given by Her August Mother*, Vol. XIX, Madrid, 1835, pp. 1 *et seq.*

² Law Declaring the Right of Property to Authors and Translators of Literary Works and Establishing Satisfactory Regulations for their Protection, *Collection of Spanish Legislation*, Vol. LXI, second four months of 1847, pp. 155 *et seq.*

³ Royal Decree fixing, in agreement with the Emperor of the French, the right of property in literary works published in Spain and France, *Collection of Spanish Legislation*, Vol. LXI, pp. 100 *et seq.*

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...books, dramatic and musical compositions, paintings, drawings, engravings, prints, sculptures, maps and other similar products. (Article 1, paragraph 4)

In addition, authors were given the right of translation, although for a very limited time and provided it was specifically stated that this right was reserved in the works in question (Articles 3 and 8).

It will be seen that the 1847 Law and the 1854 Agreement with France already recognized the major part of the rights called for by the Congress on Literary and Artistic Property held in Belgium in September 1858,⁴ in which Spain participated.⁵

Thirty years later, during preparations for the Berne Convention, a new Law was promulgated in Spain, based to a large extent on the previous Law of 1847. This was the Intellectual Property Law of January 10, 1879,⁶ implemented by the Regulations of September 3, 1880.⁷ Both these legal texts are still in force.

Therefore, when preparatory work for what would later become the Berne Convention started, Spain already had very advanced intellectual property legislation.

The legal formula delimiting intellectual property was — and continues to be — constituted by a general clause whose scope has allowed the Law to exist for over a century, which alone shows the perspicacity of the formula used.⁸ Thus, in accordance with Article 1:

...for the purposes of this Law, intellectual property shall include scientific, literary or artistic works produced by any means.

Intellectual property was recognized to authors, translators, adapters and publishers of unpublished or anonymous works (Articles 2 and 26).

The following were protected as intellectual property works: original works of literature (with special reference to dramatic works), music, art, maps, scientific plans and designs (Articles 2 and 3), parliamentary speeches (Article 11) and legal documents (Article 16).

Without prior publication of the work being necessary, the owner of the intellectual property was given the exclusive right to reproduction (Article 7), to authorize adaptations (Articles 2, 3 and 7) or

transpositions of musical works (Article 7), collections of works (Articles 30 and 32) and performance of dramatic and musical works (Article 19). With regard to works of art, it provided that transfer of the work did not give rise to transfer of the right of reproduction, unless otherwise agreed (Article 9). Intellectual property was also recognized to owners of newspapers (Article 29).

The term of intellectual property was granted to the author for his lifetime and to his heirs or legatees for another 80 years (Article 6).

When dramatic or musical works were performed, they could not be altered without the author's permission (Article 24).

The right to cite other people's works when making comments or criticizing them was also recognized (Article 7).

The protection of intellectual property required the registration of the works in the Register set up for this purpose (Article 36).

As will be seen, this system as a whole was extremely advanced for its time; however, a century later, it is now not only very inadequate but the requirement, which still exists, to register works in order to obtain protection is absolutely out of date and is extremely prejudicial to Spanish authors.

Emphasis should be laid on the serious concern expressed by the Spanish legislator in the text of the Law itself — Articles 50 and 51 — regarding the international protection of intellectual property. The former Article established the principle of reciprocity, while Article 51 provided for the immediate renunciation of existing agreements with France, England, Belgium, Sardinia, Portugal and the Netherlands, so as to establish new agreements based on the provisions of the Law and in accordance with the objectives expressed in the following terms:

(1) Full reciprocity between the contracting parties. (2) Obligation to grant each party most-favored-nation treatment. (3) Any author or his successor in title assuring his property rights by fulfilling the legal requirements in one of the contracting countries shall be granted the same rights in the other country without further formalities. (4) In both countries, the printing, sale, importing and exporting of works in the languages or dialects of the other country shall be forbidden unless authorized by the owner of the original work.

In fulfillment of these provisions, new agreements were signed immediately with France,⁹ Italy¹⁰ and Portugal.¹¹ The agreements with France and Portugal were identical and provided that authors of literary, scientific and artistic works whose ownership was proved in one of the contracting States would have the same rights as nationals in the other

⁴ See Edouard Romberg, *Compte rendu des travaux du Congrès de la propriété littéraire et artistique*, Vol. I, Brussels and Leipzig (Emile Flatau), Paris (Guillaumin et Comp.), London (John Murray), 1859. The resolutions of the Congress are to be found on pp. 175 to 178.

