

LE DROIT D'AUTEUR

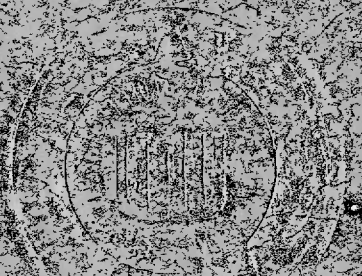
69^e année - décembre 1956



Revue du Bureau de l'Union internationale pour la protection
des œuvres littéraires et artistiques

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LE DROIT D'AUTEUR

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69^e année - n° 12 - décembre 1956

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PARTIE OFFICIELLE

Union internationale

Déclarations

de la Hongrie, du Japon et de la Suède concernant l'application à la République démocratique allemande de la Convention de Berne révisée à Rome le 2 juin 1928¹⁾

Notifications du Gouvernement suisse aux Gouvernements des Pays unionistes

Aux dates indiquées ci-dessous, le Gouvernement suisse a donné à ses Légations des instructions afin que soient faites les notifications suivantes aux Gouvernements des Etats unionistes.

I. Notification du 4 septembre 1956

(Déclaration de la Hongrie relative aux réserves formulées par le Pakistan)

Par notes des ...²⁾, la Légation de Suisse donnait connaissance au Ministère des Affaires étrangères des réserves

formulées par le Gouvernement du Pakistan à l'égard d'une déclaration du Ministère des Affaires étrangères de la République démocratique allemande, concernant l'application au territoire de celle-ci de la Convention de Berne pour la protection des œuvres littéraires et artistiques, dans la version établie, à Rome, le 2 juin 1928.

Des communications semblables ayant été adressées aux Gouvernements des autres Etats membres de l'Union internationale pour la protection des œuvres littéraires et artistiques, celui de la Hongrie a répondu, par note du 26 juillet 1956, ci-jointe en copie, qu'il n'est pas à même de prendre note des réserves dont il s'agit. Le Gouvernement hongrois a demandé, en outre, que son point de vue soit communiqué aux autres Gouvernements intéressés.

Agissant conformément aux instructions qui lui ont été données par le Département politique fédéral suisse, la Légation a l'honneur de porter ce qui précède à la connaissance du Ministère et elle prie celui-ci de bien vouloir lui en donner acte.

La Légation de Suisse saisit cette occasion ...

ANNEXE

Note verbale du Gouvernement hongrois à la Légation de Suisse à Budapest, du 26 juillet 1956

Le Ministère des Affaires étrangères de la République populaire hongroise présente ses compliments à la Légation de Suisse et se référant à la Note verbale n° 150, en date du

¹⁾ Voir dans *Le Droit d'Auteur* de 1955, p. 149 et 1956, p. 105 et 117: a) la Déclaration du Gouvernement de la République démocratique allemande concernant l'application, à son territoire, de la Convention de Berne révisée à Rome le 2 juin 1928 (du 11 mai 1955); b) les déclarations faites, à ce sujet, par divers Etats unionistes.

²⁾ Ces dates ne sont pas les mêmes pour tous les Etats auxquels lesdites notes ont été communiquées.

20 juillet 1956, a l'honneur de porter à sa connaissance que pour des raisons indiquées dans la Note verbale n° 012/13-10/1956 du 21 mars 1956 de ce Ministère, le Gouvernement de la République populaire hongroise n'est pas à même de prendre note de la déclaration du Pakistan, annexée à la Note verbale susmentionnée de la Légation. Il demande que son point de vue soit porté à la connaissance des Gouvernements des autres Etats membres de l'Union internationale pour la protection des œuvres littéraires et artistiques.

Le Ministère hongrois des Affaires étrangères saisit cette occasion...

II. Notification du 13 septembre 1956

(Déclaration de la Suède)

Par note du...¹⁾, la Légation de Suisse faisait parvenir au Ministère des Affaires étrangères la copie et la traduction française d'une lettre, du 11 mai 1955, que le Ministère des Affaires étrangères de la République démocratique allemande avait adressée au Conseil fédéral suisse au sujet de l'application au territoire de celle-ci de la Convention de Berne pour la protection des œuvres littéraires et artistiques, dans la version établie à Rome, le 2 juin 1928.

Une communication semblable ayant été adressée aux Gouvernements des autres Etats membres de l'Union internationale pour la protection des œuvres littéraires et artistiques, celui de la Suède a répondu qu'il avait pris connaissance de la déclaration dont il s'agit, mais que cela ne saurait, toutefois, impliquer la reconnaissance de la République démocratique par la Suède. Il a demandé, en outre, que sa réponse soit communiquée aux autres Gouvernements intéressés.

Agissant conformément aux instructions qui lui ont été données par le Département politique fédéral suisse, la Légation a l'honneur de porter ce qui précède à la connaissance du Ministère et de lui remettre, sous ce pli, une copie de la note adressée à la Légation de Suisse à Stockholm, à ce sujet, par le Ministère royal suédois des Affaires étrangères.

La Légation de Suisse saurait gré au Ministère des Affaires étrangères de lui donner acte de la présente communication et elle saisit cette occasion...

ANNEXE

Note du Ministère royal des Affaires étrangères de Suède à la Légation de Suisse à Stockholm, du 10 août 1956

Par Note verbale du 8 août 1955, la Légation de Suisse faisait parvenir au Ministère royal des Affaires étrangères la copie et la traduction française d'une lettre du 11 mai 1955, que le Ministère des Affaires étrangères de la République démocratique allemande avait adressée au Conseil fédéral suisse au sujet de l'application au territoire de celle-ci de la Convention de Berne pour la protection des œuvres littéraires et artistiques, dans la version établie à Rome, le 2 juin 1928.

Le Ministère a l'honneur de faire savoir à la Légation que le Gouvernement suédois a pris connaissance de la déclaration du Ministère des Affaires étrangères de la République

démocratique allemande. Ceci ne saurait, toutefois, impliquer la reconnaissance de celle-ci par la Suède.

Le Ministère prie la Légation de bien vouloir faire connaître ce qui précède à son Gouvernement, afin que les autres pays signataires de la Convention précitée en soient avisés.

III. Notification du 6 novembre 1956¹⁾

(Déclaration du Japon)

Par note du...²⁾, la Légation de Suisse faisait parvenir au Ministère des Affaires étrangères la copie et la traduction française d'une lettre, du 11 mai 1955, que le Ministère des Affaires étrangères de la République démocratique allemande avait adressée au Conseil fédéral suisse au sujet de l'application au territoire de celle-ci de la Convention de Berne pour la protection des œuvres littéraires et artistiques, dans la version établie à Rome, le 2 juin 1928. (Cette notification était effectuée en exécution de la gérance, confiée à la Suisse, de ladite Convention.)

Une communication semblable ayant été adressée aux Gouvernements des autres Etats intéressés, le Ministère japonais des Affaires étrangères, qui en avait déjà accusé réception, en formulant certaines réserves, a encore fait parvenir à la Légation de Suisse à Tokio, le 4 octobre 1956, une nouvelle note, ainsi conçue, qui aborde, en même temps, la question de l'application au territoire de la République démocratique des Actes de l'Union de Paris pour la protection de la propriété industrielle, application également notifiée aux Etats membres de cette Union:

« Le Ministère des Affaires étrangères présente ses compliments à la Légation de Suisse au Japon, et a l'honneur de se référer à deux notes verbales du Ministère n° 100/T2 en date du 18 août 1955 et n° 29/EA5 en date du 9 avril 1956, adressées respectivement à la Légation, par lesquelles le Ministère l'a informée que le Gouvernement japonais considère comme nul et non avenu l'effet légal au Japon des mémorandums du Gouvernement de la République démocratique allemande adressés au Gouvernement fédéral de Suisse au sujet de l'application au territoire de cet Etat de la Convention de Berne du 9 septembre 1886 pour la protection des œuvres littéraires et artistiques, révisée en dernier lieu à Rome le 2 juin 1928; de la Convention d'Union de Paris du 20 mars 1883 pour la protection de la propriété industrielle, révisée en dernier lieu à Londres le 2 juin 1934 et de l'Arrangement de Madrid du 14 avril 1891 concernant la répression des fausses indications de provenance sur les marchandises.

¹⁾ Le texte de note que nous reproduisons ici était destiné aux Gouvernements des Etats qui étaient seulement membres de l'Union de Berne; pour ceux qui étaient à la fois membres de l'Union de Berne et de l'Union de Paris pour la protection de la propriété industrielle, la teneur de la note était la même que celle dudit texte, sans deux modifications:

a) la dernière phrase du premier alinéa de ce texte était remplacée par les deux phrases suivantes: « En outre, par note du..., la Légation remettait au Ministère les textes allemand et français d'un mémorandum du Conseil des ministres de la République démocratique, qui concernait l'application au même territoire des Actes de l'Union de Paris pour la protection de la propriété industrielle, révisés en dernier lieu, à Londres, le 2 juin 1934. Dans l'un et l'autre cas, il s'agissait de notifications effectuées en exécution de la gérance, confiée à la Suisse, des Accords de Berne et de Paris »;

b) la fin du deuxième alinéa y était supprimée à partir des mots « qui aborde, en même temps... ». (Réd.)

²⁾ Voir ci-dessus, p. 169, note 2 en bas de la page.

¹⁾ Voir ci-dessus, p. 169, note 2 en bas de la page.

« Le Ministère prie la Légation de vouloir bien prendre les mesures nécessaires afin que le Gouvernement fédéral de Suisse informe les autres pays signataires des trois accords internationaux susmentionnés, de l'avis du Gouvernement japonais énoncé dans lesdites notes verbales. »

Agissant conformément aux instructions qui lui ont été données par le Département politique fédéral suisse, la Légation a l'honneur de porter ce qui précède à la connaissance du Ministère et elle prie celui-ci de bien vouloir lui en donner acte.

La Légation de Suisse saisit cette occasion...

Relations bilatérales

ALLEMAGNE (République fédérale)—CEYLAN

Protocole

concernant des questions générales ayant trait au commerce entre la République fédérale d'Allemagne et Ceylan

(Du 22 novembre 1952)¹⁾

Mues par le désir de régler certaines questions générales ayant trait au commerce entre la République fédérale d'Allemagne et Ceylan, en attendant la conclusion en bonne et due forme d'un traité de commerce et de navigation, afin de consolider les relations commerciales entre les deux pays, une Délégation représentant le Gouvernement de la République fédérale d'Allemagne et une Délégation représentant le Gouvernement de Ceylan se sont réunies à Colombo, du 8 au 22 novembre 1952, et ont convenu ce qui suit:

Article premier

Chacun des deux Gouvernements accordera aux ressortissants de l'autre pays, qui prendront part au commerce ou aux affaires, le traitement de la nation la plus favorisée en ce qui concerne l'entrée, le séjour et les permis de travail, dans le cadre des lois d'immigration en vigueur dans chacun des deux pays.

Article 3

Chacune des deux parties contractantes autorise les ressortissants de l'autre partie à acquérir, sur son territoire, des brevets, droits d'auteur, ainsi que des dessins et des marques de fabrique nouveaux; elle garantit la protection de tels brevets, droits d'auteur, nouveaux dessins et marques de fabrique et accepte le paiement des émoluments de renouvellement.

Article 6

Les parties contractantes conviennent que les dispositions du présent accord s'appliqueront également dans les secteurs britannique, français et américain de Berlin.

¹⁾ Ce protocole est entré en vigueur le 8 août 1955. Voir *Bundesgesetzblatt, Teil II*, 19 mars 1955, p. 189, 190, et 15 septembre 1955, p. 879. — Traduit de l'allemand. (Réd.)

Article 7

Le texte allemand et le texte anglais du présent Protocole font également foi.

Le présent Protocole entrera en vigueur le jour où se fera l'échange des instruments de ratification ou d'acceptation au lieu qui aura été convenu par les deux Gouvernements; il peut être dénoncé par chacun des deux Gouvernements, au plus tôt un an après son entrée en vigueur, moyennant préavis de six mois.

Conclu en deux exemplaires, à Colombo, le 22 novembre 1952.

Pour le Gouvernement
de la République fédérale d'Allemagne:
(signé) A. H. van Scherpenberg

Pour le Gouvernement de Ceylan:
(signé) K. P. G. Perera

ALLEMAGNE (République fédérale)—MEXIQUE

Accord

entre la République fédérale d'Allemagne et les Etats-Unis du Mexique, concernant la protection des droits d'auteur de leurs ressortissants sur des œuvres musicales

(Du 4 novembre 1954)¹⁾

Le Gouvernement de la République fédérale d'Allemagne et le Gouvernement des Etats-Unis du Mexique, désireux de protéger sur leurs territoires les œuvres des auteurs et compositeurs qui sont leurs ressortissants, et dans l'intention de resserrer ainsi les liens d'amitié qui unissent les deux nations,

ont conclu un accord pour assurer la protection des droits d'auteur de leurs ressortissants sur les œuvres musicales. Ils ont nommé à cet effet les plénipotentiaires suivants:

le Président de la République fédérale d'Allemagne: le Secrétaire d'Etat du Ministère des Affaires étrangères, le Professeur Dr Walter Hallstein;

le Président des Etats-Unis du Mexique: le Ministre des Affaires étrangères, le Licencié Luis Padilla Nervo,

qui, après échange de leurs pouvoirs, trouvés en bonne et due forme, ont convenu ce qui suit:

Article 1^{er}

Chacune des Hautes Parties contractantes s'oblige à protéger, sur son territoire, les œuvres musicales des auteurs et compositeurs ressortissant à l'autre Haute Partie contractante.

L'obligation qu'assume, en vertu du présent accord, chacune des Hautes Parties contractantes concerne uniquement la protection intégrale des œuvres musicales, y compris les textes faits spécialement pour être mis en musique.

Article II

Dans chaque Etat contractant, les droits d'auteur sur les œuvres musicales sont protégés du seul fait de la création

¹⁾ Cet accord est entré en vigueur le 20 février 1956. Voir *Bundesgesetzblatt, Teil II*, 31 octobre 1955, p. 903, 904, et 6 avril 1956, p. 410. — Traduit de l'allemand. (Réd.)

de l'œuvre; l'octroi de la protection ne dépend ni d'un enregistrement, ni d'un dépôt, ni de l'accomplissement d'aucune autre formalité.

Article III

Chacune des Hautes Parties contractantes accorde aux auteurs et compositeurs d'œuvres musicales qui sont ressortissants de l'autre Haute Partie contractante la même protection que celle que ses lois garantissent à ses propres ressortissants.