⁵ *Op. cit.*, p. 22.

⁶ *Gaceta de Madrid*, January 12, 1879.

⁷ *Ibid.*, September 6, 1880.

⁸ The positive appraisal of the legal formula can be seen in the judgment of the Supreme Court of February 4, 1984, in special proceedings, whose first preambular paragraph is reproduced above.

⁹ Agreement of June 16, 1880, *Gaceta de Madrid*, July 23.

¹⁰ Agreement of June 28, 1880, *ibid.*, August 2.

¹¹ Agreement of August 9, 1880, *ibid.*, August 2.

State without further formalities (Article 1). Authors were given the exclusive right to translation of their works during the whole term of protection of the original work in accordance with the provisions of the agreement (Article 3). Adaptations or arrangements without the author's authorization were prohibited (Article 4). The term of the rights guaranteed to authors in both countries was extended to their lifetime,

...and for 50 years after their death to the heirs, donees, legatees, transferees or other successors in title, in accordance with the legislation of the country of the deceased person. (Article 1)

These provisions contained in the national legislation and in bilateral agreements were considered at that time to be exemplary and, in many respects, as an unattainable goal in the Berne Convention.

For example, the Lisbon International Literary Congress in 1880 called upon the Executive Committee of the International Literary Association to make every effort to ensure that diplomatic agreements were based on the principles recognized in the Franco-Spanish and Franco-Salvadorian agreements which it quoted.¹²

At the Association's Rome Congress held in 1882, Mr. Challemeil Lacour, referring to the Franco-German agreement, stated the following:

Without hoping to obtain from Germany, at its present stage of national legislation, reciprocal advantages as extensive as those laid down in the Franco-Spanish agreement, which can rightly be considered to be a model for literary treaties...¹³

In his welcoming speech to participants in the 1886 Geneva Congress of the International Literary and Artistic Association, Mr. Numa Droz said:

Spain, a country of ancient literary and artistic culture where intellectual property is respected more than in any other place...¹⁴

At the 1887 Madrid Congress, Mr. Calzado said that the various previous congresses had been held in other countries because, since promulgation of the Law voted by the *Cortes* [Spanish Parliament] in 1878, Spain had nothing to learn about literary protection. He added:

We will fulfill our mission in the recalcitrant areas and go everywhere, holding in one hand an olive branch, symbol of literary brotherhood, and in the other, the Spanish Code, which we put forward as the model to be followed.¹⁵

¹² See *Association littéraire et artistique internationale. Son histoire. Ses travaux. 1878-1889*. Founder: Victor Hugo, Bibliothèque Chacornac, Paris, 1889, p. 87.

There is also an Agreement between Spain and the Republic of El Salvador, of June 23, 1884 (*Gaceta de Madrid*, June 20, 1885).

¹³ See *op. cit.*, p. 137.

¹⁴ See *Bulletin de l'Association littéraire et artistique internationale*, second series, No. 5, December 1886, p. 13.

¹⁵ See *op. cit.* in footnote 12, p. 283.

It is, however, surprising to note the scant interest shown by Spain in the commencement of the Berne Conference's work. Spain did not respond to the invitation by the Swiss Federal Council and therefore did not participate in the First Conference held in September 1884.¹⁶

Spain was however represented at the Second International Conference held in 1885 and D. Manuel Tamayo y Baus made the following statement at the first session¹⁷:

By condemning adaptation and establishing the exclusive right to translation for the term of property rights in the original work, in the Franco-Spanish treaty my country has given an outstanding demonstration of its respect for authors' rights and for modern opinions in the field of literary property. The Spanish Government therefore expects to accede to the International Union without any problem; nevertheless, it has decided to reserve the opportunity of examining and accepting or rejecting the Conference's conclusions. As the Spanish literary delegate, I am not authorized to accept final engagements on its behalf; if I state certain opinions during the course of the discussions, these in no way engage my Government.

As is well known, Spain participated in the Third Conference and signed the Berne Convention Establishing an International Union for the Protection of Artistic and Literary Works of September 9, 1886, subsequently ratified on September 5, 1887.¹⁸

The original text of the Convention does not contain any important new features compared with the Spanish legislation, which is logical given the circumstances at the time. The Spanish Law of 1879 and the international agreements signed by Spain were deemed to be the most complete regulatory texts and, as such, they influenced the elaboration of the Convention itself. In addition, the Spanish legal provisions were even more advanced than those adopted in Berne in respect of certain questions; in particular, they gave the owner of the intellectual property the exclusive right to translate or to authorize translations of an original work. In the Convention, this exclusive right to translation was limited in time to 10 years (Article 5), while in the Spanish Law (Article 2, paragraph 2) and the international agreements signed by Spain, the owner of the intellectual property was given this exclusive right for the whole of the term of protection of his property.

Consequently, the report submitted by Mr. Catreux at the Congress of the International Literary

¹⁶ See the arguments put forward by States in the *Actes de la Conférence internationale pour la protection des droits d'auteur*, meeting in Berne from September 8 to 19, 1884, Berne, Imprimerie K-J Wyss, 1884, p. 9, and the report on the International Conference by Mr. Baetzmann, at the 1884 Brussels Congress of the International Literary and Artistic Association (*op. cit.* in footnote 12), p. 223.

¹⁷ *Actes de la 2^e Conférence internationale pour la protection des oeuvres littéraires et artistiques*, meeting in Berne from September 7 to 18, 1885, Berne, Imprimerie K-J Wyss, 1885, p. 16.

¹⁸ *Gaceta de Madrid*, March 18, 1888.

and Artistic Association, held in Madrid in 1887, stated the following¹⁹:

All of us should pay tribute to this important diplomatic act carried out by the Berne Conference. This admirable result was due to the endeavors and initiatives of our Association. It constitutes a great step forward for the legitimate claims of authors and for the progress and unification of legislation in the field of copyright.

However, it is only the first step towards universal recognition of intellectual rights and the Berne Conference was not able to accept certain general principles enshrined and recognized in the international agreements of some countries, in particular France, Spain and Belgium.

III. Second Stage: Successive Revisions of the Convention and Progressive Obsolescence of the Spanish Legislation

The Paris Additional Act of May 4, 1896,²⁰ did not lead to any particularly important amendments in the original text of the Convention; however, the Berlin Act of November 13, 1908,²¹ signified a fundamental change and it can be stated that the latest text of the Berne Convention, approved in Paris on July 24, 1971,²² is in fact directly derived from the Berlin Act. It should not be forgotten that the arrangement of the Convention's articles established in Berlin was used as a basis for subsequent revisions.

The Berlin text incorporated new elements of the greatest importance. For example, in addition to establishing an "open" definition of the words "literary and artistic works" (Article 2), special attention was given to rights related to photography (Articles 3 and 7) and cinematography (Article 14); it provided that protection under the Convention was not subject to any formality and was independent of the existence of protection in the country of origin of the work (Article 4); for protection granted under the Convention, it fixed a term equivalent to the author's lifetime and 50 years after his death (Article 7) and, putting an end to a discussion that had lasted for decades, it gave the owner of the original work the right to authorize translations during the whole term of protection of the work (Article 8).

It could be said that, following approval of the Berlin text, Spanish legislation, rooted in the Law of 1879, started to be out of date compared with the Convention. This situation gradually worsened, to the detriment of Spanish legislation, up to the present day.

The reason for this process is obvious. The Convention demonstrated its vitality, adapting itself by

means of successive revisions to the new requirements imposed not only by the extraordinary development of technology, but also by new social circumstances and the progress in the elaboration of principles. On the other hand, Spanish legislation remained unchanged.

Spain nevertheless remained faithful to the Convention and ratified each and every one of its Acts shortly after their adoption.²³ Unfortunately, these successive ratifications did not in any way lead to modification of national legislation so as to adapt it to the requirements of the Convention's new text.

Already in 1916 and 1917, reform of the Spanish legislation had been called for so as to adapt it to the text of the Convention approved in Berlin²⁴ and to eliminate registration of intellectual property works as a requirement for their legal protection.²⁵

It was also at that time that the Government declared its intention to submit a new draft Intellectual Property Law²⁶ to the legislative bodies; in 1934, a draft revision of the Intellectual Property Law²⁷ was put before the Congress of Deputies and in an Order of October 7, 1938,²⁸ a Commission on Reform of the Intellectual Property Law was set up.