Article IV

Le présent accord entrera en vigueur un mois après l'échange des instruments de ratification, qui aura lieu à Mexico. Il sera valable pour trois ans et il se renouvellera de trois ans en trois ans, tant qu'une des Hautes Parties contractantes ne l'aura pas dénoncé une année avant l'expiration du délai.

Article V

Le présent accord s'appliquera également au *Land* de Berlin (Berlin ouest), à moins que, dans les trois mois qui suivront son entrée en vigueur, le Gouvernement de la République fédérale d'Allemagne n'adresse une déclaration contraire au Gouvernement des Etats-Unis du Mexique.

En foi de quoi les plénipotentiaires des deux Parties ont signé le présent accord et y ont apposé leur sceau.

Conclu à Mexico le 4 novembre 1954, en deux exemplaires rédigés en langues allemande et espagnole, les deux textes faisant également foi.

Pour la République fédérale d'Allemagne:
(signé) Hallstein

Pour les Etats-Unis du Mexique:
(signé) P. Nervo

ALLEMAGNE (République fédérale)—YOUGOSLAVIE

Accord

entre la République fédérale d'Allemagne et la République populaire fédérative de Yougoslavie, concernant certains droits ressortissant à la propriété industrielle et au droit d'auteur

(Du 21 juillet 1954)¹⁾

La République fédérale d'Allemagne et la République populaire fédérative de Yougoslavie, désireuses de renouer et de développer leurs relations en matière de propriété industrielle et de droit d'auteur, ont décidé de conclure, à cet effet, le présent Accord et ont désigné, à cette fin, les plénipotentiaires soussignés, qui, après échange de leurs pouvoirs, trouvés en bonne et due forme, ont adopté les dispositions suivantes:

Article 8

Les droits d'auteur de ressortissants allemands ou de personnes morales allemandes, quant aux œuvres littéraires et

artistiques sont considérés comme remis en vigueur sur le territoire de la République populaire fédérative de Yougoslavie, en faveur de leurs titulaires ou ayants droit antérieurs, avec effet à partir du 1^{er} août 1951.

Article 9

Le présent Accord s'applique également au *Land* de Berlin, à moins que, dans les trois mois qui suivront son entrée en vigueur, le Gouvernement de la République fédérale d'Allemagne n'adresse une déclaration contraire au Gouvernement de la République populaire fédérative de Yougoslavie.

Article 10

(1) Le présent Accord doit être ratifié par chacune des Parties contractantes selon sa procédure législative. Les instruments de ratification seront échangés à Bonn.

(2) Le présent Accord entrera en vigueur le jour qui suivra l'échange des instruments de ratification.

Fait à Belgrade, le 21 juillet 1954, en quatre exemplaires en langues allemande et serbo-croate, les deux textes faisant également foi.

Pour la République fédérale d'Allemagne:
(signé) Dr Kroll

Pour la République fédérative de Yougoslavie:
(signé) Milan Bartoš

DANEMARK—MEXIQUE

Ordonnance danoise

sur l'application des dispositions de la loi du 26 avril 1933 concernant le droit d'auteur et le droit d'artiste aux œuvres produites par des ressortissants des Etats-Unis du Mexique

(Du 13 juin 1955)¹⁾

Nous FREDERIK IX, par la grâce de Dieu, Roi de Danemark, des Vendes et des Goths, Duc de Slesvig, Holstein, Stormarn, des Dithmarses, de Lauenbourg et d'Oldenbourg,

Savoir faisons: Le Gouvernement des Etats-Unis du Mexique s'étant engagé par une convention conclue le 12 juillet 1954 entre le Danemark et les Etats-Unis du Mexique, sous condition de réciprocité, à appliquer la législation mexicaine sur la protection des œuvres d'auteurs, de compositeurs et d'artistes aux œuvres littéraires et artistiques produites par des ressortissants danois sans que soit exigée l'observation de formalités telles que l'enregistrement ou le dépôt, Nous avons ordonné ce qui suit en vertu de l'article 36 de la loi du 26 avril 1933 sur le droit d'auteur et le droit d'artiste, d'après laquelle, à condition de réciprocité, les dispositions de la loi, par ordonnance royale, peuvent être entièrement ou partiellement appliquées aux œuvres produites par les ressortissants d'un autre pays, même si ces œuvres n'ont pas paru chez une maison d'édition danoise:

Article premier

Les dispositions de la loi du 26 avril 1933 sur le droit d'auteur et le droit d'artiste seront applicables aux œuvres

¹⁾ Cet accord est entré en vigueur le 29 mai 1956. Voir *Bundesgesetzblatt, Teil II*, 19 février 1955, p. 89, 90, et 18 juin 1956, p. 742. — Traduit de l'allemand. (Réd.)

¹⁾ Le texte français de cette ordonnance nous a été communiqué par l'Administration danoise. (Réd.)

littéraires et artistiques produites par des ressortissants mexicains sans que soit exigée l'observation de formalités éventuellement prescrites par la législation mexicaine en vigueur en tout temps.

Article 2

La protection accordée en vertu de la présente ordonnance ne s'étend pas aux œuvres produites par des ressortissants d'Etats autres que le Mexique ni aux œuvres publiées par des maisons d'édition mexicaines ou éditées pour la première fois au Mexique.

Article 3

La présente ordonnance entre en vigueur le 16 juin 1955.

Donné à Amalienborg, le 13 juin 1955.

FREDERIK R.
Jul. Bomholt

PARTIE NON OFFICIELLE

Etudes générales

Le projet de loi indien

(Troisième et dernière partie)¹⁾

Henri DESBOIS
Professeur à la Faculté de droit de Paris

Correspondance

Lettre d'Allemagne
(Première partie) ¹⁾

(A suivre)

Prof. Dr Eugen ULMER
Munich

Chronique des activités internationales

Première session du Comité intergouvernemental du droit d'auteur de l'Unesco

(Paris, 11-15 juin 1956)

Le Comité intergouvernemental du droit d'auteur de l'Unesco, institué selon les dispositions de l'article XI de la Convention universelle sur le droit d'auteur, a tenu sa première session à Paris, du 11 au 15 juin 1956.

Les Etats suivants y étaient représentés par les délégués nommés ci-après: Allemagne, le Professeur E. Ulmer; Argentine, Son Excellence M. E. Mallea et M. A. Gonzalez; Brésil, le Professeur de Berredo Carneiro; Espagne, M. M. Morcillo et M. S. Fernandez de la Mora; Etats-Unis d'Amérique, le Docteur Arthur Fisher; France, le Conseiller d'Etat H. Puget et M. Ch. Rohmer; Inde: M. B. N. Lokur; Italie, Son Excellence M. A. Pennetta; Japon, M. A. Matsui, M. T. Naito et M. Yamato; Royaume-Uni, M. J. L. Girling et M. H. Wallace; Suisse, le Président P. Bolla et M. H. Morf.

Le Mexique avait envoyé un observateur, M^{lle} P. Alegria.

L'Organisation des Etats américains était représentée par M. Manuel Canyes. Plusieurs autres Organisations internationales avaient envoyé des observateurs.

Conformément à l'article XI de la Convention universelle sur le droit d'auteur, le Directeur du Bureau de l'Union internationale pour la protection des œuvres littéraires et artistiques étant membre d'office dudit Comité, avec voix consultative, s'y était fait représenter par le Dr G. Ronga et le Dr S. Castanos.

A l'issue des débats, le Comité a adopté les résolutions suivantes:

I

Le Comité intergouvernemental du droit d'auteur,

Vu le vœu formulé par la Conférence de Genève de 1952 dans la résolution concernant l'article XI de la Convention universelle sur le droit d'auteur,

Ayant pris connaissance de la décision de la Conférence générale de l'Unesco en sa septième session (Paris, 1952),

Note avec satisfaction les arrangements pris par le Directeur général de l'Unesco afin d'assurer le Secrétariat du Comité,

Emet le vœu que, dans le cadre du programme de l'Unesco adopté par la Conférence générale, l'Unesco continue à assurer le Secrétariat du Comité, notamment en poursuivant ses études sur les problèmes relatifs à la protection internationale du droit d'auteur ou de nature à affecter le droit d'auteur.

II

Le Comité intergouvernemental du droit d'auteur,

Vu le rapport du Secrétariat de l'Unesco sur l'état des ratifications, acceptations et adhésions à la Convention universelle sur le droit d'auteur,

Ayant pris connaissance des mesures d'ordre législatif adoptées dans les Etats contractants afin d'assurer sur leurs territoires respectifs l'entrée en vigueur de la Convention,

Note avec satisfaction les progrès réalisés en vue de ces ratifications, acceptations et adhésions dans divers Etats, notamment dans les Etats membres du Comité qui ne sont pas encore parties à la Convention,

Emet le vœu que les Etats signataires et les Etats non signataires de la Convention universelle sur le droit d'auteur ratifient cette Convention ou y adhèrent,

Recommande aux Etats contractants de communiquer au Secrétariat toute mesure d'ordre législatif réglementaire ou judiciaire relative à la ratification, l'entrée en vigueur ou la mise en application de la Convention ou à l'adhésion à cette Convention,

Recommande au Directeur général de l'Unesco de prendre toutes mesures utiles afin d'obtenir la ratification, l'acceptation ou l'adhésion des Etats qui ne sont pas encore parties à la Convention,

Note avec satisfaction la publication par l'Unesco de la version anglaise du *Recueil mondial des lois et traités sur le droit d'auteur* préparée en collaboration avec le *Copyright Office* des Etats-Unis et le *Patent Office, Board of Trade* du Royaume-Uni,

Recommande au Directeur général de l'Unesco de continuer la préparation des versions espagnole et française du recueil mondial des lois et traités sur le droit d'auteur afin d'en assurer une publication prochaine.

III

Le Comité intergouvernemental du droit d'auteur,

Vu la communication en date du 14 novembre 1955 adressée au Directeur général de l'Unesco par le Gouvernement de la République des Philippines,

Emet le vœu que le Gouvernement de la République des Philippines examine à nouveau son attitude à l'égard de la Convention universelle sur le droit d'auteur.

IV

Le Comité intergouvernemental du droit d'auteur,

Vu le rapport soumis par le Secrétariat sur le régime institué pour les nouvelles et autres informations de presse par les législations nationales et les conventions internationales relatives au droit d'auteur,

Recommande au Directeur général de l'Unesco d'entreprendre une étude complète sur l'état actuel du régime des nouvelles et autres informations de presse diffusées par la voie de la presse imprimée, de la radio, de la télévision et du cinéma; cette étude devrait tenir compte des résultats inscrits dans le rapport déjà soumis par le Secrétariat, et aussi devrait porter sur des législations nationales et des conventions internationales autres que celles relatives au droit d'auteur et traitant de la protection des nouvelles et informations de presse ainsi que sur la jurisprudence et sur la coutume en ce domaine,

Recommande qu'en vue d'une telle étude, des renseignements d'ordre pratique soient obtenus en consultant les associations et les organismes privés ou officiels intéressés à la protection des nouvelles et autres informations de presse,

Recommande que cette étude complète, assortie de suggestions quant aux solutions possibles en cette matière, soit soumise au Comité intergouvernemental du droit d'auteur lors de sa deuxième session, afin que ce Comité puisse examiner, sur la base d'une telle étude et en tenant compte des renseignements d'ordre pratique qu'aura obtenus le Secrétariat, s'il convient de consulter les Etats sur l'opportunité de modifier ou de compléter les dispositions concernant cette matière dans les conventions internationales relatives au droit d'auteur.

V

Le Comité intergouvernemental du droit d'auteur,

Vu le rapport du Secrétariat sur l'état actuel de l'étude relative à la double imposition des droits d'auteur,

Ayant entendu les informations données par le représentant de la Confédération internationale des sociétés d'auteurs et compositeurs concernant l'action menée par la Confédération en vue de favoriser la con-

clusion de traités bilatéraux tendant à éliminer la double imposition des droits d'auteur,

Considérant l'utilité d'une étude de la double imposition des droits d'auteur qui fasse apparaître dans le cadre de cas concrets les difficultés rencontrées,

Recommande au Directeur général de l'Unesco de continuer l'étude entreprise en collaboration avec le Secrétariat des Nations Unies,

Est d'avis que les enquêtes menées avec le concours des sociétés d'auteurs devraient être complétées par les nouveaux renseignements qui pourraient être recueillis en utilisant de nouvelles sources d'information afin de donner des exemples concrets permettant au Secrétariat de rechercher des solutions tendant à diminuer ou à éliminer la double imposition des auteurs et des artistes,

Emet le vœu qu'il soit rendu compte à la prochaine session du Comité intergouvernemental du résultat de l'action entreprise.

VI

Le Comité intergouvernemental du droit d'auteur,

Vu le rapport du Secrétariat de l'Unesco sur les suites données à la résolution n° VI adoptée par le Comité intérimaire du droit d'auteur lors de sa deuxième session (Paris, octobre 1955),

Vu le rapport adopté à l'unanimité par le Groupe d'étude réuni à Paris en mai 1956,

Vu l'étude soumise par le Secrétariat sur l'état actuel de la législation et de la jurisprudence en cette matière,

Considérant que les droits d'une portée absolue revendiqués, sur le plan international, par les exécutants, les enregistreurs et les radiodiffuseurs sont regardés dans certains pays, du moins partiellement, comme de véritables droits d'auteur, alors que d'autres pays les règlent dans leur législation sur le droit d'auteur ou dans une législation spéciale,

Considérant que, en tous cas, l'exercice desdits droits ne saurait manquer d'avoir des incidences sur l'exercice des droits des auteurs,

Considérant que les problèmes soulevés par les revendications susmentionnées ne peuvent être tranchés uniquement dans le cadre de règlements contractuels ou d'autres arrangements des conditions de travail entre employeurs et employés et que leur solution intéresse au plus haut degré le public en général,

Considérant qu'il appartient dès lors à l'Unesco et à l'Union pour la protection des œuvres littéraires et artistiques (Union de Berne) d'examiner en toute objectivité les problèmes soulevés par les revendications en question, et cela en collaboration, comme il serait désirable, avec l'Organisation internationale du Travail en vue de la préparation d'un projet d'accord international sur une base universelle,

Considérant qu'aux termes de l'article XI, alinéa 1, lettre c), de la Convention universelle sur le droit d'auteur, le Comité intergouvernemental a compétence pour examiner lesdits problèmes,

Estime qu'il est souhaitable que les Organisations intergouvernementales intéressées étudient ce problème conjointement,

Recommande au Directeur général de l'Unesco de poursuivre activement, conformément aux propositions faites par le Groupe d'étude et dans l'esprit de la résolution adoptée par le Conseil exécutif de l'Unesco lors de sa 43^e session (Madrid, avril 1956) et de la résolution adoptée par le Comité permanent de l'Union internationale pour la protection des œuvres littéraires et artistiques lors de sa sixième session (Paris, mai 1956), les travaux commencés en vue d'aboutir à un accord international à base universelle qui protégera les intérêts légitimes des exécutants, enregistreurs et radiodiffuseurs, sans en contrepartie porter atteinte aux droits des auteurs,

Recommande au Directeur général de l'Unesco de prendre toutes mesures utiles à cet effet et de tenir au courant les gouvernements.

VII

Le Comité intergouvernemental du droit d'auteur

Emet le vœu qu'interviennent les arrangements nécessaires pour que sa prochaine session ordinaire ait lieu aux Etats-Unis d'Amérique.

Première rencontre des Organisations s'occupant de l'unification du droit

(Barcelone, 17-20 septembre 1956)

Organisée par l'Institut international pour l'unification du droit privé, la *première rencontre des Organisations s'occupant de l'unification du droit* a eu lieu à Barcelone, du 17 au 20 septembre 1956. Y ont participé les représentants de plusieurs Organisations internationales mentionnées ci-dessous, ainsi que des juristes, à titre privé.

Cette réunion avait pour but de confronter les méthodes suivies par chacune des Organisations internationales, en ce qui concerne l'unification du droit. Il s'agissait donc de questions auxquelles s'intéresse particulièrement l'Union internationale pour la protection des œuvres littéraires et artistiques.

Les Organisations participantes étaient représentées par les délégués nommés ci-après:

Commission économique pour l'Europe de l'Organisation des Nations Unies, M. L. Kopelmanas; *Organisation des Nations Unies pour l'éducation, la science et la culture*, M. H. Saba; *Organisation des Nations Unies pour l'alimentation et l'agriculture*, M. P. Moral Lopez; *Bureau international du Travail*, M. N. Valticos; *Bureaux internationaux réunis pour la protection de la propriété industrielle, littéraire et artistique*, M. G. Ronga; *Office central des transports internationaux par chemins de fer*, M. R. Cottier; *Organisation de l'Aviation civile internationale*, M. P. K. Roy et M. G. Bonilla; *Conseil de l'Europe*, M. G. von Haefthen; *Benelux*, M. G. van Hecke et M. F. van Goethem; *Conseil Nordique*, M. G. Petrán et M. A. Malmström; *League of Arab States*, M. M. A. Namazi; *Instituto Ibero-americano y Filipino de Derecho Comparado*, M. F. Castejon y Martinez de Arizala; *National Conference of Commissioners on Uniform State Laws (U. S. A.)*, M. J. C. Barrett; *Comité maritime international*, M. R. Sandiford; *Chambre de commerce internationale*, M. G. Lagergren et M. M. Prodromidès; *International Law Association*, M. N. V. Boeg et M. S. Daehli; *Institut pour la comparaison et le rapprochement des droits européens de l'Université de la Sarre*, M. G. Langrod et M. L.-J. Constantinesco; *Association nationale des avocats de France et de l'Union française*, M. J. Lisbonne.

Les débats ont été présidés alternativement par M. A. de Cossio, Professeur à l'Université de Séville, et par M. P. Valindas, Professeur à l'Université de Salonique. Le Rapport général a été présenté par M. M. Matteucci, Secrétaire général de l'Institut international pour l'unification du droit privé; il traitait « des méthodes de l'unification du droit privé ». Des rapports sur les méthodes suivies par les Organisations internationales ont également été présentés par celles-ci. Enfin, les participants ont approuvé la résolution suivante:

Il est ressorti des travaux de la rencontre des Organisations s'occupant de l'unification du droit que, si les méthodes d'unification peuvent varier selon les cas, certains problèmes sont communs dans les différents cas d'unification du droit, bien qu'ils n'aient évidemment pas toujours la même importance. Aussi est-il apparu qu'il serait utile que des représentants des Organisations qui, soit à titre principal, soit comme un

moyen d'atteindre leurs objectifs propres, contribuent à l'unification du droit sous quelque forme que ce soit (unification ou harmonisation législative, préparation des codes-modèles, établissement de normes minimales communes, recommandations, normalisation de pratiques commerciales ou autres), se réunissent de temps à autre pour mettre à profit leur expérience, se communiquer leur programme d'action en la matière, exposer les problèmes de méthodologie qu'ils ont pu rencontrer et étudier de plus près certaines questions d'intérêt commun.

Les participants à la présente rencontre ont indiqué qu'ils ont été heureux de tirer profit des exposés écrits et oraux qui ont été faits au cours de cette réunion et qu'ils se félicitent du pas qui a été ainsi accompli vers une plus grande coordination entre les méthodes suivies en matière d'unification du droit.

Ils remercient vivement l'Institut international pour l'unification du droit privé de Rome pour l'heureuse initiative qu'il a prise et l'excellent travail préparatoire du Rapporteur et Secrétaire général de l'Institut, M. Mario Mattencci, et estiment que cette initiative mérite d'être poursuivie par l'Institut.

Charte du droit d'auteur approuvée par la Confédération internationale des sociétés d'auteurs et de compositeurs

(septembre 1956)

Nous avons vu qu'à l'occasion de son 19^e Congrès¹⁾, la Confédération internationale des sociétés d'auteurs et de compositeurs avait approuvé la Charte du droit d'auteur établie par sa commission de législation. Nous reproduisons ci-après le texte de cet important document:

I. Du rôle social des auteurs

1. — Les auteurs des œuvres littéraires, musicales, artistiques et scientifiques jouent un rôle spirituel dont le bienfait s'étend à l'humanité entière, se perpétue dans le temps et conditionne essentiellement l'évolution de la civilisation.

L'Etat doit donc assurer la plus large protection à l'auteur, en considération non seulement de son effort personnel mais encore du bien social.

2. — L'accomplissement de la tâche culturelle et sociale des auteurs a pour condition la liberté de création et d'expression qui est étroitement liée à la liberté de l'information et de la science.

Liberté de création et d'expression implique en premier lieu pour l'auteur l'entière liberté dans la recherche et dans la communication publique de ses propres expériences, idées et sentiments, concrétisés dans une œuvre. Elle implique que la possibilité lui soit laissée de développer sa personnalité artistique et scientifique.

La répression des abus, de la part de l'Etat, ne justifie pas l'arbitraire de certaines interventions.

3. — Il faut se garder de confondre l'idée de la protection des intérêts généraux que comporte une libre diffusion de la culture et de l'information avec l'idée de la protection d'intérêts industriels et commerciaux qui relèvent de l'exploitation des œuvres de l'esprit. L'intérêt de l'auteur est de voir ses œuvres répandues le plus largement possible, et c'est par la protection de la création intellectuelle à sa source que le développement général de la culture et sa diffusion dans le monde sont favorisés de la manière la plus efficace.

4. — Les intérêts légitimes des artistes interprètes ou exécutants et ceux des industries qui assurent la diffusion des œuvres de l'esprit ne peuvent trouver leur réglementation légale que dans leur domaine propre. L'auteur ne doit subir aucun trouble dans l'exercice de ses droits sur l'œuvre utilisée.

II. De la nature juridique et du contenu du droit d'auteur

5. — Le droit d'auteur se fonde sur l'acte de création intellectuelle.

Il a sa source dans la nature même des choses. Il ne saurait donc trouver dans la loi que sa réglementation, son existence ne devant jamais être subordonnée à des formalités d'ordre constitutif.

6. — Le titre justificatif du droit d'auteur résidant dans l'acte de création intellectuelle, c'est uniquement en la personne physique de son ou de ses créateurs que ce droit peut prendre naissance.

Une personne morale ne peut jamais être considérée comme le titulaire originaire du droit d'auteur sur une œuvre de l'esprit. Il importe d'écarter comme inadmissible la conception de l'auteur simple salarié d'une entreprise industrielle, à laquelle l'œuvre reviendrait de droit comme un produit quelconque.

7. — L'œuvre de l'esprit est à la fois une émanation de la personnalité de l'auteur et une source d'intérêts économiques. De là dérivent les attributs du droit personnel, incessible, qui relève du droit de paternité. De là découlent également, en faveur de l'auteur, les principes du droit exclusif et transmissible sur toutes les formes d'exploitation de l'œuvre, quels qu'en soient le mérite et la destination.

En exerçant son droit éminemment personnel de première publication, l'auteur fait sortir son œuvre de sa propre sphère et la fait entrer dans la vie sociale sous les conditions fixées par lui.

8. — Les œuvres de l'esprit sont des créations de forme qui, dans le temps et dans l'espace, s'ajoutent sans se substituer les unes aux autres, et cela à la différence des inventions industrielles qui constituent des contributions successives au progrès de la technique. Dans sa fonction sociale et économique, la diffusion de l'œuvre ne saurait être assimilée à celle que revêt l'exploitation d'un brevet. L'introduction dans le domaine du droit d'auteur de la licence obligatoire ne peut donc en aucun cas se justifier par un intérêt social de caractère général.

III. De l'exercice et de la durée du droit d'auteur

9. — De la nature du droit d'auteur dérive le principe général que l'œuvre de l'esprit ne peut être considérée comme une marchandise dont la vente épuise tous les droits du vendeur.

Les différents droits exclusifs de l'auteur en ce qui concerne les utilisations économiques de ses œuvres, telles que: la reproduction graphique ou la reproduction par tout autre moyen, l'enregistrement mécanique, l'adaptation cinématographique, la représentation, la récitation et l'exécution publiques, la radiodiffusion et la télévision, l'adaptation à une autre forme d'expression, sont des prérogatives indépendantes l'une de l'autre dont la transmission à des tiers ne peut résulter que de manifestations expresses et distinctes de la volonté de l'auteur.

L'auteur doit être associé à la fortune de son œuvre, de telle façon que le principe général de sa participation au succès économique de celle-ci s'affirme dans les rapports entre les auteurs, d'une part, et les industries et les usagers, d'autre part, et cela, dans tous les cas où c'est possible, sous forme d'un pourcentage sur les revenus bruts de l'utilisation de l'œuvre, quelles qu'en soient les formes et modalités d'expression et de reproduction.

10. — L'utilisation massive des œuvres de l'esprit par certaines entreprises et industries: radio, télévision, enregistrement mécanique, cinéma, aboutit à un amoindrissement progressif et considérable de la valeur économique de l'œuvre considérée par rapport à la durée de son exploitation. Il convient de tenir compte de ce fait dans la détermination de la forme et de l'importance des rétributions dues pour l'exercice du droit d'auteur sur l'œuvre.

11. — L'utilisation de l'œuvre de l'esprit pour l'usage personnel et privé dispensée de l'autorisation de l'auteur ne peut être fondée que sur des raisons d'ordre culturel et en tant qu'un tel usage ne porte pas un préjudice aux intérêts économiques de l'auteur.

Mais, en présence des possibilités offertes par les techniques modernes, résultant de certaines inventions telles que la photocopie, le microfilm et le magnétophone, ce principe ne peut plus recevoir une

¹⁾ Cf. *Droit d'Auteur*, 1956, p. 167.

application générale et absolue. En effet, il n'est pas possible de passer outre aux droits de l'auteur lorsque l'usage personnel permet de satisfaire en même temps les intérêts d'autres personnes physiques et morales, et lorsque la confection d'exemplaires peut concurrencer, même en partie, le droit réservé à l'auteur. Des solutions appropriées doivent être envisagées sur le plan législatif ou contractuel. Sans nuire pour autant à la diffusion scientifique et culturelle rendue possible par de nouvelles inventions, ces solutions devraient protéger efficacement les intérêts des auteurs.

12. — Les différentes législations nationales doivent consacrer la perpétuité du droit moral. Après le décès de l'auteur, le soin d'assurer l'exercice de ce droit doit être confié à ses héritiers légaux ou à des organismes officiellement qualifiés.

La limitation dans le temps du droit d'auteur a pour conséquence que le nombre des œuvres tombées dans le domaine public, même s'il s'agit d'un domaine public payant, et pouvant être librement utilisées augmente tous les jours. Cette limitation tient largement compte des exigences sociales. Elle doit donc exclure toute restriction apportée au droit d'auteur pendant sa durée au titre de ces mêmes exigences.

La durée de protection de l'œuvre après la mort de l'auteur doit être aussi longue que possible. En cas d'œuvre en collaboration, le délai ne doit courir qu'à dater du décès du dernier survivant des collaborateurs.

Etant donné que, d'une part, l'entrée des œuvres dans le domaine public tarit la source des revenus pour l'auteur et ses héritiers, que, d'autre part, ces revenus sont instables et soumis à des fluctuations sensibles, et qu'enfin l'exploitation publique des œuvres produit, pour l'État, d'importantes perceptions indirectes, l'auteur doit bénéficier dans le domaine fiscal d'un régime approprié qui tienne compte de cette situation exceptionnelle.

IV. De la fonction des sociétés d'auteurs

13. — Les sociétés d'auteurs, quelle que soit leur forme juridique, sont des organismes de gestion des intérêts patrimoniaux des auteurs et de leurs ayants droit. Elles ne sont pas des organisations commerciales, ni des entreprises poursuivant des buts de lucre. Elles ne retiennent en effet, sur les perceptions effectuées, que les sommes nécessaires pour couvrir leurs frais. De ce fait, elles doivent jouir du régime légal approprié, notamment en matière fiscale.

Les sociétés d'auteurs assurent la défense des principes fondamentaux du droit d'auteur en intervenant au besoin dans les instances judiciaires et en participant à l'élaboration des lois nationales et des accords internationaux.

14. — Les sociétés d'auteurs sont devenues, tant en raison des nouveaux modes de diffusion des œuvres que du développement des échanges internationaux, des organismes indispensables pour la détermination, le contrôle, la perception et la répartition des droits de représentation et d'exécution publiques, de radiodiffusion, de télévision et de reproduction mécanique.

Leur fonction sociale est également marquée par l'activité précieuse des caisses de prévoyance et d'assistance professionnelle qu'elles ont créées.

15. — Privé du concours des sociétés d'auteurs, l'auteur isolé ne pourrait pas surveiller l'utilisation de ses œuvres et faire valoir ses droits.

Grâce à leurs règlements de répartition, qui évitent des contrats privés de forme et de contenu infiniment variables, les sociétés assurent à tous les auteurs la sauvegarde de certaines prérogatives et les fruits de leur travail créateur.