Failure to adapt Spanish legislation to the Convention's development did not mean, however, that the latter did not affect Spanish legal procedure. Its effect was important and was felt in many ways.

In the first place, it should be noted that failure to adapt Spanish legislation to the texts of the Berne Convention had the effect of granting foreigners benefiting from the Convention rights that Spaniards did not have. A judgment pronounced by the Supreme Court on October 4, 1930,²⁹ in civil proceedings stated, with reference to the 1908 Berlin

²³ Berlin Act, of November 13, 1908, ratified by the Law of August 1, 1910 (*Gaceta de Madrid*, August 27; corrected in the *Gaceta* of October 9); Rome Act, of June 2, 1928, ratified by the Law of July 21, 1932 (*Gaceta de Madrid*, August 5); Brussels Act, of June 26, 1948, ratified by the Legislative Decree of March 29, 1951 (*Boletín Oficial del Estado*, August 9); Stockholm Act, of July 14, 1967, ratified by the instrument of May 12, 1969 (*Boletín Oficial del Estado*, February 11); and Paris Act, of July 24, 1971, ratified by the instrument of July 2, 1973 (*Boletín Oficial del Estado*, October 30, 1974).

²⁴ See *Le Droit d'Auteur*, 1916, p. 83, giving a report on an article published in the review *La Propiedad Intelectual*, publication of the Spanish Society of Authors (April issue, 1916, p. 4).

²⁵ In this connection, the conclusions adopted at the Conference of Spanish Publishers and Booklovers of 1917 are relevant. See *Le Droit d'Auteur*, 1917, pp. 124 and 125.

²⁶ Royal Decree of April 4, 1913, which replaces Article 112 of the Regulations of September 3, 1880, published in implementation of the Law of January 10, 1879 (*Gaceta de Madrid*, April 6).

²⁷ *Report of Meeting of the Cortes. Congress of Deputies*, Appendix 13 to No. 108, of June 28, 1934.

²⁸ *Boletín Oficial del Estado*, October 12.

²⁹ *Aranzadi Repertorio de Jurisprudencia*, No. 1.159.

¹⁹ See *Bulletin de l'Association littéraire et artistique internationale*, second series, No. 9, May 1888, Madrid Congress (1887), summary record of the work, p. 34.

²⁰ *Le Droit d'Auteur*, 1900, pp. 45 et seq.

²¹ *Ibid.*, 1908, pp. 141 et seq.

²² *Copyright*, 1971, pp. 135 et seq.

Convention, that intellectual property treaties advantaged foreigners from the signatory countries, but that they could not be invoked in Spain by Spaniards.

Another judgment by the Supreme Court, also in civil proceedings, on June 21, 1965,³⁰ stated, with reference to the regulation of moral rights in the Convention, in the Brussels Act of 1948, that it did not prevail in Spain as long as it was not contained in national legislation.

As will be seen, the consequence of the substance of these two judgments is that foreigners can benefit from the Convention, but not Spanish citizens. It should also be noted that in Spain international treaties are incorporated in national legislation through straightforward ratification and publication in the Official State Bulletin (*Boletín Oficial del Estado*), in accordance with the relevant provisions of the Civil Code, Article 1, paragraph 5.

Notwithstanding these jurisprudential declarations, it should be ensured that, in view of the Convention's aim of imposing a minimum level of protection common to all legislations in the member countries, the provisions of the Convention laying down these minimum rights should also be advantageous to citizens in their own countries.³¹

In particular, the need to register works in order to obtain legal protection in Spain (Article 36 of the Law of 1879) is extremely prejudicial to Spanish authors, since following the Berlin Act (Article 4) foreigners benefiting from the Convention have the same protection for their works in Spain as Spanish citizens, without the need for any form of registration.

Nevertheless, it cannot be ignored that the provisions of the Convention, which do not include the need for any registration formality, have indirectly affected Spain's internal legislation as it is noticeable that the jurisprudence has tended to diminish the importance of the registration requirement, even going beyond the letter of the law.³²

³⁰ *Ibid.*, No. 3.670.