D'autre part, faute de sociétés d'auteurs, les usagers ne pourraient ni connaître avec certitude les titulaires des droits, ni obtenir, par conséquent, les autorisations nécessaires.

Le réseau serré des sociétés des divers pays, résultant de leurs contrats de représentation réciproque, assure aux auteurs d'un pays déterminé la protection de leurs œuvres dans plusieurs pays et, en même temps, permet aux usagers l'utilisation régulière des œuvres de plusieurs pays.

16. — Les sociétés d'auteurs sont des organismes visant à rendre possible l'exercice de certains droits exclusifs que la loi et les conventions internationales reconnaissent à l'auteur sur son œuvre. Le fait de rassembler entre leurs mains des mandats d'auteurs ne saurait donc les faire considérer comme exerçant un monopole.

V. De la protection internationale du droit d'auteur

17. — L'œuvre de l'esprit, fruit de l'effort créateur personnel, revêt, même si elle tire certains éléments importants de la langue et des traditions propres aux différents pays, un caractère universel, et l'ensemble des œuvres de l'esprit constitue le patrimoine culturel commun à l'humanité tout entière.

D'autre part, l'œuvre de l'esprit n'est pas liée à la possession d'un objet matériel dans un pays déterminé. Elle franchit facilement toutes les frontières.

De là l'importance d'introduire dans les lois nationales des règles spéciales assurant la protection des œuvres étrangères, ainsi que d'établir des systèmes de protection internationale du droit d'auteur résultant de traités et de conventions internationales.

18. — Il faut avant tout, dans les lois nationales, les conventions internationales et les contrats de représentation réciproque qui lient les sociétés d'auteurs des différents pays, sauvegarder le principe de l'égalité de traitement des œuvres étrangères et des œuvres nationales qui caractérise un état plus évolué et plus libéral que ne le fait le principe de la réciprocité. Toute mesure discriminatoire vis-à-vis des œuvres étrangères, telles que des mesures de contingentement, doit être écartée. Leur protection automatique sans formalités doit être affirmée.

Le domaine, éminemment international, du droit de traduction, doit être réglementé sur la base du droit exclusif revenant à l'auteur de l'œuvre originale, l'exercice de ce droit représentant le moyen le plus sûr pour obtenir des traductions correctes et pour éviter tout état dangereux d'anarchie dans la diffusion de la culture.

19. — Les conventions internationales multilatérales ouvertes à la signature de tous les pays du monde, telles que la Convention d'Union de Berne et la Convention universelle sur le droit d'auteur, représentent les instruments les plus efficaces pour la protection internationale de ce droit. Les auteurs souhaitent toute évolution dans le sens d'une coordination toujours plus étroite entre les conventions existantes en vue d'une protection plus uniforme et plus parfaite.

Les auteurs ne pourront jamais oublier le rôle précurseur et décisif en cette matière de l'Union de Berne pour la protection internationale des œuvres littéraires et artistiques depuis la Convention du 9 septembre 1886, qui constitue un des actes internationaux les plus considérables du siècle dernier.

20. — La protection légale internationale du droit d'auteur, afin d'être vraiment efficace, doit être liée, dans l'ordre national et international, à des mesures qui permettent la libre circulation des œuvres de l'esprit dans tous les pays du monde et le transfert des devises garantissant le règlement effectif et à bref délai des sommes dues aux auteurs pour l'utilisation de leurs œuvres dans les différents pays.

Des accords internationaux, sous la forme d'une convention multilatérale, aux termes desquels les revenus provenant de l'exercice du droit d'auteur ne seront pas assujettis à une double imposition, à la fois dans le pays d'utilisation de l'œuvre et dans le pays du domicile de l'auteur, sont également nécessaires afin d'assurer l'efficacité de la protection internationale des droits des auteurs ainsi que la plus large diffusion de la création intellectuelle.

Jurisprudence

AUTRICHE

Nature du contrat d'édition. Obligations et droits en résultant.
Restitution des avances faites, par l'éditeur, à l'auteur? Non.

(Conr suprême, 11 août 1954)¹⁾

Un associé de la maison d'édition demanderesse a déclaré oralement à la défenderesse, une femme de lettres, qu'il éditerait le prochain roman de celle-ci et tous ceux qu'elle écrirait par la suite. La défenderesse accepta cette offre et, à quelque temps de là, reçut, après l'avoir demandée, une avance de 3000 shillings autrichiens. La défenderesse envoya à la demanderesse le manuscrit de son prochain roman, lequel ne répondit pas entièrement à l'attente de celle-ci. Ladite défenderesse se déclara prête à remanier l'œuvre; mais la nouvelle version ne donna pas non plus satisfaction à l'éditeur, lequel renvoya le manuscrit, déclarant que ce roman ne présentait pour lui aucun intérêt. Le tribunal de première instance a reconnu le bien-fondé de l'action en restitution des avances, mais la Cour d'appel ne l'a pas admis; elle s'est référée notamment aux dispositions du Code civil autrichien sur le contrat d'ouvrage (*locatio conductio operarum*). Le pourvoi devant la Cour suprême a été rejeté essentiellement pour les motifs suivants:

1. — La Cour suprême a estimé qu'il s'agissait d'un contrat d'édition valable; qu'en l'occurrence, il n'était pas nécessaire, contrairement à ce qu'avait admis le tribunal de première instance, qu'un accord fût intervenu sur les honoraires, la date de publication, le nombre des exemplaires gratuits revenant à l'auteur, etc.

2. — La Cour suprême ne s'est pas rangée à l'avis de la deuxième instance, selon lequel les dispositions sur le contrat d'ouvrage seraient ici applicables, mais a déclaré que « le contrat d'édition est un acte juridique *sui generis*, réglé de façon indépendante, auquel ne peuvent être appliquées de plano les dispositions sur le contrat d'ouvrage ».

3. — Comme l'a déclaré la Cour, au demeurant, l'auteur, en concluant un contrat d'édition, n'engage aucunement sa responsabilité en ce qui concerne la qualité de l'œuvre. Le risque résultant de ce que l'œuvre ne pourrait pas être utilisable incombe à l'éditeur; toutefois, il faut que ladite œuvre soit prête à être imprimée, condition dont s'est acquittée la défenderesse.

4. — En refusant d'éditer l'œuvre, qui était prête pour l'impression, l'éditeur a violé ses obligations contractuelles, ce qui autorisait la défenderesse à rompre le contrat.

5. — Celle-ci a également le droit de conserver les avances qu'elle a reçues. La Cour s'est, ici, fondée sur la constatation faite en deuxième instance, et selon laquelle, chez les éditeurs, tant en Autriche qu'en Allemagne ou en France, il est d'usage que l'auteur garde les honoraires reçus lorsque le contrat vient à ne pas être exécuté pour des raisons imputables à l'éditeur. La Cour n'a pas admis le point de vue de la demanderesse, selon lequel, aux termes du paragraphe 10 du Code civil autrichien, « on ne peut tenir compte de la coutume que pour les cas dans lesquels la loi y renvoie »; la Cour a considéré que les termes de ladite disposition n'excluent pas, ici, la possibilité de se reporter à l'usage.

La Cour s'est donc prononcée en faveur de la femme de lettres actionnée.

Nouvelles diverses

Grande-Bretagne

La nouvelle loi britannique sur le droit d'auteur

Nous avons reçu du *Board of Trade* le texte de la nouvelle loi britannique sur le droit d'auteur. Conformément à son article 51 (2), cette loi entrera en vigueur après que le *Board of Trade* aura rendu l'ordonnance nécessaire à cet effet.

¹⁾ Traduit de l'allemand. — Ce résumé d'arrêt nous a été aimablement communiqué par le Dr Paul Abel.

Grèce

Adhésion au texte de Bruxelles de la Convention de Berne révisée

Au moment de mettre sous presse, nous recevons du Département politique suisse communication des instructions qu'il a adressées à ses Légations afin que celles-ci notifient aux Gouvernements unionistes l'adhésion de la Grèce à la Convention de Berne révisée en dernier lieu à Bruxelles le 26 juin 1948.

L'adhésion dont il s'agit prendra effet le 6 janvier 1957. A cette occasion, le Gouvernement hellénique a renoncé à toutes les réserves qu'il avait formulées dans le passé, lors des révisions successives de la Convention, et cette renonciation est valable pour tous les membres de l'Union.

Bibliographie

Copyright Laws and Treaties of the World, textes de lois et traités concernant le droit d'auteur, recueillis par l'Unesco, avec le concours du *Copyright Office* des Etats-Unis d'Amérique et l'*Industrial Property Department of the Board of Trade* de Grande-Bretagne. Un volume relié de 2000 pages environ, 20 × 25 cm., édité par l'Unesco, à Paris, et *The Bureau of National Affairs Inc.*, à Washington, 1956.

Avant la parution de ce recueil, l'on pouvait déjà trouver, en version ou original français, dans la collection de notre revue, la plupart des textes conventionnels ou législatifs concernant le droit d'auteur dans le monde; au demeurant, l'utilisation de cette collection avait été singulièrement facilitée par un répertoire méthodique que notre Bureau avait publié en 1948, répertoire qui porte sur l'ensemble des années 1888 à 1947, et qui a été conçu pour être facilement mis à jour au moyen des tables annuelles du *Droit d'Auteur*. L'Unesco ayant reconnu l'utilité de cette documentation en a poursuivi la réalisation comme la mise en valeur, et, notamment avec le concours du *Copyright Office* des Etats-Unis ainsi que du *Board of Trade* de Grande-Bretagne, a réuni, en version ou original anglais, tous les textes en vigueur au 1^{er} janvier 1956 dont elle a pu avoir connaissance en temps utile. Son enquête législative a porté sur 85 pays. De nombreux textes concernant les relations bilatérales entre ces pays ont été insérés dans l'ouvrage. Les grandes conventions multilatérales, comme celles de Berne et de Genève, y figurent avec l'indication détaillée de leurs ratifications ou adhésions et de leur portée d'application. Cette publication monumentale, de 2000 pages environ, paraît sur feuilles mobiles, et possède une reliure permettant une mise à jour facile, au moyen des suppléments qui seront publiés périodiquement.

A chaque pays, se trouve consacré un chapitre spécial groupant la documentation suivante le concernant: a) législation interne; b) accords ou autres textes relatifs aux relations bilatérales qui peuvent exister avec chacun des autres pays; c) indications sur les liens internationaux qui, pour le pays dont il s'agit, résultent éventuellement des conventions multilatérales. Cette disposition de la documentation est très pratique, elle permet de consulter rapidement et sans effort un fort gros volume.

Une édition espagnole et une édition française doivent paraître au cours des prochaines années. Elles augmenteront encore la valeur de l'ouvrage, notamment en accroissant le nombre des textes originaux commodément accessibles à l'utilisateur: nul n'ignore, en effet, qu'en matière juridique, il est souvent nécessaire de se reporter au texte ou aux textes qui font foi.

Point n'est besoin de rappeler les précieux services que rendra un tel instrument de travail; ils sont assez évidents. Nous ne saurions que complimenter les promoteurs ainsi que les réalisateurs de ce vaste recueil, et tout particulièrement son *Board of Editors*, qui groupe des noms connus de nos lecteurs: Dr Arpad L. Bogsch, M. Harold W. Clarke, M. Juan O. Diaz-Lewis, M. Abe A. Goldman et M. Thomas Hosvay.

The British Copyright Bill¹⁾

by R. F. Whale

Secretary of the Performing Right Society

The House of Lords is the Upper House of the British Parliament, but it is not obligatory for a Bill to be presented first in the Lower House — the House of Commons. Thus the Copyright Bill presented by the Government to Parliament in November last was introduced in the House of Lords, from which it has now passed, considerably modified, to the House of Commons. The present moment, therefore, is an appropriate one for those who have found it necessary to criticise the Bill and to work for its amelioration (according to their point of view) to consider their present position, and their hopes for the later stages of the Bill's progression through Parliament. The point of view from which we write is that of the authors' and music publishers' societies of the United Kingdom, and it is in our capacity as Honorary Secretary of the British Joint Copyright Council, an association grouping the societies in question, and Secretary of the Performing Right Society, that we undertake this expression of opinion.

The Bill follows, on the whole, the recommendations of the Copyright Committee 1951. The copyright owners, who had no reason to suppose that it would be otherwise, were not, therefore, surprised at the general content of the Bill, though they have in our view reason for disappointment that the authorities have not been more receptive to the objections which the copyright owners have expressed, often on practical rather than personal grounds, to a number of the conceptions accepted by the Copyright Committee. It must be recognized that the energetic representations made to the authorities by the authors' Societies since the issue of the Copyright Committee's report have resulted in several important victories for the copyright owners, two of them, to which we shall refer in connection with Clause 4 of the Bill and in connection with the Performing Right Tribunal being vital, but these representations have not effected the removal

from the Bill of the two general defects with which, in our view, it is open to reproach, namely:

1. The placing of the author's work at the service of the community in general on conditions which the author is not at liberty to fix, and which in some cases deprive him, or threaten to deprive him, of remuneration, thus placing the author in a situation of inferiority in regard to suppliers of physical goods. Let us say at once that we are not here writing of «fair dealing» — a conception which is incorporated in the existing Act, and which the copyright owner has voluntarily extended far beyond the scope provided therein.

2. The inclusion within the scope of the Bill of protected domains whose justification and administrative practicability have been insufficiently explored. Already it has been found necessary to modify profoundly the provisions for these domains in the light of criticism in the House, so that a number of the most important provisions in the Bill now suggest a risky improvisation.

We do not mean, of course, that the authors of the Bill, and the authorities who have decided the policy to which it gives effect, have not performed their tasks in the most conscientious way. It is certain that they have. The Bill is, in fact, a characteristic emanation of the British spirit, which «refuses to let itself be bound by theories», as the apologists of British empirical methods put it. That is to say that, faced with a problem, the British, either through intellectual diffidence or a sound political instinct, instead of constructing a theory which, if it appears to fit the facts, can be taken as a guide for the proper regulation of the questions at issue, prefer to deal with the facts in such a way that they can do without a theory to rationalise their actions. The British Constitution, largely unwritten and almost wholly illogical, but which «works», is the most famous example of this spirit in action.

¹⁾ The French translation of this text is published in *Le Droit d'Auteur* of June 1956.

But the practical spirit, if it has great advantages in the political sphere, has a more questionable value when applied to the rights of the individual. The British politician or Civil Service functionary, who may seriously deny the existence of any such thing as a «natural right» (for such a right can hardly be conceived independently of a theory) is all too apt to accept without question an acquired right or vested interest, the *raison d'être* of which is more easily distinguished. Faced with a conflict between the claimants to such rights, he will find it «reasonable» to compromise between them. It is in this spirit, the search for the «reasonable» compromise, that the Copyright Bill has been conceived, and we hasten to add that British traditions justify the hope, if not the presumption, that it is in a spirit of reason that it will be interpreted. We are able to cite a remarkable instance of this spirit at work in the application of the existing Act, Section 18 of which provides that, where any work has been prepared or published by direction or control of H. M. Government, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty. We understand, and our experience confirms, that in general this provision has been operated in the sense that, while the copyright in works prepared by servants of the Government has vested in the Crown, the copyright in works prepared by authors not in the employment of the Government but «under the direction of the Government» has vested in accordance with normal copyright law, that is, has been considered as the property of the author unless specifically assigned otherwise by him. These considerations need not and do not, however, prevent us from criticising the Bill, for we have no reason to compound with our beliefs. Moreover, copyright questions are essentially international in character, and exclude in our view an examination in the light of purely national criteria. It falls, however, outside the scope of this article, and outside the scope of our qualifications, to analyse the Bill from a juridical and international standpoint. The limited objective we have proposed to ourselves is to draw attention to those provisions of the Bill which are most susceptible, in our view, to claim the authors' attention.

The scope and character of the Bill can best be understood by bearing in mind from the outset that the Government has disregarded the advice of the authors' societies of the United Kingdom to confine the Bill to the domain of the author's right, as do the Conventions of the Berne Union, and to leave questions of ancillary or neighbouring rights to be dealt with if necessary in a separate Act along lines to be internationally agreed. It was pointed out by the societies that by including ancillary rights within the scope of the Copyright Bill the Government might make it impossible for the United Kingdom to adhere to a future international convention on ancillary rights, and that it would be extremely regrettable if by premature action in a field not yet adequately explored the United Kingdom should contribute to international disorder in a domain in which international concord can be achieved.

The reasons why the British Government has rejected these counsels are presumably as follows:

1. The demands of the B. B. C., now reinforced by those of the I. T. A., for measures which will enable them to control the public exhibition of their television broadcasts, and so to facilitate agreements with the sports promoters whose promotions it is desired to broadcast.

2. The existing provision in the present Copyright Act of a copyright in mechanical recordings, a right which the Copyright Committee 1951 recommended should be preserved.

3. The unlikelihood of an international convention on ancillary rights being realised in the near future.

It cannot be excluded, moreover, that the British Government considers that the proposed Convention is developing on lines which it does not find acceptable.

Many of the features of the Copyright Bill which will appear most shocking to our Continental friends were inevitable once the decision had been taken to grant certain ancillary rights, and to confirm others which had already been granted, and in mitigation of these features it can only be said that they anticipate a situation which will perhaps obtain, but probably to a much more restricted extent, in other countries in the course of time.

Part I

Copyright in Original Works

Clause 2 (5) merits citing in full. It is:

«The acts restricted by the copyright in a literary, dramatic or musical work are:

- a) reproducing the work in any material form;
- b) publishing the work;
- c) performing the work in public;
- d) broadcasting the work;
- e) making any adaptation of the work;
- f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs a) to d) of this subsection.»

The right to broadcast a work is a new provision, for there is, of course, no such provision in the 1911 Act. Under that Act, however, it has been held that broadcasting constitutes a form of public performance. The extreme brevity of the phrasing in this Clause will immediately strike the expert, who will contrast it with the ample stipulations of the Brussels Convention (cf. Articles 11, 11^{bis}, 13 and 14) and modern copyright legislation generally. This economy of phrase in a clause which is among the most vital in the Bill is partly explained by the fact that Clause 46 provides a number of definitions, among them that of «performance», which is defined as follows:

«„performance” includes delivery, in relation to lectures, addresses, speeches and sermons, and in general, subject to the provisions of subsection (3) of this section, includes any mode of visual or acoustic presentation, including any such presentation by the operation of wireless telegraphy apparatus, or by the exhibition of a cinematograph film, or by the use of a record, or by any other means, and references to performing a work or an adaptation of a work shall be construed accordingly;»

Nevertheless, a careful examination of all those parts of the Bill which are capable of supporting or amplifying the provisions of Clause 2 (5) does not dispel our belief that this Clause is inadequate. In Clause 46 (subsection 3) it is stated

that the operation of a broadcast relay station shall not be taken to constitute performance. It seems unquestionable that such an operation does not constitute broadcasting, so that broadcast relay services are accordingly placed outside the scope of the Bill. The British Joint Copyright Council has protested vigorously, but it would appear to be the Government's view that the broadcast relay services are not giving public performances, and, if this view is maintained, a most serious prejudice to authors, entailing possibly unforeseeable consequences as a result of technical developments, may follow. It is true that there has as yet been no decision in the British Courts which expressly lays down that the relaying of a broadcast constitutes a public performance, but can it be reasonably argued that an organisation which, by advertising and other means, invites the public at large to listen to performances of copyright works is not giving a public performance to those members of the public who accept its invitation?

Though there has been no decision in the English Courts on the specific liability under the Copyright Act of the broadcast relay services, support for the view that they are giving public performances can be found by reference to certain judgments. Thus, in the case of *Messenger v. British Broadcasting Corporation, 1927*, the learned judge said:

« In my view, however, the defendants, in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room they set in motion certain ether waves, knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representations of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter, and also the object and extent of the Copyright Act. »

No appeal was made on this point, and it remains the law, notwithstanding that the decision of *McCardie, J.*, was reversed on other grounds, entirely special to that case, namely the true interpretation of a certain licence.

In the case of the *Performing Right Society v. Hammonds' Bradford Brewery Co. Ltd.*, which concerned the performance in a hotel by means of a wireless receiving set, it was held that such a performance for the entertainment of the hotel guests was a public performance, and in default of the authorisation of the owner of the performing right in copyright works so performed constituted an infringement. Lord Justice Romer, in giving judgment, said:

« In my opinion a man performs a musical composition when he causes it to be heard. »

The relay companies appear to us to fall within the scope of this definition. They are, therefore, giving performances, and although the individual members of the audience are each in their private homes, those members nevertheless constitute a public audience, in accordance with the dictum of the Judge in the *Messenger* case.

Express provisions of the Brussels Convention (to which H. M. Government has declared its intention to accede) seem to cover the case of the broadcast relay services. These provisions are:

« Article 11. — (1) The authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorising:

i)

ii) the public distribution by any means of the presentation and performance of their works.

The application of the provisions of Articles 11^{bis} and 13 is, however reserved. »

We do not understand in what way Articles 11^{bis} and 13 can justify the abrogation in respect of dramatic, dramatico-musical and musical works of the right conferred by Article 11 i) ii), which would cover a performance in a studio (whether in public or not) which is then broadcast and relayed to the customers of the broadcast relay services. The only question at issue is whether the «distribution» is «public», and in judicial decisions in this country, notably in the *Messenger* case, indicate that it is.

Article 11^{bis}, which refers to literary and artistic works, in paragraph (1) ii) covers exactly the case of broadcast relay services, and we do not understand in what way the reservations which national legislation may make to the application of that article could justify the exemption from the scope of the Act of the broadcast relay services.

Both Article 11 (1) ii) and Article 11^{bis} (1) ii) confer specific rights, and it is submitted that such rights should also be conferred by the legislation of a country which intends to accede to the Brussels Convention, whatever conditions (not prejudicial to the author's right to just remuneration) are then attached to those rights.

The situation at present in the United Kingdom is that the relay services do not pay authors' fees in respect of copyright works included in the broadcast programmes which they relay. This is not because they deny liability under the Copyright Act, for they have always paid such fees in such places as Malta, where the British Act is applicable, and where there is no local broadcasting station. They have not paid such fees in respect of their services in the United Kingdom because the copyright fees paid by the B. B. C. cover wireless reception by all holders of radio or television receiving licences. Thus the PRS receives from the B. B. C. a fee at the rate of so much per licence issued by the Postmaster General, and such licences authorise reception via a relay service or direct from the B. B. C. The situation is different in the case of the I. T. A. programme contractors, which pay authors' fees on bases which are not related, or are not wholly related to, the number of wireless licence holders. So far, however, no question of relay service fees in connection with I. T. A. programmes has arisen.

The present situation, however, is unlikely to endure for the many years during which the new Act will be in force. The Tribunal to be instituted in accordance with Part IV of the Bill might, for example, be called on to fix the fee paid by the B. B. C. to the PRS, and might decide that, as many people receive broadcast programmes via relay services instead of direct from the B. B. C., and as the former are making a profit from their service while the latter is subsidised by the public, it would not be fair that the whole of the PRS fee should come out of the B. B. C. revenue. The Tribunal might, consequently, reduce the B. B. C. fee by the proportion which it considered the relay service should bear. The latter might then plead that they are not liable under

the Act. The Tribunal, on the other hand, if it took these circumstances into consideration before it made its decision, might take the view that it could not impose an inequitable charge on the B. B. C. because of a defect in the Act, and that the remedy for the PRS lay in effecting a change in the law. The Tribunal might, however, feel obliged to fix the PRS fee on a basis which it considered bore unfairly on the B. B. C.

Similar possibilities arise in the case of the I. T. A. programme contractors.

Within measurable time of the Copyright Act entering on its doubtless long life, the main revenue of the broadcasters may be derived neither from licence revenue, nor from advertising revenue, but from subscribers paying for the programmes they want to receive by the insertion of coins in a slot, enabling them to receive clear broadcasts which would otherwise be unintelligible, or by subscriptions to relay services which would «unscramble» such programmes for them. If a large part of these fees go, as they probably will, to relay services, how will it be possible to fix a broadcasting fee equitable both to authors and to the broadcasters if the relay services are to be exempt from authors' fees?

A possible further complication is presented by the definition in the Bill of a broadcast relay station, which follows the definition in the Television Act 1954, namely:

« „Broadcast relay station” means a station for the retransmission by cable or wire to the customers of the persons maintaining the station of broadcast programmes which these persons receive either by cable or by wireless from the persons who broadcast the programmes. »

This definition would be applicable to a hotel or similar premises in which is installed a master set from which broadcast programmes are transmitted by wire to the public or private rooms of the hotel. If this proved to be so, then such places would also escape liability under the Bill.

The question at issue on this point has thus a very great importance.

The provisions for the protection of artistic works have given general satisfaction. We recall that the acts restricted by the copyright in such works are:

- a) reproducing the work in any material form;
- b) publishing the work;
- c) including the work in a television broadcast.

«Fair dealing» clauses provide that artistic works other than paintings, drawings, engravings and photographs which are permanently situated in a public place, or in premises open to the public, may be included in a cinematograph film or in a television broadcast without infringing copyright. It is provided, however, that, without prejudice to the stipulations just mentioned, the copyright in any artistic work is not infringed by inclusion of the work in a cinematograph film or in a television broadcast if its inclusion is only by way of background, or is otherwise only incidental to the principal matters represented in the film or broadcast. The effect of these provisions appears to be that, for example, a painting, whether permanently situated in a public place or not, may not be included in a cinematograph film or television broadcast without infringing copyright unless its inclusion is incidental. On the other hand, a sculpture which is

permanently situated in a public place may be included in a cinematograph film or television broadcast without infringing copyright, whether the inclusion is incidental or not, but if the sculpture is not permanently situated in a public place it may not be included in a cinematograph film or television broadcast unless its inclusion is incidental.

The Bill provides that the copyright in a work of architecture is not infringed by its inclusion in a cinematographic film or in a television broadcast.

No objection is made to the general principle on which these stipulations are based, for they conform to the conception of «fair dealing» which is well established under the present Act, but we consider that the intentions to which these provisions give effect might have been more clearly expressed, and the exception to the prejudice of sculptures, apparently on the ground that such works are often situated out-of-doors, appears questionable to us.

Clause 4, which concerns ownership of copyright, is one of the most controversial sections of the Act. It has been considerably modified by the Government as a result of criticism by spokesmen for the authors, and, besides gaining in clarity, has come some way towards satisfying the authors. Nevertheless, it still opens a most serious breach in the protection which authors have enjoyed under the present Act.

The 1911 Act provides that in the case of works created under a contract of service the copyright shall, in the absence of agreement to the contrary, vest in the employer, but that when the work is an article or other contribution to a newspaper, magazine or similar periodical, then, again in the absence of agreement to the contrary, there is reserved to the author a right to restrict the publication otherwise than as part of a newspaper, magazine or similar periodical. Clause 4 of the Bill renews the existing position in regard to works created under a contract of service, except that, instead of leaving the employee author with only a right of restriction, it provides, if there is no agreement to the contrary, for a «split copyright» in the case of literary, dramatic or artistic works made for publication in a newspaper, magazine or similar periodical, the employer having the copyright for the purposes of such publication and the author for all other purposes.

The 1911 Act vests the copyright of an engraving, photograph or portrait ordered by someone other than the author against valuable consideration in that other person, subject to agreement to the contrary. The new Bill reproduces this provision, though in different terms.

The retrograde part of Clause 4 is the provision that when a literary, dramatic or artistic work is made for the purpose of publication in a newspaper, magazine or similar periodical in pursuance of a contract with another person providing specifically for the making of that work for the purpose of its being so published, that other person is entitled to the copyright in so far as that copyright relates to publication of the work in a newspaper, magazine or similar periodical, the author retaining the copyright for all other purposes (the «split copyright» again). This provision is again subject to agreement to the contrary.

The view expressed to the Government by the authors is that it is the fundamental principle of copyright that the author shall be the first owner of the copyright in his creations, and that the only admissible exception to this rule is the case when the parties have executed an agreement to vest the copyright in some other person. Nevertheless, the majority of authors (the journalists are an exception) have not shown themselves vigorously opposed to the Government's proposals in regard to works created under a contract of service, for these proposals represent an improvement over the present Act, or to the Government's proposals regarding commissioned photographs, engravings and portraits, which are no more disadvantageous to them than is the present Act and for which a case which many would regard as justified can be made (though some authors think that the vesting of the copyright in such works in the commissioner should at the most be confined to portraits, by whatever process they are produced). Naturally, however, the authors are unalterably opposed to any further breach in their fundamental right.