³¹ See Hermenegildo Baylos Corroza, *Tratado de Derecho Industrial*, Madrid, 1978, p. 658. In this connection, with reference to the Convention of the Paris Union for the Protection of Industrial Property, setting out the different positions of principle on this subject, see my work "Import of Products and the Scope of Protection for Inventions Concerning Pharmaceutical Procedures in Current Spanish Law," in *Actas de Derecho Industrial*, Vol. I (1974), pp. 73 *et seq.* (in particular, pp. 99 to 102).

³² With regard to the criminal field, see the judgments by the Supreme Court of April 27, 1979 (*Aranzadi. Repertorio de Jurisprudencia*, No. 1.697), and February 14, 1984 (*ibid.*, No. 1.129); in civil proceedings, the judgment of the Supreme Court of October 14, 1983 (*ibid.*, No. 5.326). Also in this connection, see the commentary on the latter judgment by Rodrigo Bercovitz in *Cuadernos Civitas de Jurisprudencia Civil*, No. 3 (September–December 1983), pp. 998 *et seq.* (in particular, p. 999).

Otherwise, it can be said that Spanish intellectual property legislation throughout this century has been characterized by the immobilism of the basic legislation — Law of 1879 — and the continued efforts to extend the open definition contained in Article 1 of the Law to new forms of works to be protected. This task has been carried out through the jurisprudence and the regulatory administrative legislation, which, in support of the developments advocated, have continually invoked the text of the successive Acts of the Berne Convention. That is to say that the Convention has constituted basic support for the development of intellectual property in Spain, even though this development has been inadequate for the reasons stated.

The right of authors of photographs is recognized in an Order of January 9, 1953,³³ which is based on a Royal Order of September 4, 1911,³⁴ and on the accession of Spain to the Berlin Act of the Berne Convention.

Protection for phonographic works is recognized as coming under Article 1 of the Law of 1879, in an Order of July 10, 1942,³⁵ which is also based on Article 2, paragraph (2), of the Berlin and Rome Acts of the Berne Convention, both incorporated in Spanish legislation.

The judgment of the Supreme Court of May 30, 1984,³⁶ in criminal proceedings also invokes the "international conventions signed and ratified by Spain" when recognizing and protecting the exclusive right of a recording company in the version or copy it has made.

In the cinematographic field, the Order of March 29, 1935,³⁷ already applied by analogy the provisions of the Law of 1879 so as to allow the registration in the Intellectual Property Register of themes and scores to be used in a cinematographic production, basing itself on the Berne Convention. Subsequently, the Law of May 31, 1966,³⁸ was promulgated; it dealt with intellectual property rights in cinematographic works and gave the exclusive exercise of economic exploitation rights in the cinematographic work to the producer, his assignees or successors in title (Article 1).

With reference to television, an Order of June 15, 1959,³⁹ proclaimed the right of the Spanish General Society of Authors to require payment of fees corresponding to its rates from the owners of television

³³ *Boletín Oficial del Estado*, April 6.

³⁴ *Gaceta de Madrid*, September 6. The Royal Order merely provides that persons duplicating photographic works must indicate the name of the author at the bottom of the copies.

³⁵ *Boletín Oficial del Estado*, July 15.

³⁶ *Aranzadi. Repertorio de Jurisprudencia*, No. 3.492.

³⁷ *Gaceta de Madrid*, April 1, 1935.

³⁸ *Boletín Oficial del Estado*, June 2, 1966.

³⁹ *Ibid.*, July 4.

sets in public places. As a basis for this Order, Article 11^{bis} of the Berne Convention, revised at Brussels in 1948, ratified by Spain and published as a Law of the Kingdom, was repeatedly invoked.

In a judgment by the Supreme Court on December 15, 1969,⁴⁰ in criminal proceedings, the Berne Convention was also invoked in order to extend protection of copyright to radio and television. It was stated

...that protection of copyright, embodied in current Spanish legislation as a result of the basic Intellectual Property Law of January 10, 1879, presently extended to the broadcasting and televising of protected works, reflected in the international field by the Berne Convention of 1948 and the Geneva Convention....(first preambular paragraph).

With regard to the rights granted to authors, the influence of the Berne Convention has been important for the recognition of moral rights, introduced in Article 6^{bis} of the Rome Act of 1928.

It could not be said that the Spanish Law of 1879 ignores the author's moral rights. As proof of this, Article 24 is worded as follows:

Enterprises, societies or individuals that, when performing a dramatic or musical work in public, announce it changing its title, eliminating, altering or adding any passages without prior permission by the author, shall be considered as infringers of intellectual property.

A judgment of the Supreme Court of February 25, 1899,⁴¹ in criminal proceedings, affirmed the author's right to have the integrity of his work respected.

In addition, it will be recalled that the first recognition of copyright in a photographic work was established by the above-mentioned Royal Decree of September 4, 1911, which was limited to obliging any person reproducing photographic works to mention at the bottom of the copies the name of the person who had made the work.

Subsequently, the Law on Books of March 12, 1975,⁴² recognized to the owner of intellectual property the right to "respect for the integrity of the work, unless otherwise agreed" (Article 19(1)(d)).

There can be no doubt that the provisions of the Convention influenced this legal recognition in the Law on Books. It is significant that the judgment by the Supreme Court of June 21, 1965,⁴³ in civil proceedings, which concerned the author's moral rights, devotes the whole of the first preambular paragraph to commenting on the regulations contained in Article 6^{bis} of the Berne Convention and in the texts approved in Rome and Brussels, although after-

wards it affirms that these provisions of the Convention cannot prevail in Spain while the corresponding legislation does not exist.

In subsequent judgments, the author's moral rights appear to be fully recognized. For example, in the civil judgment by the Supreme Court of October 14, 1983,⁴⁴ and especially in the Supreme Court's judgments of May 23, 1975,⁴⁵ and May 30, 1984,⁴⁶ in criminal proceedings.

Particular attention should be paid to the judgment of the Supreme Court of February 14, 1984,⁴⁷ in criminal proceedings, since it clearly expresses the important effect that the successive texts of the Berne Convention had on Spanish juridical proceedings. This can be seen from the following text of the second preambular paragraph:

Considering that the *nomen iuris* of intellectual property designated in the Law and corresponding Regulations of January 10, 1879, and September 3, 1880, respectively, has been substituted in the international Conventions — which are of such importance for our legal order and have been ratified successively by Spain — by copyright which is more widely accepted and in accordance with its legal character since the Berne Convention of September 9, 1886, which established the International Union for the Protection of Artistic and Literary Works, up to its latest revision in Paris on July 24, 1971, not forgetting the revisions made at Paris in 1896, Berlin in 1908, Berne in 1914, Rome in 1928, Brussels in 1948 and Stockholm in 1967; a series of texts that only serve to underline the progressive and changing multiplicity of the "material supports" (the so-called *corpus mechanicum*) on which literary or artistic works or categories of works are fixed (Article 2(2) of the Paris Act of 1971), whose various forms of reproduction or diffusion were taken into account, fortunately for our legal order, notwithstanding the fact that it dates from the 1880s, in describing the object of intellectual property and in considering as such scientific, literary or artistic works which can be produced by any means whether by known systems of reproduction or systems to be invented in the future (Article 1 of the Law and Article 1 of the Regulations).

In connection with the Convention's influence with regard to moral rights, the following text of the fifth preambular paragraph of the same judgment is of particular significance:

Considering that, after having outlined the previous schema, it should also be emphasized that, as far as the moral aspect is concerned, the original property of the author remains his own (right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation), even after the transfer of the said rights to a third party (Article 6^{bis}(1) of the Paris Act of 1971); a distinction that is particularly relevant for dramatico-musical and musical works whose authors have the exclusive right to authorize performance of their works, including public performance and public transmission by any means (Article 11(1) of the said Act); our national legislation grants both these aspects of protection for phonographic works in the Order of the Ministry of National Educa-

⁴⁰ Aranzadi. *Repertorio de Jurisprudencia*, No. 5.917.

⁴¹ Alcubilla. *Diccionario de la Administración Española*. 1899, Appendix, p. 406.

⁴² *Boletín Oficial del Estado*, March 14; errors rectified in *Boletín Oficial del Estado*, June 28.

⁴³ Aranzadi. *Repertorio de Jurisprudencia*, No. 3.670.

⁴⁴ *Ibid.*, No. 5.326.

⁴⁵ *Ibid.*, No. 2.325.

⁴⁶ *Ibid.*, No. 3.492.