It seems that the blame for this retrogressive measure is to be found in an assumption of the Copyright Committee 1951 that when a work is created at the request of another person it would generally be the intention of the parties that the copyright should vest in that other person. In consequence, the Committee fell into the deplorable error of recommending that, in the absence of an express agreement to the contrary, the copyright in a work created for valuable consideration in pursuance of an agreement to create it, or in the course of the employment of the author, should vest in the person giving the consideration, or in the employer. It will be observed that this strange recommendation applied to all works so created. The authorities must be accorded the credit of having accepted the greater part of the objections made on behalf of the authors to this recommendation but they have obviously not been able to rid themselves entirely of the erroneous supposition to which the Copyright Committee had given its support.

It is very greatly to be hoped that the legislature will recognise, in the light of the opposition which this clause is meeting from the authors, that, whatever may be argued in regard to works created under a contract of service, that is, works created under the supervision of an employer, commissioned works are original works; it is the author who supplies the ideas and the creative mental effort; he who inspires the character of the work and brings to it the vital elements on which depend its appeal. It is the natural prerogative of the author of such works to fix not merely the terms on which he will create his work, but what part of the rights inherent in that work on its creation he will consent to assign to another. This prerogative has been recognised hitherto in British Copyright law, except in the case of the artistic works to which reference has been made, as in the copyright law of nearly every country with advanced legislation in that domain.

Opinion in general approves the suppression of the proviso to Section 3 of the existing Act, which provides for a compulsory licence to reproduce a published work for sale 25 years after the death of the author on the giving of statu-

tory notice and on the payment of statutory royalties. This provision has not had any noticeable effect on the publication of books in cheaper editions which would not otherwise have been available to the public at or about the same price. Consistent with this suppression the proviso to Section 5 (2) of the present Act has also been left out of the Bill. This proviso enacts that when the author of a work was the first owner of the copyright therein the copyright reverts to his heirs 25 years after his death irrespective of any assignment made by him (collective works are excepted from this provision). This proviso was apparently inserted in the Act so as to give the royalty payable under the proviso to Section 3 to the personal representative of the deceased author. Similarly the elimination from the Bill of the provision in Section 4 of the Act under which at any time after the death of the author of a literary, dramatic or musical work which has been performed in public application may be made to the Judicial Committee of the Privy Council to require the owner of the copyright to grant a licence allowing reproduction or performance of the work in public, if he has refused to allow this to be done, was obviously called for, since no such application has ever been made.

Clause 5, which concerns infringements by importation, sale and other dealings, contains only one measure on which we will comment. It is one of the characteristic features of the present British copyright law (Section 2 [3]) that copyright is infringed by any person who «for his private profit» permits a theatre or other place of entertainment to be used for the performance in public of a work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright. A somewhat similar provision has been incorporated in the Bill, but the phrase «theatre or other place of entertainment» has been broadened to «place of public entertainment», and instead of the phrase «for his private profit» there has been substituted: «gave the permission gratuitously, or for a consideration which was only nominal or (if more than nominal) did not exceed a reasonable estimate of the expenses to be incurred by him in consequence of the use of the place for the performance».

In practice, Section 2 (3) of the existing Act has not been of much assistance to authors in bringing infringers to book because of the difficulty of proving knowledge of infringement, but the representations made on behalf of the authors have been successful in having inserted in the Bill a definition of «place of public entertainment», which covers premises occupied mainly for other purposes but which are from time to time hired to persons desiring to use them for purposes of public entertainment, such as town and village halls.

While the copyright owners are hardly in a position to press any strong objections to this clause, which might in that case be dropped altogether from the Bill, it must nevertheless be regretted that the Bill should lend any support to the pretension that the relationship of the proprietor of the premises to the promoter of the entertainment or to the audience should affect the author's right. The circumstances

in which a hall may be let without fee, or for only a nominal fee to cover expenses, are many, but none of them has any bearing whatever on the essential factor in the situation — the relation of the author to his audience. The author's fee should accordingly be regarded as one of the expenses to be covered by the proprietor when calculating his expense-covering charge. The position is not changed if the proprietor decides not to make a charge. He does this presumably because of some personal or local interest in the entertainment. In effect, he decides to donate to the cause for which the entertainment is provided the sum of money that he will lose because of the expense that he will incur by letting the hall free, and there is no valid reason for the exclusion of the author's fee among all the expenses incurred in letting the hall gratis.

Clause 6 concerns general exceptions from the protection of literary, dramatic and musical works, mostly under the heading of «fair dealing», and we shall comment on two only of these exceptions. The first provides that no fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for the purpose of conveying news of current events to the public in a newspaper, magazine or similar periodical, or by means of broadcasting, or in a cinematograph film, and is accompanied by sufficient acknowledgment. It is perhaps questionable whether cinema or television newsreels should have been excepted from this provision. For both these methods of presenting news are intended primarily for entertainment. There is a great difference between commenting in a newspaper that a particular piece of music was played on a particular occasion, and the actual performance of that music (perhaps the whole of it) in public. Indeed, it was established in the Appeal Court Judgment 30th April 1934, *Hawkes & Son v. Paramount Film Service* that to perform a musical work by means of a newsreel is an invasion of the author's right beyond that of «fair dealing» for the purpose of a newspaper report. Nevertheless, we express the personal opinion that the exception in question is justified. The probability of the whole of a work being played in such circumstances is remote, and it is a well-established principle that an extract which is not a substantial part of a work does not infringe copyright. We accept, moreover, the argument that it would not be reasonable to require the suppression of incidental music to film and television newsreels to avoid infringement.

The second exception is of a much more serious character, and concerns what are called in the Brussels Convention «ephemeral recordings», though these words are nowhere used in the Bill. Clause 6 (7), already amended by the Government from its first draft, now provides that when a person has been authorised to broadcast a literary, dramatic or musical work, copyright in the work is not infringed by his making reproductions of the work in the form of a record or a cinematograph film solely for the purpose of broadcasting the work, provided that the reproduction is not used for any other purpose, and provided also that the record is destroyed before the end of 28 days from the day on which the record is first used for broadcasting the work in pur-

suance of the said authorisation. It will be seen that far from being «ephemeral», recordings made in such conditions could have an almost indefinite existence, while no remuneration whatever would be payable to the recording right owner. It would be impracticable within the scope of this article to discuss all the objections to which this provision is open. Article 11^{bis} (3) of the Brussels Convention has perhaps been more widely discussed in copyright circles than any other article of that Convention, and it is only necessary to say here that the authorities have been made fully aware of all the grounds on which the proposed measure is regarded by copyright owners as an unreasonable erosion of their rights. Of these grounds we shall only quote two, because of their particular application to the Bill.

1. It is clear that the provision in question has been based on the assumption that the recording right owner and the performing right owner are always one and the same person. It is conceded that this is nearly always so, but it is not invariably so.

2. The British delegation to the Brussels Conference insisted as much as any other delegation on the choice of a designation for the recordings to be specified in Article 11^{bis} (3) which would demonstrate their short-lived character, and on the necessity not to exclude «just remuneration» for the copyright owner.

The extent of the inroad on the author's right which this proposal represents has not yet been recognized by our legislators. The argument which is constantly advanced by proponents of the measure in question is that in demanding a fee for a recording intended solely to facilitate a broadcast for which a fee is demanded the author is asking to be paid twice for the same service. This argument rests partly on the fallacy already pointed out, but mainly on a more serious misapprehension. It is well known that a truly «ephemeral» recording is of little practical value to the broadcasters, and that is why the Copyright Bill proposes a relatively long, indeed potentially almost unlimited, «life» to recordings destined ostensibly to do no more than facilitate the broadcasting of the work recorded. But a recording made under these conditions expropriates a right which is expressly confirmed in the same Act as that which includes the expropriative measure, and that not merely to facilitate a broadcast but for the greater convenience, the greater economy, and (in the case of the commercial television) the greater profit of the broadcasters. Moreover, the argument according to which the recording right owner would be satisfied with his performing right fee is not, we submit, tenable in view of the institution in Part IV of the same Bill of a Performing Right Tribunal, which has the power, if the broadcasters should appeal to it to do so, to fix a fee which may not satisfy the performing right owner.

We hope these remarks will not be construed as an attack on either the B. B. C. or the I. T. A. programme contractors, with which both the organisations with which we have the honour to be associated have the most friendly relations, but we are not, we trust, inhibited by the friendliness of these relations or our respect for the organisations in question from speaking in defence of a right which we think is justified.

We pass now to Clause 8, another of the controversial clauses of the Bill, although it does not constitute an innovation, for the compulsory recording licence for which it provides has already been enacted in Section 19 (2) of the existing Act. The stipulations in Clause 8 are that the copyright in a musical work is not infringed by a person who makes for the purposes of retail sale records of a work, provided that records of the work have previously been made for the purposes of retail sale with the licence of the owner of the copyright in the work, subject to the giving of the owner of the copyright of the prescribed notice of his intention and the paying to him of the prescribed royalty. By «copyright owner» is to be understood the copyright owner in the territory to which the Act applies.

It goes without saying that this clause has been vigorously opposed by the copyright owners, who had hoped that recognition of the difference between conditions which now prevail in the record manufacturing trade as compared with those which existed at the time of the 1911 Act or even in 1951, when the Copyright Committee sat, would have induced the Government either to discard the compulsory recording licence altogether, or to limit its scope. Up till recently there existed only a small number of record manufacturers, who were all reputable firms with knowledge of their obligations under the Act and the requisite organisation to comply with them, whereas nowadays, with the advent of cheap recording apparatus, almost anyone can set up as a record manufacturer, so that the compulsory licence obliges the owner to have dealings with persons who would not be regarded as trustworthy by the ordinary commercial trader, even if he could trace them. It has been replied to this argument that the copyright owner is at least no worse situated to deal with

such mushroom manufacturers under the compulsory licence scheme than he would be without it, but it is doubtful whether this reasoning is valid, because the compulsory licence acts as an invitation to persons with a greater aptitude to acquire knowledge of their privileges than of their obligations.

It is certain that the readers of the *Droit d'Auteur* are familiar with the case against the compulsory recording licence, so that we need not state that case here, but mention should be made by us of the effect on the situation of the long-playing record. It has been advanced in favour of the compulsory recording licence that the long-playing record makes no practical difference to the copyright owner, whose royalty is based on price, which is higher in the case of the long-playing record. It appears, however, that the price of the long-playing record is not *proportionately* higher than that of the normal 78-revolutions-per-minute record, so that the statutory royalty system is not flexible enough to meet the situation. In fact, the reputable manufacturers have already for many years operated under agreements with the recording right owners according to which the statutory royalty provisions of the 1911 Act have been modified to meet circumstances to which those provisions are not properly applicable, and for which Clause 8 of the Bill would not be adequate either.

One of the objections to Clause 8 in its present form is that if the copyright owner in the territory to which the Bill is applicable is also the copyright owner in another territory, say the U. S. A., and he gives the American manufacturer permission to record for the American market, manufacturers in the territory to which the Bill applies could avail themselves of the compulsory licence to record in that territory.

(To be continued)

The British Copyright Bill¹⁾

by R. F. Whale

Secretary of the Performing Right Society

(Concluded)²⁾

Part II

Copyright in Sound Recordings, Cinematograph Films, Broadcasts, etc.

Part II of the Bill has, it is safe to say, provoked wider discussion than any other Part. It will be recalled that the existing Act grants a copyright to mechanical recordings, and, though the Copyright Committee, 1951, noted that this right had probably been granted only as a result of faulty drafting, and that the right had been used to a certain extent for purposes of which it did not approve, it nevertheless recommended the continuance of the right (for reasons which do not emerge with any clarity from the Committee's Report) but subject to certain limitations. As the Committee fully recognised, the purposes of which it did not approve, that is, the refusal by the record manufacturers' licensing organisation to authorise the use of their records for the giving of public performances, had, except in regard to the broadcasting organisations, been dictated by the Musicians' Union, which had imposed this restriction on the manufacturers whenever the Union considered that the use of gramophone records was in complete or partial substitution for the employment of live musicians. The limitations on the exercise of the «record performing right» recommended by the Copyright Committee were not incorporated in the original draft of the Bill. Instead, the Performing Right Tribunal to be instituted in accordance with Part IV of the Bill (which we shall refer to hereafter) was given powers to impose on the record manufacturers the obligation to grant performing right licences gratis or at nominal rates to «social service organisations». As a result of pressure in the House, however, the Government has amended the original draft (Clause 12) concerning the copyright in mechanical recordings by providing specific limitations to the exercise of the «record performing right», the effect of which is that the right will not

be exercisable against hotels and boarding houses unless a special charge is made for admission to the part of the premises where the recording is heard, or against clubs or other organisations not established for profit and whose main objects are charitable or concerned with the advancement of religion, education or social welfare, again unless a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of these organisations.

These provisions constitute a conspicuous example of the policy which we tried to describe at the beginning of this article, and one which is likely to have unfortunate consequences. They are illogical, and are unjustifiable on any grounds other than expediency. We do not, of course, defend the performing right in recordings, which is, as experience shows, incompatible with the author's performing right (if any) in the work recorded, but if it is considered equitable to grant that right, how can it be justifiable to abrogate it in favour of activities which are conducted for profit, or even of activities which are not conducted for profit but which are not statutorily exempted from the claims of suppliers of other services or goods? It must unfortunately be feared that attempts will be made to bring the author's right within the scope of these exemptions, and to enlarge the area of their application, although to do so would be contrary to the recommendations of the Copyright Committee. It is certain, however, that the numerous Members of Parliament who represent seaside constituencies will be under great pressure from their local hotel associations to consolidate at the author's expense the victory won over the record manufacturers. It is because we fear another compromise that we should have preferred the «record performing right» to have been left intact if it was not to be abolished altogether.

¹⁾ For the French translation of this article, see *Le Droit d'Auteur* of June and July 1956.

²⁾ See *Le Droit d'Auteur* of June 1956.

As Clause 12 now stands, copyright will subsist in recordings of which the maker was a «qualified person» (a person who by nationality or residence qualifies for protection under the Act) at the time the recordings were made, and, without prejudice to this provision, in published recordings if first publication took place in the United Kingdom or other country to which the clause extends. The copyright in published records (publication is defined as «the issue to the public of records embodying the recording») will endure for 25 years from the end of the calendar year in which the recording is first published. The copyright will vest in the «maker», and, for the purposes of the Act: «a sound recording shall be taken to be made at the time when the first record embodying the recording was produced, and the maker of the sound recording is the person who owns that record at the time when the recording is made».