⁴⁷ *Ibid.*, No. 1.129.

tion of July 10, 1942, whose Article 7 refers back to Articles 46 *et seq.* of the Law of 1879 concerning the infringement of such rights, which, in accordance with the said Article 46, is dealt with in Article 534 of the Penal Code; finally, it should be noted that the Order of June 15, 1959, by the same Ministry attributes to Article 7 of the Law the protection of reproduction using magnetic tape, among other means, like the Convention of October 29, 1971, on the protection of phonograms [Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms], which deems the latter to be any exclusively aural fixation of sounds of a performance or of other sounds (Article 1(a)), entrusting the protection of such products to the Contracting States so as to avoid "the making of duplicates without the consent of the producer" (Article 2), and providing for penal sanctions (Article 3).

In conclusion, there can be little doubt that the Berne Convention, in its various revisions, exercised a continuous and important influence on Spanish legislation and encouraged its modernization, within the limits permitted by the unchanged status of the 1879 Law. In spite of this, it is obvious that the current situation of copyright in Spain is far from satisfactory.

IV. Third Stage: Future Modernization of Spanish Legislation

The serious defects of Spanish intellectual property legislation have been universally recognized and have given rise to the implementation of draft reforms.

In May 1985, a report on legislative priorities in the field of copyright and intellectual property⁴⁸ was drawn up in the Senate and it set out some of the criteria for reform.

Finally, in February of this year, a draft Intellectual Property Law⁴⁹ was put before the Congress of Deputies. Unfortunately, this draft was not dealt with because of the dissolution of the *Cortes* for general elections. However, there can be little doubt that a new intellectual property law will be promulgated during the new legislature and that it will be based to a large extent on the above-mentioned draft.

The draft is aimed at adapting Spanish law to modern requirements and to the provisions of international conventions. It is a modern legal text that

provides for the elimination of the obligatory nature of registration of works in the Registry of Intellectual Property, as laid down by the Law of 1879, although surprisingly it makes such registration voluntary (Articles 129 and 130). It also reduces the term of protection to 60 years after the death of the author (Article 26).

Part I includes general provisions and regulates the subjects and works protected, as well as the content of the author's rights (Title II), distinguishing between moral rights (Articles 14 to 16) to which it pays special attention, and right to work (Articles 17 to 23), to which is added the so-called "*droit de suite*" and rights related to the duplication of works for personal use "by means of non-typographical technical apparatus" (Article 25).

Title III (Articles 26 to 40) regulates the term and limits imposed upon authors' rights.

Title IV concerning "transfer of rights" is particularly important since, in addition to general provisions (Articles 42 to 56), it also includes provisions on publishing contracts (Articles 57 to 72) and performance contracts (Articles 73 to 84).

Title VI concerns cinematographic and other audiovisual works and Title VII deals with computer programs.

Part II deals with related rights, including the rights of performers (Articles 100 to 106), the rights of producers of phonograms (Articles 107 to 110), of cinematographic and other audiovisual works (Articles 111 to 114), broadcasting organizations (Articles 115 and 116) and the protection of photographs (Article 117).

Part III specifies the actions and procedures to ensure respect for rights recognized by the Law, which is of great importance in Spain because the regulations in force to date have been of little practical effect in protecting rights recognized to authors by the Law of 1879, since they only specifically provide for criminal actions for the defense of intellectual property.

Part IV concerns the Law's scope of implementation.

With regard to the Berne Convention, it can be stated that as a whole the draft carefully follows the provisions of the Paris Act of 1971, which currently prevails in Spain. Undoubtedly the future Law, although it will contain amendments compared to the above-mentioned draft, will nevertheless meet the criterion of respecting scrupulously the Convention's provisions.

Let us hope that the new Law will soon become reality, so that Spanish legislation can embark upon a new stage that does not only incorporate fully the provisions of the Berne Convention but, as in the past, contributes towards its improvement.

(WIPO translation)

⁴⁸ Report by the Commission on Education and Universities, Research and Culture. See *Boletín Oficial de las Cortes Generales, Senado*, series I, No. 152, May 14, 1985. The presentation and discussion on the Report can be found in *Cortes Generales, Diario de Sesiones del Senado*, 1985, No. 122, and approval of the Report in the *Boletín Oficial de las Cortes Generales, Senado*, series I, No. 159.

⁴⁹ *Boletín Oficial de las Cortes Generales, Congreso de los Diputados*, series A, No. 184-I, of February 1, 1986.

General Studies

**Copyright Protection of Computer Programs
in the Federal Republic of Germany**

Lieck BETTEN*

Correspondence

Letter from France

André FRANÇON*

Calendar of Meetings

Commemoration of the Centenary of the Berne Convention

We have received information on the following commemorative events by international non-governmental organizations and national organizations:

- November 13 and 14 (Brioni) — Conference on the occasion of the Centenary, organized by the Yugoslav Authors Agency, the Business Association of Yugoslav Publishers and Booksellers and the Yugoslav Association of Intellectual Property Rights
- November 18 to 21 (Cracow) — Commemoration of the Centenary in the framework of a Seminar organized by the Jagiellonian University
- November 20 and 21 (The Hague) — Commemoration of the Centenary, organized by the Ministry of Justice and the Ministry of Culture of the Netherlands
- November 24 to 28 (New Delhi) — Commemoration of the Centenary in the framework of the Sub-Regional Workshop on Copyright and Neighboring Rights organized by WIPO and the Government of India

WIPO Meetings

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

1986

- November 11 to 14 (Geneva) — Committee of Experts on the International Registration of Marks
- November 24 to December 5 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- December 8 to 12 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning
- December 16 to 19 (Paris) — Committee of Governmental Experts on Works of Visual Art (convened jointly with Unesco)

1987

- January 12 (Geneva) — Information Meeting for Non-Governmental Organizations on Intellectual Property
- January 26 to 31 and February 3 (Geneva) — Paris Union: Revision of the Paris Convention (Second Consultative Meeting)
- February 23 to 27 (Geneva) — Nice Union: Preparatory Working Group
- March 9 to 13 (Geneva) — Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights
- March 23 to 27 (Geneva) — Paris Union: Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions
- March 31 to April 4 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information
- April 6 and 7 (Geneva) — Permanent Committee on Patent Information (PCPI)
- April 27 to 30 (Geneva) — Committee of Experts on Intellectual Property in Respect of Integrated Circuits
- May 4 to 19 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- May 5 to 8 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property
- May 11 to 13 (Geneva) — Vienna Union: Working Group on the International Classification of the Figurative Elements of Marks
- May 11 to 15 (Paris) — Committee of Governmental Experts on Dramatic and Musical Works (convened jointly with Unesco)

- May 18 to 23 and 26 (Geneva) — Paris Union: Revision of the Paris Convention (Third Consultative Meeting)
- May 25 to 29 (Geneva) — Committee of Experts on the Protection Against Counterfeiting
- June 1 to 4 (Geneva) — Madrid Union: Working Group on Links Between the Madrid Agreement and the Proposed (European) Community Trade Mark
- June 11 to 19 (Washington) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning
- June 22 to 30 (Geneva) — Berne Union: Executive Committee (Extraordinary Session) (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)
- June 29 to July 3 (Geneva) — Paris Union: Committee of Experts on Biotechnological Inventions and Industrial Property
- July 1 to 3 (Geneva) — Rome Convention: Intergovernmental Committee (Ordinary Session) (convened jointly with ILO and Unesco)
- July 6 to 8 (Geneva) — Budapest Union: Assembly (Extraordinary Session)
- September 7 to 11 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Patent Information for Developing Countries
- September 14 to 19 and 23 (Geneva) — Paris Union: Revision of the Paris Convention (Fourth Consultative Meeting)
- September 21 to 30 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT, Vienna and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)
- October 5 to 9 (Geneva) — Committee of Governmental Experts on Works of Applied Art (convened jointly with Unesco)
- November 2 to 6 (Geneva) — Paris Union: Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions
- December 1 to 4 (Geneva) — Committee of Governmental Experts on the Printed Word (convened jointly with Unesco)

UPOV Meetings

1986

- November 18 and 19 (Geneva) — Administrative and Legal Committee
- November 20 and 21 (Geneva) — Technical Committee
- December 1 (Paris) — Consultative Committee
- December 2 and 3 (Paris) — Council

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

Non-Governmental Organizations

1987

- June 1 and 2 (Sorrento, Italy) — International Literary and Artistic Association (ALAI): Study Session
- July 20 to 22 (Cambridge) — International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting

1988

- June 12 to 17 (London) — International Publishers Association (IPA): Congress