An aspect of the copyright in sound recordings which has caused much debate is the conditions under which copyright shall be granted to published recordings. The relevant Section of the 1911 Act is so obscurely worded that it has never been possible to determine precisely what categories of records fall within its scope (although this question has not been tested in the Courts). As a result, it has been tacitly accepted that recordings pressed in the United Kingdom from foreign-made matrices are copyright. If, however, large numbers of recordings without copyright were in circulation the position of the Musicians' Union as regards non-broadcast performances and of both the Musicians' Union and the manufacturers as regards broadcasts, would be undermined. It will be observed that published recordings produced from foreign-made matrices will, under the provisions of the Bill, be copyright if the records are pressed abroad but are first distributed to the public in the United Kingdom or other territory to which the clause applies, and it seems that, with the definition of «simultaneous publication» as «within 30 days» foreign record manufacturers could, if they desired to do so, secure copyright in their records by this means without great difficulty. It appears, moreover, though we find the Bill obscure on this point, that a foreign manufacturer could secure copyright for his recordings in the territory to which the Act will apply by the simple procedure of ensuring that a «qualified person» is the owner of the first record embodying the recording. Whether in the case of commercial records (as distinct from tapes) the record in question is the matrix or the first record pressed from the matrix is not clear. In any case, it seems that to secure copyright by this means the «qualified person» need only be the temporary owner, that is, at the moment the record is made.

The subject of the copyright in films is well known to give rise to many difficulties, and we can hardly deal satisfactorily with the aspect of the Copyright Bill in the brief space which we can devote to it in the course of this article. We must excuse ourselves in advance for the inadequacies of our remarks.

The present British Copyright Act defines a cinematographic production as a dramatic work, and protects it as such, provided it has an original character, since copyright subsists only in original dramatic works. The Act does not

make clear, however, who is the owner of the copyright in this dramatic work, though it is generally held that this owner must be the producer, since it is he who decides the scenes to be filmed and is therefore the author of the dramatic action. In any case, it seems that the copyright in the cinematographic production must be distinct from the copyright in the original literary, dramatic, musical or artistic works out of which the cinematographic production is constructed. The Copyright Committee 1951 endorsed this theory, except that it regarded films as a distinct category of work, to which it was not necessary to apply the test of dramatic originality. Having identified the cinematographic work as entirely distinct from the parts of which it is composed, the Committee found it logical that the copyright in this distinct entity should vest in the person by whom the arrangements necessary for making this film are undertaken (the word «film» is evidently to be understood here in the sense of «cinematographic work») and recommended accordingly. This recommendation is now implemented in the Bill.

What we have already said about the antecedents of Clause 13 will have indicated that its provisions have caused neither surprise, nor, except on points of detail, opposition from the authors' societies of the United Kingdom. The authors' rights in their individual contributions to the film have not been subjected to any special regime, and in this respect British authors are better situated than their French confreres under the French draft law. It must be remembered that had the Copyright Committee's recommendation regarding commissioned works been adopted without modification film authors would have faced a disastrous situation, for their ability to «contract out» of the automatic vesting of the copyright in the producer would have been illusory. We say «author», and not merely «composer», because we understand it is usual for the literary authors of the film to assign only a limited right to the producers. It must be remembered too that there have not occurred (at least we know of no such cases) recent instances where the exercise of the author's right, either by individuals or by societies, has led to the prohibition of the performance of a British-made film. «Droit moral» is, of course, not expressly recognised in English law, so that, although an author has certain recourses open to him if he considers his reputation has been prejudiced, film producers have less reason to fear, or to allege that they fear, an abusive action under this heading than in countries where «droit moral» exists (we are not, of course, here making a case against «droit moral»).

In considering the case of works commissioned for films the Copyright Committee seems first to have inclined to the view that there were reasons for vesting the copyright in the commissioner. On close examination of the situation, however, the Committee recognised that no practical difficulties of the kind feared by the producers existed in the United Kingdom, for the PRS has given undertakings to the film producers that in any infringement actions which it is obliged to initiate no steps will be taken to prevent the showing of the film concerned. The Committee, accordingly, stated that it did not consider any special legislation necessary to regulate the relations of film composers and film producers, a recom-

mentation which would have justified an exception being made in the case of commissioned film music, had the Committee's recommendation regarding commissioned works generally been accepted.

It may be considered, therefore, that the Copyright Bill does not disturb the present state of equilibrium between producers and authors in the United Kingdom. It is true that this equilibrium is the result of a policy of moderation on the part of those concerned rather than of an exact delimitation of right, so that it may be held that this equilibrium is precarious, and that a solution which superimposes one right on another has an inherent weakness (we are considering the question from a practical viewpoint only, and not on the basis of equitable rights) which may produce strains. We should personally have preferred a solution on the Italian model, with the producer's economic rights safeguarded, and copyright conferred only on those to whom copyright properly belongs — the authors.

The point of detail in this Clause which is most open to objection is the stipulation that after the copyright in a film has expired (generally speaking, 50 years after production), the causing of the film, in so far as it consists of visual images, to be seen in public, and, in so far as it consists of sounds, to be heard in public, will not constitute an infringement of the copyright subsisting in any literary, dramatic, musical or artistic work included in the film. Granted that this point cannot be of great practical importance, since few films will have any performance value 50 years after they have been made, it is still regrettable on a point of principle that the author's right should be extinguished before its normal period of expiry, especially as the producer, by virtue of possessing a physical property — the film — which he can let on hire, will still be able to exploit the film to his profit after the copyright has expired, in so far as the film is still exploitable. It is doubtful, moreover, whether this provision can be reconciled with Articles 7 (1) and 14 (2) of the Brussels Convention. Although strong representations have been made on this point it seems that the authorities are resolved to all breach of a fundamental right admitted earlier in the Bill, for ensuring that all copyrights attaching to the film expire on the same date.

Although Clause 14 introduces a right which was to have been provided by the now withdrawn Television Exhibiting Right Bill, it does not follow altogether the lines of that Bill, and the right granted to the television broadcasters is not now termed «television exhibiting right». Clearly this right is the most important innovation in the Bill, and it deserves, and will no doubt receive in the course of time, exhaustive analysis. It will not be possible on this occasion, however, to do more than glance briefly at the principal features of this new right, and the broad outlines of the situation which it will create. We bear in mind that, as with other provisions of the Bill which we have discussed, the conditions under which this new right is granted may be modified in the House of Commons, and that this eventuality is more probable in the case of a new right than in the case of a traditional right.

It is provided in Clause 14 that copyright shall subsist in every television broadcast made by the B. B. C. or the I. T. A. from any place to which the clause applies, and in every sound broadcast by the B. B. C. or I. T. A. from such a place. The copyright so granted is to vest in the B. B. C. or the I. T. A., as the case may be, and is to subsist until the end of 25 years from the end of the calendar year in which the broadcast is made. Repetitions of an original broadcast, whether from films, records or otherwise, will be copyright only as long as the original broadcast is copyright.

Whereas the protection given to sound broadcasts is against reproduction (otherwise than for private purposes) and rebroadcasting only, television broadcasts are to be granted in addition a «performing right», though not so called, as the action of «performing» a television broadcast is defined as «causing it, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public». This «television broadcast performing right», is, however, exercisable only against a «paying public», which is specifically defined in terms which include persons who have the obligation to purchase goods or services at prices which exceed those usually charged, in return for seeing or hearing the broadcast. It seems that this important restriction of the exercise of the new right has been imported into the Bill with the agreement of the Association for the Protection of the Copyright in Sport and of both the B. B. C. and I. T. A.

It was clearly essential to protect the person who causes a sound broadcast to be heard in public, or who, with the authority of the B. B. C. or I. T. A., causes a television broadcast to be seen or heard in public, against involuntary infringement of the copyright in sound recording and films. This has been done by providing that a person who causes a sound broadcast (as distinct from a television broadcast with its sounds) to be heard in public does not infringe the copyright, if any, in a sound recording included in the broadcast, and by an ingenious series of provisions through which the B. B. C. and I. T. A. will have no right of action against a person who, by causing a television broadcast to be seen in public, would otherwise infringe the copyright of the B. B. C. or I. T. A. in a film included in the broadcast, while a person other than the B. B. C. or I. T. A. who owns the copyright in a film included in a television broadcast will in similar circumstances have a right of action against the broadcasters only; such right of action would, of course, lie only if the film had been broadcast without the licence of the copyright owner.

It will be obvious that a complex situation will arise from the concurrent or superimposed rights which may be exercised, or may not be exercised, as the case may be, by manufacturers of sound recordings, by film producers, and by the B. B. C. and I. T. A. The exercise of these rights will be further complicated by pressure in one direction or another from performing artistes and sports promoters. Films on the one hand, and television broadcasts and sound recordings on the other, have each a different period of protection, and we have seen that films have also a limiting effect on the duration of the copyright of the author's work included in them.

To these difficulties must be added the more familiar tasks of distinguishing the copyright status of the author's work under national and international law, and the position of this work on either side of an obscure borderline delimiting the spheres of small rights and grand rights. Such difficulties, however, are not in themselves a long reason for opposing rights which are regarded as justifiable. Many difficulties will be the concern of technicians only, and «blanket» licences will greatly mitigate public inconvenience. There remains the question (leaving aside an examination of the grounds on which justification is claimed) of whether the complex situation which the Bill proposes will produce for the ancillary right owners and for the public generally results which will compensate for the considerable residue of public inconvenience which will remain. We think this doubtful. Thus, it has been argued that the justification for granting the television broadcast performing right is not the possibility of collecting fees from the public with which to satisfy the demands of the sports promoters, but the ability to control the exhibition of the broadcast in areas where such exhibition would reduce the attendance on which the sports promoters rely for the financing of their promotions. The exercise of such local control will, however, in our view prove difficult. It is the private viewer rather than the public viewer whose abstention from personal attendance at the sports promotion will reduce the «gate». We have seen, too, that the exercise of the «mechanical performing right» is greatly circumscribed by statute, and it can be limited still further by the Performing Right Tribunal to be instituted by the Bill. It will, however, still be exercisable in certain cases, the broadcasting organisations and cinemas, for example, but it may be exercised in such cases to restrict rather than to authorise performances. We have seen, moreover, that, quite apart from the Tribunal, which may exercise its discretion differently in the case of television broadcasts and gramophone records, the rights attached to these two productions are exercisable against different categories of the public («paying public», public paying under specific conditions, organisations with charitable objects, etc.). It appears to us, accordingly, that the attempt effectively to exercise the rights in question, whether to authorise or not to authorise, might not produce results commensurate with the organisation it would be necessary to set up, or that, if the attempt is made, it may produce confusion and exasperation among the public. It has already been demonstrated in England that this situation reacts against the primary right of the author, for the lay public, while able to appreciate the justification for the latter, is so little able to discern a *raison d'être* for ancillary rights that it can only conceive of the latter as a form of author's right. The Copyright Committee, on page 54 of its Report, quotes a witness as saying that those on whose behalf he spoke «could understand and appreciate the justification for the payment of performing right fees to composers, but not the requirement to pay additional fees for playing the composers' music by means of gramophone records». Such views will hardly be mollified by the grant of additional ancillary rights, and those who propound the absurd theory of the equality of such rights and the author's

right might do well to ponder the remark quoted by the Committee.

A more immediate danger to the author's right will arise during the passage of the Bill through the House of Commons. We fear that attempts will be made to bring the author's right within the scope of the exemptions to which the «record performing right» and television broadcasting right are subject. Such attempts will certainly be resisted by Government spokesmen, and we hope with success. It is certain, however, that the very existence of «copyrights» on which it has been thought justifiable to impose such far-reaching statutory limitations will be a constant incitement to interested parties to attack the author's right.

In view of the numerous superimposed rights for which provision is made in Part II of the Act, authors welcome the statement in Clause 17 (6) that the rights subsisting in sound recordings, films, broadcasts and other subject matter as provided in that Part do not affect the operation of Part I of the Act, relating to literary, dramatic, musical and artistic works, and that the rights granted in Part II are «additional to and independent of any copyright subsisting by virtue of Part I of the Act», subject to the exception as regards the duration of copyright in the author's work included in films. We agree, however, on obvious grounds, with criticism in the House of the use of the words «independent of».

Part III

Remedies for infringement of copyright

This Part of the Bill, which deals with remedies for infringement of copyright, will not call for much comment from us.

There has been provided a slight but welcome improvement in the presumptions in favour of the plaintiff in an action for infringement. Under the existing Act, in an action for infringement the work concerned is presumed to be a work in which copyright subsists, and the plaintiff is presumed to be the owner of the copyright, unless the defendant puts in issue the existence of copyright or the title of the plaintiff, in which case the person whose name is printed or indicated on the work as the author is presumed, unless the contrary is proved, to be the author of the work. It is, accordingly a facile tactic on the part of the defence, especially in the more remote territories to which the Act is applicable, to put these presumptions in issue, whether or not the defendant has any valid reasons for doing so. Usually the only means of countering the defendant's tactics is the sworn evidence of the plaintiff that, for example, he had not reproduced writings in the public domain, or that he did not write the work in question under a contract of service, the cost of providing which evidence is often prohibitive, even if it is practicable to provide it. Thus the plaintiff is deterred from pressing his action, because he may not be able to recover his costs. Such manœuvres would have been further facilitated if these presumptions had remained unchanged under the new Act, because of the provisions in Clause 4 which, in certain circumstances, vest the copyright automatically in the commissioner of the author's work. It is, therefore,

satisfactory that the authorities have accepted certain representations on this point, so that the person whose name appears on copies of a published work, or on an artistic work, is to be presumed in accordance with Clause 20, unless the contrary is proved, to be the author of the work and to have made the work in circumstances not falling within the scope of the provision in Clause 4 vesting under certain conditions the copyright in the work in the employer or commissioner, that is to say, that the author is presumed to be the first owner of the copyright in the work.

It is also provided that when the author is dead a work which is the subject of an action for infringement shall, unless the contrary is proved, be presumed to be an original work, and if it is alleged by the plaintiff that a publication is the first publication, and that publication took place in a country and on a date specified by him, then, unless the contrary is proved, these allegations shall be presumed to be correct.

The copyright owners are nevertheless disappointed that other representations made on their behalf for ameliorating their situation under the presumption clauses have not been accepted. We submit, for example, that if the two presumptions made in the case of a dead author are reasonable, then they are also reasonable in the case of a living one. At the least the first of these two presumptions might be made in favour of the plaintiff.

The only other comment which we have to make on this Part of the Bill concerns Clause 22, which provides for seizure by the Commissioners of Customs and Excise of infringing copies at the request of the copyright owner. The omission of records from the scope of this clause appears not to be in strict conformity with the Brussels Convention, Article 13 (4).

Part IV

Performing Right Tribunal

In accordance with Part IV of the Bill there is to be constituted a Performing Right Tribunal whose function it will be «to determine disputes arising between licensing bodies and persons requiring licences, or organisations claiming to be representative of such persons».

A «licence» is defined as a licence granted by or on behalf of the owner or prospective owner of the copyright in a literary, dramatic, or musical work, or in a sound recording or in a television broadcast.

A «licensing body» is defined as: «a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting of such licences, either as owner or prospective owner of copyright or as agent for the owners or prospective owners thereof».

It would appear, therefore, that the PRS (Performing Right Society), which grants licences on behalf of performing right owners, the P. P. L. (Phonographic Performance Ltd.), which grants licences on behalf of the record manufacturers, and the organisation which will presumably be set up to license the «television performing right» on behalf of the B. B. C. and the I. T. A., will fall within the jurisdiction of the Tribunal. It is, however, provided that «licensing

body» is «not to apply to an organisation by reason that its objects include the negotiation or granting of individual licences each relating to a single work or the works of a single author, if they do not include the negotiation or granting of general licences, each extending to the work of several authors», so that publishers would not fall within the Tribunal's jurisdiction, and nor, apparently, would the M. C. P. S. (Mechanical Copyright Protection Society), for neither of them normally grant «blanket licences».

What are the causes which have led to the establishment of the Tribunal? The original cause is to be found in the Report of the Select Committee to which the Musical Copyright Bill, 1930, was referred. This Bill was intended to amend the law relating to the right of public performance in musical works by providing, among other measures, a legal licence to perform and a maximum performing right fee. In consequence of the Committee's Report, the Bill was not proceeded with, but the Committee included in its Report the following statement:

«Your Committee are agreed that a fixed fee cannot be applied to all the varying circumstances of public performance if the composer is to receive a reasonable remuneration. Nor do they wish to place any obstacles in the way of composers forming an Association for the purposes of protecting and enforcing their performing rights. Such an Association is undoubtedly a convenience and almost a necessity, both to the composer, music publisher and the user of music, who would be considerably embarrassed if he had to deal separately with each piece of music performed. In fact it may be said to be the only practicable way in which the composer can collect his fees for performing rights in any adequate manner. If such an Association is to function effectively, it must obtain as nearly as possible a super-monopoly of the monopolies conferred upon composers by the Copyright Acts.

«Your Committee consider that such a super-monopoly can abuse its powers by refusing to grant licences upon reasonable terms, so as to prejudice the trade or industry of persons carrying on business in this country and to be contrary to the public interest, and that it should be open to those persons to obtain relief in respect of such abuse by appeal to arbitration or to some other tribunal. This should apply only in those cases where the ownership or control of copyright has been transferred to an Association.»

The Committee found, accordingly, that though there had been no actual abuse, the possibility of abuse existed. The Committee recommended accordingly that at the next conference for the revision of the Convention of the Copyright Union the British delegation should reserve its government's right to enact legislation to control «the monopoly rights conferred upon the owners of copyright by the law of the United Kingdom». This recommendation was implemented by the British delegation at the Brussels Conference 1948. Meanwhile, the PRS had demonstrated its invulnerability to the reproach of abuse by adopting as its consistent policy whenever an impasse was reached in its negotiations with the associations of music-users to offer to refer its tariffs to independent arbitration. When, in turn, the Copyright Committee, 1951, examined this question it came to the same

conclusions as the 1930 Committee, namely, that though complaints had been made by some music-users they had not been proved, and were counterbalanced by evidence from other users, including the B. B. C. and the «social service societies», that they had no complaints against the PRS; that the PRS was, nevertheless, in the position «to exercise a control in its field which is substantially monopolistic», and that «the mere existence of this power, however it is exercised, is likely to lead to doubts and suspicion about the justice of its tariffs». Moreover, the Committee was very disturbed to find that, unlike the PRS, Phonographic Performance Ltd. had not infrequently refused to grant its licence, and had used its rights «in an arbitrary and autocratic manner». Adding to these circumstances the fact that it had recommended the creation of a new performing right in favour of the television broadcasters, and that it had proposed that «social service societies» should be exempted from obligations under the Copyright Act towards the owners of *ancillary* rights, an exemption which the Committee considered would be better regulated by a Tribunal than by statute, the Committee decided in favour of a Tribunal with jurisdiction over performing rights of all kinds.

Having for very many years adopted as a policy the offer of arbitration, it was natural that the PRS should not oppose the institution of a Tribunal, provided, of course, that such a Tribunal should act simply as an arbitrator, and also that the PRS should accept the principle that, as in the case of an arbitrator, the decision of the Tribunal should be binding.

The Copyright Committee, in paragraph 139 of its Report, noted that the then Chairman of the Society, Mr. L. A. Boosey, had said that there had been occasions in the past «when the Society would have welcomed an authoritative decision of the Board of Trade on a proposed tariff revision if that Department had the statutory power to give such a decision». The Society, moreover, accepts the view of the Copyright Committee that the Tribunal will deprive interested parties of the possibility of creating doubts and innuendoes about the Society's practice, and so provide a better atmosphere for the negotiation of equitable tariffs. It is to be presumed that the Tribunal will not fail to bear in mind that if the tariffs it approves bear unfairly on the performing right owners the result would be that the Society would break up, leaving its members free to negotiate individually with the users. Such a situation would obviously be extremely inconvenient to the users and, doubtless, the aggregate fees they would have to pay in such conditions would greatly exceed the cost of a «blanket licence».

The PRS, in fact, would have preferred that the Tribunal had been established long ago, for the knowledge that it was impending has greatly hampered negotiations with the user's associations, who in some cases have shown themselves fully aware of the strong position in which they temporarily found themselves through the natural unwillingness of the PRS to give its opponents an opportunity for propaganda at a moment when the constitution of the Tribunal was under consideration. It is, accordingly, the terms of reference of the Tribunal to which the attention of the PRS is directed, and not the Tribunal's imminent institution, and in this connection the

PRS has certain doubts, one of which is that it will have no direct access to the Tribunal except when the revision of a tariff already approved by the Tribunal is in question.

It is to be hoped that the authorities will give further consideration to this point.

The Tribunal is to be empowered not merely to fix the tariff to be operated by a licensing body, but to impose on that body the obligation to grant its licence. The Tribunal may also decide that conditions which the licensing body may wish to attach to its licence are unreasonable and may not be enforced. It is clear that the first of these provisions has in view the licensing bodies of the record manufacturers and television broadcasters, for in practice, as the Copyright Committee noted, the PRS never refuses its licence, provided its fee is tendered. On this practical ground, therefore, the PRS could have been exempted from the compulsory licence obligation, and a situation avoided which is plainly incompatible with the exclusive rights granted to the author in the Brussels Convention, and elsewhere in the Bill itself. We have not forgotten the declaration quoted above of the British delegation to the Brussels Conference, but apart from the fact that the situation contemplated by this declaration has not arisen it is a strange provision which deprives the composer of a right which is secured by the constitution to manual workers, or even the interpreters of the composer's work. The fact that no practical difficulty is likely to arise in this connection does not mitigate the serious character of this derogation from the author's right; indeed it may even enhance it.

So far as conditions are concerned, the only essential one imposed by the PRS is the obligation to render programme returns — an obligation which it has always been necessary to temper in the light of practicability. It is presumed that no conflict will arise between the Tribunal and the Society on this question.

The authorities have accepted a recommendation from the performing right owners that an appeal from the decisions of the Tribunal should lie on a point of law, and the original draft of the Bill has been amended accordingly. This facility is of equal value to the copyright users as to the copyright owners.

Among the powers granted to the Tribunal is that of reducing, even to nothing, the charges which it determines to be generally reasonable for licences in respect of the copyright in sound recordings or television broadcasts which are required by clubs, societies or other organisations not established for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. It is considered that this definition is so wide that it could conceivably be interpreted as extending even to the B. B. C., though presumably the effective interpretation will be fairly narrow. Our readers will be astonished to know that this provision originally extended to the composer's performing right, and this despite the fact that such a provision would have been contrary to the recommendations of the Copyright Committee. Happily, the representations which were made by the composers and lyric writers were successful in effecting the withdrawal of their

performing right from the scope of this provision, but our Continental readers will appreciate in the light of this incident how powerful is the opposition in the United Kingdom to the effective exercise of this right. There is the likelihood, moreover, that attempts will be made in the House of Commons to bring the performing right back within the scope of the exemption powers granted to the Tribunal, but it is certain that, unless their scope is much more limited than the original proposals, such attempts will fail.

Miscellaneous and supplementary provisions

We pass over Part V, which concerns extension or restriction of the operation of the Act, while Part VI, the provisions of which are technical, will not call for much comment in a survey of this character.

A useful provision is contained in Clause 36 (1), which will resolve a legal difficulty of not infrequent occurrence. This clause provides that where by an agreement made in relation to any future copyright the prospective owner purports to assign the future copyright to another person, then if, on the coming into existence of the copyright, the assignee or a person claiming under him would be entitled as against all other persons to require the copyright to be vested in him, the copyright shall, on its coming into existence, vest in the assignee or his successor in title accordingly. The present legal difficulty arises when the copyright owner assigns or undertakes to assign a future copyright, giving rise to what is known in British law as an equitable right in favour of the assignee, and then on the copyright coming into existence assigns it to another person, giving rise to a legal right in favour of that other person.

Clause 38 grants a number of privileges to schools which will enable them to use copyright works, and also sound recordings, cinematograph films and television broadcasts, for instructional purposes without infringing copyright. No objection is made on principle to these provisions, which for the most part merely give statutory effect to the present custom among copyright owners in the United Kingdom. It is considered, however, that Clause 38 (b) enlarges (no doubt unintentionally) the scope of these privileges to an unreasonable extent, and that it should be amended accordingly. This clause provides that if a literary, dramatic or musical work is performed in class, or otherwise in the presence of an audience, and is so performed in the course of the activities of a school by a person who is a teacher in, or a pupil in attendance at, the school, the performance shall not for the purposes of the Act be taken to be a performance in public if the audience is limited to persons who are teachers or pupils in attendance at the school, or are otherwise directly connected with the activities of the school. The first use of the phrase «in the course of the activities of a school» would cover a dance or other social function which in the case of a large school might have an attendance of a thousand persons. It is represented, accordingly, that the first use of the word «activities» should be substituted by «teaching curriculum» or other words excluding social functions.

Performing artistes

The Dramatic and Musical Performers' Protection Act 1925 makes it an offence to record a dramatic or musical work without the consent in writing of the performers, and to use a recording so made for the purpose of public performance. Clause 43 of the Copyright Bill now provides that there shall be added to the said Act a clause making it an offence to broadcast, otherwise than by the use of a record or cinematograph film, a dramatic or musical work without the consent in writing of the performers. Neither under the existing Act, nor under the addition to it for which the Bill provides, are the performers granted any rights. They are protected merely by the device of making it an offence to do the acts specified. It is further provided that the expression «consent in writing of the performers» means consent given either by the performers themselves or by the person who, as manager or otherwise, made the arrangements for the performance on behalf of the performer.

The 1925 Act provides that the expression «performer» in the case of a mechanical performance means the person whose performance is mechanically reproduced, a definition which places no limit on the number of performers. The Bill throws no further light on the meaning of «performer», which must apparently be interpreted in the widest sense.

It will be seen, therefore, that while the performers will gain protection for «live» broadcasts of their performances, they will not gain the right which the Musicians' Union has solicited to authorise the broadcast of a performance by means of an authorised recording. It will still be possible for the Musicians' Union to exert pressure on the record manufacturers, but the latter will in turn through P. P. L. be subject to the jurisdiction of the Tribunal. The latter may thus find itself in a very difficult situation should disputes arise between the Musicians' Union or the record manufacturers, and the broadcasters. Such a dispute might arise through the new regulations for the protection of sound recordings, which might result in there being in circulation a large number of unprotected recordings. We know that this possibility has given much concern to the Musicians' Union.

It will be observed that, while the performers will always control the recording of their performances, the author is to lose that control in the case of recordings made by the broadcasting organisations, but the authors will control the broadcasting of the work recorded, while the performers will not.

At the beginning of this Article, we ventured to criticise the Bill on the general grounds that it is not founded on a firm basis of accepted principle. No theory of the nature of the various rights which the Bill proposes is discernible in its provisions. (At least, this principle, and this theory, if they existed, have disappeared as a result of the amendments to the Bill in the House of Lords.) The author's right, which, whatever its precise nature, is in its essence manifestly a property right, is dealt with in the same terms as other rights, which, it is equally clear, are not of the same nature but concern the manipulation of existing material, instead of, as in the case of the author's right, the creation of original work. The primary aim of the Bill should be the protection

of the author's right to the limit of what is compatible with the public interest, but it appears to us that the right has been unnecessarily restricted in favour of interests which are private rather than those of the public in general. Moreover, even if it is conceded that the public interest is the end in view, the ways chosen to attain this end are so empirical that they will produce on occasion results which are the opposite of those which were intended. Thus the public domain, the constitution of which is considered a counterpart to the statutory protection of the author's right, is being eliminated in favour of gramophone record manufacturers and broadcasting organisations, which can renew over and over again their copyright property in public domain works.

Perhaps it might have been judicious on the part of the authors' and music publishers' societies, after the Carwardine case in 1933 had shown that gramophone records had been invested by the 1911 Act with a full copyright, to campaign against the word «copyright», which we hold responsible for some of the features of British copyright legislation which are most deplored in authors' circles. Can it be supposed, for example, that if the words «author's right» had been substituted for the word «copyright» in the 1911 Act, Section 19 of that Act would have commenced with the words: «The author's right shall subsist in records, perforated rolls and other contrivances . . . in like manner as if such contrivances

were musical works»? Such a campaign might have prevented the integration of the author's right and ancillary rights into a single legal structure, and so favoured a more cautious approach to the latter.

It will no doubt be objected by proponents of the Bill that our remarks are sterile and unconstructive, and that the Bill should be regarded as a courageous and resourceful effort to cope with problems which do not admit of solutions equally satisfactory to everyone, but which it is, nevertheless, necessary to solve. It is not for us to deny all validity to this charge, but we maintain that this riposte will not shelter the new Act from criticism by those who feel themselves hampered by the arbitrary and illogical system it will create. It is at that time that the difficulty of justifying this system on the grounds of a consistent principle may have consequences which, if they cannot be foreseen, it can be surmised may open the door to still further encroachments on the author's rights.

It may be expected that the Bill will have completed its three readings in the House of Commons towards the end of the year, when it will be returned to the House of Lords for approval or otherwise of any modifications made in the House of Commons. The Bill will, therefore, probably become law early in the new year.